

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

+ **Crl. L.P. No. 252/2010 & Crl. M.A. No. 12818/2010**

% **Date of Decision: 15.09.2010**

State Appellant

Through Mr.Jaideep Malik, APP

Versus

Gajender 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. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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Crl. M.A No. 12818/2010

This is an application seeking condonation of delay of 122 days in filing the leave petition to appeal.

For the reasons stated in the application it is allowed and the delay in filing the petition for leave to appeal is condoned.

Crl. L.P No. 252/2010

1. The state has sought leave to appeal against the order dated 21st October, 2009 passed by the Additional Sessions Judge in S.C. No.

516/2006 titled State Vs. Gajender Kumar Mehta in FIR 485/2005, PS Adarsh Nagar under Section 302/34 and 376(2A) of IPC acquitting the respondent/accused of the said charges.

2. The case in brief of the petitioner is that a sweepress got electrocuted on 20th September, 2005 in House No. C-60, First Floor, Rajan Babu Road, Adarsh Nagar, Delhi from electric wire hanging in the bathroom which had fallen down on the floor. After the sweepress was injured by electrocution Sushil Kumar, younger brother of the accused called Dr. Ajay Kumar Aggarwal, PW-2 who advised him to remove her to some Government hospital. On the advice of said doctor, brothers of the accused/respondent, namely Sushil Kumar and Rupesh @ Rinku, who were present in the house went to a nearby Govt. school to call Smt. Meena, PW-4 another sweepress who came with another sweeper Santosh, PW-5 and removed Babbal, who had been electrocuted, to Dharmatma Hospital from where she was removed to BJRM hospital, however, she was declared brought dead at the said hospital.

3. Information regarding the death of Babbal was sent to police station, Adarsh Nagar and after preliminary investigation, a case for the offence under Section 304A of IPC was registered and thereafter Gajender, alleged owner of the house where the sweepress Babbal was electrocuted, was arrested. Since Section-304A of IPC is a bailable

offence, Gajender/respondent was released on bail. The post mortem of the body of the sweepress Babbal, however, revealed 18 external injuries on her body, out of which 14 were electric contact wounds and her body also had injuries on the inner surface of left side and also on right side of labia majora which were ante mortem. The injuries on labia majora, injury no. 17 and 18 were found to be on account of blunt force being used being consistent with forcible sexual intercourse prior to her death. The multiple electric contact injuries were suggestive of electric torture and the death was thus opined to be homicidal in nature.

4. Certain hairs were also found on the chest of the dead body which were taken into possession by the doctors. The cloths of the dead body as well as scalp hair sample besides the vaginal swap from orifice and walls were also taken. On the basis of the postmortem examination report, the initial offence under Section 304A of IPC was replaced by offence under Section 302/376 of IPC and the respondent/accused was re-arrested.

5. On committal of the case to the Court of Sessions, charge for offences under Section 302/376 IPC was framed, however, respondent/accused pleaded not guilty and claimed trial. During the trial, prosecution examined 30 witnesses whereas after the statement of the accused/respondent under Section 313 of Crl. Procedure Code, four

witnesses were also examined by the accused/respondent in his defence.

6. After considering the testimonies of the witnesses and the documents established on record, the Trial Court has held that the factum of Babbal being electrocuted and dying in the house of the respondent is not disputed. The report of the autopsy surgeon that the deceased Babbal was also raped has also not been disputed. What has been disputed is whether the respondent has done it or not. In the circumstances, the learned Sessions Judge considered two points, i.e., whether the respondent was the owner of the premises in question whether the offense was committed and whether he was present in the house at the time of the incident.

7. The Trial Court noticed that the prosecution witnesses namely, PW-4 Meena, PW-5 Santosh, PW-7 Kalawati, PW-13 Naveen, PW-14 Deepak Jain and PW-19 Vishal Goel have not supported the case of the prosecution about the presence of the respondent/accused at the time of incident. The Trial Court rejected the plea of the prosecution that under Section 106 of the Evidence Act, the burden to explain that the respondent was not present at the time of incident was on the respondent. Instead the trial Court reiterated that it was for the prosecution to prove the same.

8. The evidence of the respondent's witnesses was also considered whose testimonies supported the plea of the respondent that he was admitted to BSA Hospital at the time of incident. Reliance was placed on the deposition of the record clerk of BSA hospital, DW3 Raj Kumar, regarding the record of the respondent as well as of his mother-in-law, namely Smt. Sudesh Chopra, who were admitted in the said hospital from 19th September, 2005 to 21st September, 2005 whereas the deceased Babbal had been electrocuted on 20th September, 2005.

9. The Trial Court also based its inference of respondent not being present at the place of incident on account of the mobile phone record of the respondent which was proved by DW-4 Anuj Bhatia, the Nodal Officer. The mobile phone record unequivocally reflected that the cell phone of the accused/respondent was in the area of Rohini where BSA hospital is situated. For relying on the testimonies of the defence witnesses the Trial Court relied on the observation of the Supreme Court in the case of Budh Nath Pandey Vs. State of UP, AIR 1981 SC 911 and thus inferred that the prosecution has not been able to establish that the accused was present in the house when the deceased Babbal was electrocuted and allegedly raped.

10. The Trial Court also noticed that the brothers of the accused, namely, Sushil Kumar and Rupesh could not be arrested by the police and are still absconding but since the accused has been able to establish that he was not present at the time of incident and the prosecution has failed to establish his presence, it cannot be held that the respondent had raped the deceased and murdered her.

11. The learned Sessions Judge has also held that no ownership document of the House No. C-60, First Floor, Rajan Babu Road, Adarsh Nagar, Delhi has been produced by the prosecution. However, even if it is established that the respondent/accused is the owner, mere fact that he is the owner would not lead to the conclusion that the respondent is guilty of offence of rape and murdering the deceased Babbal. The mere statement of PW-6 Charan Pal that his wife told him a few days ago that people in the house bearing No. C-60, First Floor, Rajan Babu Road, Adarsh Nagar, Delhi were having an evil eye on her, does not point to the guilt of the accused/respondent nor on the basis of such a testimony any culpability can be inferred against the respondent.

12. The Trial Court has also noticed that though the hair found on the chest of the deceased were found to be human in origin but they did not match with the hair of the accused. Besides the report of FSL, no further examination or comparison was done which could have shown

whether the hair found on the chest of the deceased were the same as that of the accused/respondent.

13. The learned counsel for the prosecution is unable to point out any findings of the Trial Court which can be held to be unsustainable or perverse. On perusal of the evidence from the record of the Trial Court and the documents on re-appreciation of the evidence and documents, this Court does not find any evidence on the basis of which it can be established that the respondent was present at the time of incident on 20th September, 2005 in the said house where the deceased Babbal was electrocuted.

14. 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 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.

15. 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=AIR 2009 SC 1242, Prem Kanwar v. State of Rajasthan; 2008 (11) SCC 394, 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.

16. The learned counsel for the petitioner is unable to show any ground on the basis of which the defence evidence can be ignored. The Nodal Officer DW-4 Anuj Bhatia has produced the records of the mobile phone of the respondent which categorically reflects that the phone of the accused was present in the area of Rohini where the BSA hospital is situated. Nothing has been pointed out by the learned public prosecutor on the basis of which said record can be held to be not admissible or not reliable or not credible. The plea of the defendant that he was in the hospital admitted from 19th September, 2005 to 21st September, 2005, therefore, has to be accepted. If that be so and if on the basis of the testimonies produced on behalf of the prosecution, it cannot be held that the accused/respondent, Gajender, was present at the time of the incident at the address where the deceased was electrocuted, then the acquittal of the respondent cannot be held to be unsustainable or that the findings of the trial Court to be perverse. The star witnesses of the prosecution regarding alleged presence of the respondent had turned hostile and had not supported the plea of the prosecution regarding the presence of Gajender. From their cross-examination also, it could not be elicited about the presence of Gajender at the place where the

sweepress Babbal was electrocuted. It has to be held in the facts and circumstances that the prosecution has failed to establish that Gajender, respondent/accused was present at the place of incident. If he was not present, he could not have raped the sweepress nor could have murdered her. The learned counsel for the State is unable to show any evidence which is admissible and which has been ignored by the trial Court. The judgment of the trial Court cannot be termed to be unreasonable, irrelevant and based on convincing material which has been ignored or unjustifiably eliminated.

17. The FSL result also does not implicate Gajender, respondent/accused as the hair found on the chest of the deceased does not match with the hair of the respondent. In the circumstances, there is no evidence which can implicate the respondent. The findings of the Trial Court in acquitting the respondent cannot be framed unsustainable or perverse or that the Trial Court has ignored the material evidence in arriving at the findings of innocence of the respondent.

18. No other grounds have been raised by the learned counsel for the petitioner. The Trial Court has also held that since the accused Sushil Kumar and Rupesh @ Rinku have been declared as proclaimed offender, liberty has been granted to the petitioner to get the

proceedings revived against them, as and when the absconding accused persons are apprehended. In the circumstances, there are no grounds to interfere with the judgment of the Trial Court acquitting the respondent of the charges under Section 376(2A) and 302/34 of IPC.

19. The petition for leave to appeal of the petitioner is therefore without any merit and there are no grounds to interfere with the judgment dated 21st October, 2009. The petition is, therefore, dismissed.

ANIL KUMAR, J.

SURESH KAIT, J.

SEPTEMBER 15, 2010

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