

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

+ **Crl.M.A 12891/2010 & CRL.LP No.257/2010**

% **Date of Decision: 08.09.2010**

State Petitioner
Through Mr.Saleem Ahmed, Additional Standing
Counsel

Versus

Pankaj @ Sonu 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.12891/2010

This is an application seeking condonation of delay of 169 days in filing the leave petition.

For the reasons stated in the application delay is condoned.

CRL.LP No.257/2010

1. The petitioner/state has sought leave to appeal against the order dated 30th October, 2009 in F.I.R.No.1004/2006, under Sections 366,

328 & 376 of Indian Penal Code acquitting the respondent of the said charges.

2. Briefly the case of the petitioner is that the respondent had allegedly kidnapped the prosecutrix Ms.Chandni (changed name) at about 12:00 noon on 26th June, 2006 from her house at Street No.5, Station Block, Prem Nagar-1, Sultanpuri, Delhi. It is alleged that she was given sweets (barfi) laced with some chemical which made her giddy and this was allegedly done with the intention to seduce her and have illicit intercourse and rape her in a park of Mangol Puri.

3. The matter was allegedly reported to the police by the mother of Ms.Chandni, namely, Smt.Shyamo Devi, PW-2 on 28th June, 2006, two days after her daughter was allegedly kidnapped, and on her complaint an FIR Ex.PW-7/A was registered where after the respondent was arrested. After the arrest of the respondent on fulfilling the formalities, the charges under Sections 366, 328 and 376 of Indian Penal Code were framed on 9th February, 2007 to which the respondent pleaded not guilty. In the trial court, eight witnesses were examined by the prosecution including the mother, Smt. Shyamo Devi, of Ms.Chandni as PW-2. The statement of the accused was recorded under Section 313 of Criminal Procedure Code where he claimed himself to be innocent and contended that he has been falsely implicated. He deposed that he was having an affair with Ms.Chandni, and consequently, her father

objected to it, and thereafter, he was falsely implicated in the present case. The trial court while acquitting the respondent noted that the prosecutrix was minor at the relevant time. Grave and serious contradictions in the depositions of prosecutrix (PW-1), her mother (PW-2) and Investigating Officer ASI Krishan Kumar (PW-7) were noticed and considered. According to the trial court, the contradictions in the statements were very material which went to the root of the matter and in the circumstances it has been held that the prosecution has failed to establish the charges levelled against the respondent.

4. From the testimony of prosecutrix (PW-1), her allegation was that at about one and a half years back the respondent had come to her house in the absence of her parents and had given her a piece of sweet (barfi) and after eating it she fell giddy. The accused had asked her to sit in a rickshaw on the pretext of taking her to doctor, however, instead of taking her to doctor, he took her at Mangol Puri in a bushy area where she was raped and kept there for the whole night. She further deposed that she was raped again by the respondent on the next day, and for one week she was taken to various places and the accused repeatedly raped her without her consent. After a week, she was apprehended by the police official where her mother had also come from Mangol Puri Railway Station after which she was medically examined and her undergarments were seized by Doctor, which are exhibited as Ex. P1 to Ex. P4. Prosecutrix (PW-1), however, in the cross-examination

deposed that Pankaj @ Sonu was not known to her and whenever prosecutrix's mother would go away, an old couple residing near her Jhuggi used to take care of her.

5. According to PW-1, prosecutrix, sweets (barfi) laced with something which made her giddy was given to her at about 3:00 p.m. and she became unconscious and regained conscious at about 5:00 p.m. She stated that during one week when she was with the respondent, she travelled to various places where different persons were present, however, she did not tell anyone about she being raped repeatedly by the respondent on different dates against her consent and wishes, as he had threatened to kill her. She also deposed that the respondent used to go with her even when she used to go for the call of nature.

6. The mother of the prosecutrix (PW-2), however, deposed that about one and one and a half years back she had gone to Bahadurgarh and when she came back she found her daughter Ms.Chandni was missing and her other siblings were alone in the house. She stated that for 2-3 days she tried to trace out the daughter, but she could not succeed and other residents of the locality had reported the matter to the police. She deposed that she was made to put her thumb impression on certain papers and her daughter was recovered from Mangol Puri Railway Station. However, at the time of recovery of her

daughter from Mangol Puri Railway Station, she was not present, and she was informed later regarding recovery of her daughter. The mother was declared hostile and was cross-examined in which she denied that she had reported the matter to the police official and also denied that she had expressed any suspicion on the accused Pankaj @ Sonu. She did not admit that accused Pankaj @ Sonu and her daughter were apprehended in her presence at the Mangol Puri Railway Station. According to her, the case was registered against the respondent by certain persons who had enmity with him, and gave a good certificate to the respondent and also deposed that he does not have any bad habits and she had not complained against him.

7. The trial court has considered the deposition of ASI Krishan Kumar (PW-7) which has inherent contradictions with the statement of Smt. Shyamo Devi (PW-2). According to him on 28th June, 2004, the mother had come to the police post and had lodged a missing report, Ex. PW-2/A, regarding her daughter Ms. Chandni and in the report she had expressed her suspicion on the respondent. According to ASI Krishan Kumar, the mother Smt. Shyamo Devi had produced her daughter herself along with the respondent in the police post. When the prosecutrix was produced by her mother herself, recovery was shown vide Memo Ex. PW-7/B and she was taken for medical examination by lady constable Usha (PW4). According to him, the respondent was also medically examined. The said constable deposed that statement of the

prosecutrix was recorded under Section 161 of Criminal Procedure Code, and on the basis of her statement Sections 328 and 376 of Criminal Procedure Code were also invoked. He also deposed about the disclosure statement made by the respondent, and the statement of prosecutrix under Section 164 of Criminal Procedure Code could not be recorded due to language problem.

8. From perusal of the trial court record and the testimonies of these witnesses, the learned public prosecutor has asserted that the testimony of the prosecutrix is corroborated by the medical evidence and by the testimony of her mother, and there are no serious and grave contradictions in the depositions of the prosecutrix, her mother and the investigating officer. It is further asserted that since the accused had admitted that he had been having an affair with the prosecutrix, therefore, the testimonies of these witnesses ought to have been believed and in the circumstances, the alleged contradictions on the basis of which, the trial court has acquitted the respondent has to be ignored and are to be treated as minor imperfections. In the circumstances, it is prayed that leave to appeal be granted against the order of the trial court acquitting the respondent from the charges under Sections 366, 328 and 376 of Indian Penal Code.

9. This Court has perused the trial court record and has gone through various testimonies and documents on record in details along with the public prosecutor. From the perusal of the testimonies, it is apparent that there are major contradictions between the testimonies of PW-1 Ms.Chandni, her mother Smt.Shyamo Devi (PW2) and ASI Krishan Kumar(PW7). The prosecutrix had stated that she was recovered with Pankaj @ Sonu by the police and her mother from the Mangol Puri Railway Station, whereas the ASI Krishan Kumar had deposed that she was not recovered with the respondent rather PW-2 mother, Smt.Shyamo Devi of the prosecutrix had brought the prosecutrix and the respondent to the police post where after a recovery memo was prepared and the prosecutrix along with the accused was sent for medical examination. Smt.Shyamo Devi, on the other hand, stated that the police had recovered her daughter from the Mangol Puri Railway Station, but she was not present at that time. In the circumstances, all the three witnesses have given three different versions. Which version is correct cannot be inferred on the basis of any other evidence or document on record.

10. There are inherent contradictions regarding missing of Ms.Chandni (prosecutrix). Smt.Shyamo Devi mother has denied that she had complained to the police about her missing daughter and had expressed any suspicion on the respondent. She has also denied that her daughter with the respondent was apprehended by other relatives

from the Mangol Puri Railway Station, and thereafter police had arrested the accused. She has very categorically stated that she did not lodge a complaint but her thumb impression was taken on Ex. PW-2/A and other blank papers which was given to her at the insistence of her neighbour and relatives. This deposition is diametrically contrary to the statement of ASI Krishan Kumar who deposed that Smt. Shyamo Devi, mother of prosecutrix had come to the police post and had lodged a missing person report, Ex. PW-2/A, and the mother herself had produced her daughter on 2nd July, 2006 along with accused respondent where after they had been taken into custody.

11. Dr. Brijesh Singh (PW-5) has deposed that on local examination of the prosecutrix no external injury on the parts of her body was found and even no external injury was found on the body of the accused/respondent. Dr. Manoj Dhingra (PW-6) has deposed that Dr. Meenakshi had opined that hymen of the prosecutrix was torn. Forensic examination report Ex. PW-7/H reveals that semen was not detected on Kameej, Salwar, Dupatta and underwear. The report though opined that Kameej, Salwar and Dupatta had human blood, but the blood group was not detected. From the said report and other evidence, it cannot be inferred that the accused/respondent had sexual intercourse with the prosecutrix. In the circumstances, the only evidence of sexual intercourse by the respondent with the prosecutrix is her statement. The statement of Ms. Chandni (PW-1) is also not consistent viz-viz

statement of her mother Smt. Shyamo Devi and ASI Krishan Kumar. Her statement that the respondent took her to bushy area near Mangol Puri and there he raped her. Thereafter, he took her to different places and continuously had sexual intercourse with her at different places, against her consent also does not inspire confidence. Though the medical examination had revealed that her hymen was torn, from the evidence of the witnesses and the report of forensic examination, it cannot be inferred that he had sexual intercourse with the prosecutrix. The mother of the prosecutrix has rather deposed that she did not even complain to the police and that it was at the insistence of other relatives, a police complaint was lodged and she was made to thumb mark the papers. The mother says that her daughter was not recovered with the respondent in her presence whereas the Inspector stated that the mother had produced the prosecutrix and the respondent before the police where after the respondent was arrested and the prosecutrix was sent for medical examination. The prosecutrix stated that she is not known to the respondent whereas the respondent deposed that he was having an affair with the prosecutrix. If prosecutrix was not known to the respondent, her version that she was given sweets (barfi) laced with something which made her giddy and she became unconscious and regained conscious after two hours and she was taken to bushy area near Mangol Puri and raped by the respondent cannot be believed. If she was raped against her consent, she would not have remained quite for a number of days as she herself has admitted that she had been

going to different places with the accused where different persons were present. If the accused has been raping her at various places against her consent, she would have revealed it or tried to escape from the clutches of the respondent. This is not the case by the respondent that he had intercourse with the prosecutrix with her consent. Consent of the prosecutrix would not be relevant as she was minor at that time. Rather in the facts and circumstances, the prosecution has failed to establish that the respondent had sexual intercourse with her. On the basis of sole testimony of the prosecutrix also it will not be appropriate to infer that the respondent had sexual intercourse with her as her statement and version is unreliable. Because of inherent contradictions it has not been even established as to from where the prosecutrix was recovered and the alleged places she had gone with the respondent. For these inherent contradiction, it is improbable that the respondent had sexual intercourse with the prosecutrix.

12. This is not disputed that the prosecutrix is minor and therefore, her consent will not be material, but on the basis of the testimonies of the prosecutrix, her mother, the ASI Krishan Kumar and other witnesses, it cannot be inferred that the respondent had sexual intercourse with the prosecutrix. If that be so, the trial court's inference acquitting the respondent of the charge under Section 376 cannot be said to be unsustainable or perverse. If the mother of the prosecutrix had herself produced the prosecutrix along with accused/respondent

and also deposed that he is a good boy and that she has not complained against him, it cannot be held that he had kidnapped the prosecutrix and had sexual intercourse with her.

13. On perusal of the entire testimonies and the documents and the record of the trial court, this Court also concurs with the finding of the trial court that prosecution has failed to establish the guilt of the respondent. This cannot be disputed that unless the conclusion of the Trial Court on the evidence on record are unreasonable, perverse or unsustainable, the High Court would not interfere with the order of the acquittal. Though the High Court has the power to assess the evidence and reach its own conclusion which power is as extensive as in appeal against the order of conviction, yet as a Rule of Prudence, the High Court should always give proper consideration to matters such as (i) the views of the Trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favor of the accused; a presumption which certainly is not weakened by the fact that the accused has been acquitted at his trial; (iii) the right of the accused to the benefit of any doubt, and (iv) the slowness of an Appellate Court in disturbing a finding of the fact arrived at by a Judge who had the advantage of seeing the witnesses and noticing their demeanor. On the analysis of facts and circumstances and the evidence of the prosecution, this Court does not differ with the conclusions of the Trial Court acquitting the respondent of the charge under section 376 of IPC and other sections in

the facts and circumstances of the case.

14. No other grounds have been raised by the petitioner seeking leave against the judgment of the Trial Court 30th October, 2009 in F.I.R.No.1004/2006, under Sections 366, 328 & 376 of Indian Penal Code acquitting the respondent of the said charges. The judgment of trial Court cannot be termed to be unsustainable or perverse and in the circumstances there are no grounds to grant leave to the petitioner to impugn the judgment dated 30th October, 2009

15. For the forgoing reasons, the petition to grant leave to appeal against the judgment of the Trial Court dated 30th October, 2009 cannot be allowed. There are no grounds to grant leave. The judgement of Trial Court is neither perverse nor unsustainable. The petition to leave is therefore dismissed.

ANIL KUMAR, J.

SURESH KAIT, J.

SEPTEMBER 08, 2010

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