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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Crl.M.A.Nos.16687/2010 & Crl.L.P No.0394/2010

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Date of Decision: 26.11.2010

The State

Through Mr.Lovkesh Sawhney, APP Appellant

Versus

Yogesh

Through Nemo. Respondent

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE S.L.BHAYANA

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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.16687/2010

This is an application by the petitioner/applicant under Section 5 of the Limitation Act, read with under Section 482 of the Criminal Procedure Code seeking condonation of delay of 197 days in filing the petition for leave to appeal against the judgment dated 2nd December, 2009 arising out of the Sessions case No.102 of 2009 acquitting the respondent of the charges under Sections 376/377 of the Indian Penal Code.

The petitioner/applicant has contended that the judgment dated 2nd December, 2009 was examined at various levels and by letter dated 25th March, 2010 Director of Prosecution, Government of NCT of Delhi had informed of the decision to file the petition for leave to appeal. The copy of the impugned judgment was applied on 5th June, 2010 and had been obtained on 15th June, 2010. The petitioner/applicant has also given the details of various officers and the date on which the petition was drafted and other steps which were taken to file petition for leave to appeal.

The applicant has relied on Collector of Land Acquisition Vs. Katiji, (1987) 2 SCC 107 and State of Nagaland Vs. Lipok Ao, 2005 (3) SCC 752 holding that sufficient cause should be considered with pragmatism in justice oriented approach rather than a technical defection of sufficient causes for explaining every days delay having regard to considerable delay of procedural red tape in the decision making process of the government, certain amount of latitude is permissible and should be given. The applicant has contended that the State Government is the impersonal machinery working through its officers or servants- hence it cannot be put on the same footing as an individual.

Considering the averments made in the application, and the law cited by the counsel for the petitioner/applicant, there is sufficient cause to condone the delay in the facts and circumstances in filing the petition for leave to appeal.

The application, is therefore, allowed and the delay of 197 days in filing the petition seeking leave to appeal is condoned.

Crl.L.P.No.394/2010

The petitioner has sought leave to appeal against the judgment dated 2nd December, 2009 in Sessions Case No.102 of 2009, titled as 'State v. Yogesh Kumar' arising from the FIR No.1135 of 2005, under Sections 376/377 of Indian Penal Code, P.S.Sultanpuri, Delhi acquitting the respondent of the charges framed against him.

The case of the prosecution before the Trial Court was that the wife of the respondent made a complaint against her husband/respondent that he had put his finger in the anus of their daughter, aged about 5 years and had also raped her in her absence four months before 24th July, 2005, the day when the complaint was made.

The child of the complainant and the respondent was examined medically and thereafter the respondent was arrested and charge sheet under Sections 376/377 of the Indian Penal Code was filed. The respondent pleaded not guilty and claimed trial and the prosecution examined 14 witnesses during the trial. The respondent was also examined under Section 313 of the Criminal Procedure Code.

The trial court considered the statement of Smt. Madhu, complainant, wife of the accused/respondent, and her mother-in-law, Smt.Prem Lata, besides Ms.Sangeeta Bansal from an NGO Sampurna who had given a report that she had asked various questions from the prosecutrix and the answers were given by the prosecutrix by nodding her head. The statement of the prosecutrix, however, was recorded in the Court where she denied anything done to her by her father/respondent and considering her statement and her demeanor, the trial court declined to rely on the report allegedly given on the basis of nodding the head by the prosecutrix.

From the statement of the mother of the prosecutrix, it has been inferred that the respondent has been falsely implicated on account of property dispute and no reliance was placed on Ex.PW-7/A, the alleged report given by an NGO Sumpurna. The statement of the prosecutrix was recorded in the Court by putting general questions and she

categorically deposed in the Court that her father had not committed any wrong act with her and had not put any finger in her anus. The trial court noticed that when the statement was given by the prosecutrix in the court, the respondent was in judicial custody, and therefore, there was no influence on the prosecutrix and the statement given by the prosecutrix was believed.

The prosecution also failed to disclose any cogent reason by the complainant for not complaining for four months after the alleged rape and alleged insertion of finger by the father in the anus of his daughter. Even the complainant had been declared hostile and was subjected to cross-examination. The trial court noticed that the medical report of Joshi Road Hospital, Karol Bagh, Delhi where the prosecutrix was allegedly taken after insertion of finger in her anus and alleged rape by the respondent, had not been produced, nor any effort was made by the prosecution to get the record and to explain the delay in lodging the FIR.

The underwear of the prosecutrix was found to be torn but the same was neither seized, nor produced in the Court, and the statement of the complainant was found to be self conflicting. The trial court also relied on the fact that before lodging the FIR, the complainant had went to her in-laws' house and had demanded ownership documents of

Sultanpuri House which were refused. The complainant rather admitted that had the documents of Sultanpuri House and jewelry been handed over to her, she would not have lodged the complaint against the respondent, her husband. The complainant also admitted that she had given brick blows to her husband/respondent and that she had come to Court to give statement to get her jewelry and the documents of the Sultanpuri House.

In these circumstances, the statement of the complainant was held to be unreliable and even the statement of the mother-in-law of the accused could not be relied on as even she did not depose that her daughter had informed her that the respondent had raped his own daughter.

Considering all these points and the relevant evidence, the trial court has acquitted the respondent of the charges under Section 376/377 of the Indian Penal Code and has acquitted him.

This is no more *res integra* 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 favor of the accused which is rather fortified and strengthened by the order of acquittal passed in his favor. 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 favors the accused should be adopted and the view taken by the trial Court which had an advantage of looking at the demeanor 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 (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 favorable 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.

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 not accepting those grounds and not subscribing to the view of the trial Court that the accused is entitled to acquittal.

The learned APP, Mr.Lovkesh Sawhney has not been able to show any perversity or unsustainability in the order of the trial court. The learned APP could not dispute that in the Court the prosecutrix deposed that her father did not commit any wrong act with her, nor put his finger in her anus. In view of the specific statement given before the Court, the alleged statement allegedly recorded by an NGO, which is also based on the nodding of head by the prosecutrix, the charge against the respondent cannot be held to have been made out. The findings of the trial court cannot be held to be perverse in the facts and circumstances nor is it unsustainable in view of the testimony of the prosecutrix.

On perusal of the testimony of the wife of the accused/respondent and mother of the prosecutrix from the trial Court

record, it is inevitable to infer that she made a complaint against her husband so that her in laws would have handed over the documents of Sultanpuri House under pressure. She has admitted categorically that if the documents of the Sultanpuri House had been handed over to her, she would not have lodged the complaint against her husband. She even went to the extent to depose before the Court that she came to Court to give statement with a view to get her jewelry and the documents of Sultanpuri House from the respondent.

Learned Additional Public Prosecutor is also unable to show any justifiable reason for delay in filing the complaint for four months. The allegation that rape was committed four months prior to 24th July, 2005 is also negated by the fact that though the complainant had deposed that she had taken her daughter for treatment after alleged rape to Joshi Road Hospital, Karol Bagh, Delhi, however, no record of the said Hospital had been produced. There is nothing on record on the basis of which, it could be inferred that the accused/respondent had committed rape on his own minor daughter aged about 5 years and would have inserted his finger in her anus as has been alleged by the complainant. Apparently, the inevitable inferences based on the testimonies on the record which has been perused by this Court is that it cannot be inferred that the respondent had raped his own minor daughter and had indulged in any other acts on the basis of which, the charge under

Sections 376/377 of the Indian Penal Code can be made out against him.

In the totality of the facts and circumstances, learned Additional Public Prosecution has not been able to make out any case for grant of leave to appeal against the impugned judgment dated 2nd December, 2009. The petition in the facts and circumstances, is without any merit, and it is therefore, dismissed.

ANIL KUMAR, J.

S.L.BHAYANA, J.

NOVEMBER 26, 2010

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