

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

DECIDED ON: OCTOBER 31, 2011

+ CRL. L.P. No. 9/2008 and Crl. M.A 818/2008

STATE Appellant
Through: Mr. M.N. Dudeja, APP for the State
versus

MOHD. ASHRAF Respondent
Through: None

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MS. JUSTICE PRATIBHA RANI

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

MS. JUSTICE PRATIBHA RANI (OPEN COURT)

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1. By virtue of this petition, the State seeks leave to appeal against the judgment dated 17th August, 2007 of learned Additional Sessions Judge by which respondent Mohd. Ashraf was acquitted of the charge of having committed an offence punishable under Section 376/506 IPC. The facts of the case are that on 26th March, 2005 at about 9.28 p.m. vide DD No. 49-B, P.S. Samai Pur, Badli was informed about the complaint being received from Shabnam that her husband was doing 'galat kaam' with her daughter. The DD was marked to ASI Prem Singh for necessary action. The intimation of the rape being committed was also given to WSI Parvati of P.S. Samai Pur, Badli who also reached the spot and found ASI Prem Singh along with his staff present there. The complainant Shabnam Begum along with her daughter, the child victim 'R' (the name of

the child victim withheld) and her husband were found present. As per the complaint Ex. PW-2/A, Mohd. Ashraf was the second husband of the complainant and she had two children from her first husband Mohd. Ismail, after whose death, she married the respondent Mohd. Ashraf. The complaint also said that on 24th March, 2005, she was away on work and when she returned home in the evening, her neighbour Salma informed her that, at about 5 PM, (when she visited the complainant's house to take the cooker), she saw the respondent doing 'galat kaam' with her daughter. She questioned the child victim who confirmed the same and further informed her that earlier too he had done such said 'galat kaam'. When she asked the respondent why he had done so, he threatened her. Again on 26th March, 2005, in her presence, the respondent tried to do 'galat kaam' with the child victim under the influence of liquor and she informed the PCR about the incident as well as the earlier incident of rape having been committed upon her daughter three days back. After registration of FIR No. 231/05 at P.S. Samai Pur, Badli in respect of the incident, the child victim 'R' as well as the respondent were sent for medical examination. Statements of the witnesses were recorded.

2. After completion of investigation, the charges of having committed the offences punishable under Section 376/506 IPC were framed against the respondent to which he pleaded not guilty. In order to bring home his guilt, the prosecution examined 10 witnesses. Out of these witnesses, the statements of PW-1 the child victim 'R'; PW-2 her mother and complainant Shabnam Begum; and PW-3 Salma her neighbour are very crucial to decide the present petition; their testimonies are to be considered in the light of findings given by PW-4 Dr. Shakuntala on the MLC Ex. PW-4/A of the child victim.

3. After considering material discrepancies and improbabilities regarding the occurrence and whether the 'galat kaam' or rape was committed by the respondent, once or more than once, whether there was a fatal delay in reporting the matter to the police and whether the conduct of the eye witness PW-3 Salma in the facts and circumstances was normal and probable, the Trial court arrived at the following conclusion:-

- “(i) the version narrated by the prosecution witnesses is inconsistent on material aspects;
- (ii) it does not stand established that on 26.3.2005 the accused committed or attempted to commit any wrong act against his step father;
- (iii) there is unexplained delay in reporting of matter to police about

alleged 2/3 earlier incidents of commission of wrong act against the prosecutrix; and

(iv) prosecution version narrated by PW1 to PW3 regarding commission of rape on the prosecutrix on 24.3.2005 is inconsistent, improbable and unbelievable and as a result highly doubtful.”

4. It has been contended on behalf of the State that the victim in this case was a minor girl aged about 9 years and the offender was none other than her step-father. Further, the child victim had fully supported the case of the prosecution not only in respect of the incident dated 24th March, 2005 but also the earlier incidents, which was also mentioned by her before the doctor and recorded on the MLC Ex. PW-4/A. It is further contended that it is not necessary that the hymen must be torn in case the victim is sexually assaulted and that the statement of child victim which is duly supported by PW-3, the eye witness and the mother, the complainant who is none other than the wife of the respondent, required due appreciation by learned trial court, but ignoring the testimony, learned trial court has mis-appreciated the evidence and acquitted the respondent. It is urged that in the circumstances, leave to appeal should be granted.

4. We have considered the submission made by Mr. M.N. Dudeja, learned APP on behalf of the State. We have also examined the evidence produced by the prosecution to prove its case and after going through the testimony of PW-1 the child victim, PW-2 the mother of the child victim, PW-3 the neighbour who is an eye witness to the incident and PW-4, the doctor who medically examined the child victim, we are of the considered view that the finding and conclusion reached by the trial court are reasonable, having regard to the evidence led before the learned trial court.

5. The law with regard to the grant of leave is well settled by catena of judgments. Leave to appeal can be granted where it is shown that the conclusions arrived at by the trial court are perverse or there is misapplication of law or any legal principle. The High Court cannot entertain petition merely because another view is possible or that another view is more plausible. In *Arulvelu and Anr. Vs. State represented by the Public Prosecutor and Anr.* 2009 (10) SCC 2006, while referring with approval the earlier judgment in *Ghurey Lal vs. State of Uttar Pradesh*, (2008) 10 SCC 450, the Supreme Court reiterated the principles which must be kept in mind by the High Court while

entertaining an appeal against acquittal. The principles are:-

1. *The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*

2. *The power of reviewing evidence is wide and the appellant court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.*

3. *The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.*

4. *The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has 'very substantial and compelling reasons' for doing so.*

5. *If two reasonable or possible views can be reached – one that leads to acquittal, the other to conviction – the High Courts/appellate courts must rule in favour of the accused.*

6. *Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either 'perverse' or wholly unsustainable in law."*

6. The evidence adduced by the prosecution requires to be considered in the light of above legal principles to determine whether any case for grant of leave is made out.

7. First of all, we will examine the Ossification Test Report and MLC Ex. PW-4/A. As per the report Ex. PW-5/A (about bone age), the estimated bone age was between 7 years to 9 years. The history as given on Ex. PW-4/A is of sexual assault by her step father for two months almost daily and lastly, it was done two days prior to examination. As per the statement of PW-4, Dr. Shakuntala of Babu Jagjivan Ram Hospital, on 26th March, 2005 when she examined the child victim, she found no mark of external injury anywhere and hymen seemed to be intact.

8. The MLC of the accused/respondent Mohd. Ashraf shows that there was nothing

to suggest that he was incapable of performing sexual activity. The respondent in this case is a grown up man of 25 years of age and the victim was his own step-daughter aged between 7-9 years not capable of offering any resistance. If the child victim was sexually assaulted almost daily for a period of one month or so by the respondent, her medical examination would have revealed not mere external injuries and tear on her private parts, but even hymen would not have remained intact since a child of such tender age was sexually assaulted (on regular basis) by a grown up man.

9. It is necessary to mention here that as per the statement of PW-1, on the day of incident (which was claimed to have been witnessed by PW-3 Salma), while she was playing outside, the accused called her inside and took off his pants and removed her salwar and inserted his penis in her vagina. If this part of the statement of the child victim is correct, then the telltale signs should have been revealed during her medical examination at least to the extent that a tear would have required surgery. Not only that, as per the statement of PW-1 the child victim, when her mother returned after 2-3 hours, she narrated the facts to her and prior to that, when her neighbour Salma came, she saw the accused/respondent was doing 'galat kaam' with her. PW-1 is silent about her being taken by PW-3 Salma to her house till her mother returned home. On this aspect, PW-2 Shabana Begum also did not state that she was told about the incident by PW-3. Rather, as per her version, it was her daughter who informed her about the incident. The conduct of PW-3 Salma is unnatural when she visited the house of the respondent. She claims she entered as the door was open and she went to the respondent to take the cooker. Though she saw the zip of the accused's pant open and the child's underwear having been removed, she did not raise any alarm to save the child. Rather her version is that the accused gave her cooker and she left the house and PW-1, the child victim, accompanied her.

10. This conduct of PW-3 Salma, that even in such a situation, she waited for the accused to get up and give the cooker to her, and she returned with cooker without drawing the attention of the neighbourers, from adjoining rooms about the incident, is also highly improbable and contrary to natural human conduct. She has not stated that she made any effort to save the child victim from being sexually assaulted by the

respondent and her merely saying that the child victim 'R' accompanied her is highly unbelievable.

11. It is pertinent to mention here that the DD No. 49-B Ex. PW10/C was recorded at the behest of PW-2 Shabnam whereby she informed that '*mera pati Ashraf meri ladki se galat kaam kar raha hai*' meaning that the respondent was in the process of doing 'galat kaam' with the child victim. When the police arrived at the spot, he was found there and he made no effort to abscond either after commission of the earlier act dated 24th March, 2005 or the one complained of on 26th March, 2005. Rather, he accompanied the police to Babu Jag Jeevan Ram Hospital where he was medically examined, though the complaint Ex. PW-2/A states that he was under the influence of liquor, there is no observation about even the smell of alcohol emanating from him. Thus, the evidence, considered from whatever angle, the testimonies of the child victim, as well as her mother PW-2 and her neighbour PW-3 Salma are untrustworthy.

12. No doubt, in a case of sexual assault, even the statement of the victim without any corroboration is sufficient to convict the accused but at the same time, only if it inspires confidence. If the statement of PW-1 is considered from that angle, not only it is contrary to the medical record, but she has also only spoken about the incident that took place in presence of Salma. She is silent about the incident dated 26th March, 2005 which was claimed to have been witnessed by her mother PW-2 Shabnam regarding which the police was informed by DD No. 49-B. After going through the testimony of child victim PW-1 and her mother PW-2, this court finds that the conclusions arrived at by the trial court are plausible.

13. In view of the above, this court is of the opinion that no ground is made for grant of leave to appeal. The petition, therefore, deserves to be dismissed.

PRATIBHA RANI
(JUDGE)

S. RAVINDRA BHAT
(JUDGE)

OCTOBER 31, 2011
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