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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On : 20.01.2011

Decided on: 27.01.2011

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Criminal Leave Petition No.447/2010

STATE

..... Petitioner

Through : Shri Saleem Ahmed, Addl. Standing
Counsel (Crl.) for the State

versus

SANJAY & ANR.

..... Respondents

Through : Nemo

CORAM:

**MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE G.P. MITTAL**

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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. |

MR. JUSTICE S.RAVINDRA BHAT

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1. This order will dispose of prosecution petition for leave to appeal preferred under Section 378 (1) of Criminal Procedure Code against the acquittal of the first respondent/accused (hereafter referred to as Sanjay) by judgment dated 27.03.2010 of the learned District Judge cum Additional Sessions Judge. The accused had been charged along with another accused (hereafter referred as Devender Sharma) for committing offences under Sections 365/376/506/34 IPC. Briefly the prosecution case is that the prosecutrix was residing in Sanjay's neighbourhood in 1996 (when she was about 17). He introduced her to Devender Sharma on 06.05.1996.

Devender Sharma used to publish newspaper where she was employed as a clerk. The prosecutrix alleged that Devender Sharma used to indulge in indecent acts with her and committed rape upon her. The prosecutrix further stated that she did not report the matter anywhere or even disclosed it since Sanjay threatened that she would be defamed in the locality. She also complained that during her employment with Devender Sharma he continued to harass her and committed further acts of rape, citing his pending divorce from his wife and also later he would solemnize his marriage with the prosecutrix. She alleged that she threatened Devender Sharma that she would commit suicide and implicate him upon which he got scared and consequently she left his employment. The prosecutrix got married on 31.10.1998 and was living happily with her husband. About a year and half prior to the incident, she was again contacted by Sanjay who compelled her to meet Devender Sharma, failing which her past with Devender Sharma would be disclosed to him (her husband). It is alleged that Sanjay also stated that in case the prosecutrix refused to co-operate Devender Sharma would use his connections and get her husband implicated falsely in a smack case. The threats and frequent visits of the accused to her house and the neighbourhood instilled fear in her mind and she started living in her parental house.

2. The prosecutrix alleged that on 26.05.2006 in the late evening when she was returning with her younger brother, a Tata Indica Car stopped near them, Devender Sharma alighted from the Car, slapped her brother and after threatening him with a gun (which belonged to his security guard) abused them and asked her to sit in the car, since a crowd had by then gathered he allegedly claimed to be a Police Officer and drove off. She complained that on 27.05.2006 when she was going to the market around 7.50 P.M., upon her reaching Khalsa College, Devender Sharma arrived in his black Indica car and dragged her inside it, threatened her with revolver and slapped and warned her not to raise alarm. The prosecutrix alleged that she was asked to live with Devender Sharma and leave her husband and was also given the allurements of a good job and a separate residence. At that time Devender Sharma's security guard was not with him. He took the car to a hilly area and at Budha Garden he stopped the car. It was alleged that in the meanwhile Sanjay also reached there on

his scooter. Both Sanjay and Devender Sharma committed acts of rape in turn upon the prosecutrix and again threatened her to keep quiet saying that in case she disclose the incident, her family members would be killed. It is stated that she was living in fear and eventually sent a complaint to Commissioner of Police, which led to lodging of FIR for further investigation and charges being framed.

3. The prosecution examined 20 witnesses in their support including the prosecutrix who deposed as PW-1; her brother Pawan Kumar as PW-3 and PW-8, Constable Ram Kumar was another material witness being the PSO of accused Devender Sharma. The Court by above judgment believed the prosecutrix story and the other materials so far as Devender Sharma was concerned. The conclusion in this regard is as follows :

“60. Thus, prosecution has been able to prove not only the two incidents of rape committed in the year 1996 by accused Devender Sharma but also that on 26.05.06 at about 9.00 pm the prosecutrix alongwith her brother Pawan was going to her paternal house and when they reached near Khasla College, Dev Nagar one black colour Indica car No. DL-8-CM-0814 stopped there on which logo of Press and Police were affixed and accused Devender came out from that car duly armed with a gun and asked the prosecutrix to sit in her car and when she refused the accused Devender Sharma slapped her and on seeing the public gathered there, accused Devender Sharma left that place leaving the prosecutrix weeping there. Again on 27.05.06 at about 7.45 pm when the prosecutrix was going to the market, accused Devender came there in his Indica Car and dragged her inside the said car at the point of revolver and then took her to Budha Garden where he committed rape on her. The incident dated 26.05.06 and 27.05.06 wherein accused Devender Sharma kidnapped her by showing a weapon and took her in a car to some place identified by her as deserted place in Budha Garden. To this extent the prosecution case against accused Devender Sharma stands proved beyond reasonable doubt.

4. It is contended by the petitioner/prosecution that acquittal of Sanjay is unjustified since the prosecutrix had equally implicated him and proved his role in the entire episode as also the fact that he was instrumental in introducing Devender Sharma (to the Prosecutrix). It is urged that the trial court observation that the prosecutrix had held a grudge against Sanjay since he had introduced her to Devender Sharma is not

borne out and ought not to have been considered a circumstance to acquit him.

5. The relevant observations of the trial court leading to Sanjay's acquittal are as follows :

"63. In the instant case also it appears that prosecutrix had grudge against accused Sanjay for the reason that he was an associate of accused Devender Sharma who was hell bent upon to ruin her married life, hence while making the complaint she named accused Sanjay also to be person who committed rape on her. There is nothing on record to suggest as to how accused Sanjay could come to know about the presence of the prosecutrix with accused Devender Sharma at a deserted place near Budha Garden so as to reach there on his scooter and commit rape on her. From the evidence available on record, I find that presence of accused Sanjay on 27.05.06 at the place where prosecutrix was raped by accused Devender Sharma is doubtful. Thus, I am of the view that accused Sanjay deserves to be given benefit of doubt."

6. We have considered the petitioner's submissions and have also gone through trial court record, which was summoned by the order dated 03.12.2010. The record undoubtedly establishes that Sanjay had introduced prosecutrix to Devender Sharma, however, it did not believe the prosecutrix version so far as the specific acts alleged against Sanjay were concerned. The reasons which persuaded trial court to acquit Sanjay were that he had merely introduced her to the perpetrator of the crime i.e. accused Devender Sharma. Her statement about involvement of Sanjay in the rape incident of 27.05.2006 has been disbelieved because of the fact that the call details from the mobile phone of Devender Sharma did not show any contact with Sanjay's telephone. The trial court also notices that Sanjay was not with Devender Sharma on the previous date's incident, i.e. that of 26.05.2006. The Court further gave weightage to the circumstance, the testimony of the prosecutrix as to involvement of others, which nowhere showed that Devender Sharma had any communication with Sanjay after the prosecutrix was seated with him. In the totality of circumstances, the Court was convinced that the prosecutrix's version implicating Sanjay in respect of the incident of 27.05.2006 was unbelievable. The Court also relied upon two judgments of the Supreme Court i.e. Bijoy Singh V. State of Bihar, (2002) 9 SCC 147 and Jayaseelan V. State of Tamil Nadu, (2009) 12 SCC 275, to say that only that part of the evidence which is credible and trustworthy of a witness can be taken into

consideration, if it convinces the Court trying the criminal charge. Upon these facts the Court concluded that prosecutrix had apparently borne some grudge against Sanjay and consequently named him also as an accused in respect of rape incident of 27.05.2006.

7. The standard, which the High Court has to apply while considering the petitions for grant of leave to appeal are that the record must show a substantial ground. The Court has to be mindful and alive to the fact that the presumption of innocence, which an accused is entitled to, stands affirmed by the conclusion of trial court in the case of acquittal. The High Court, therefore cannot entertain a petition merely because another view is possible; there has to be some substance in the grounds urged either in the appreciation of evidence or in material omission of consideration, certain factors or mistaken application of law or any legal principle. The principles are well settled by catena of judgments of the Supreme Court and were reiterated in the latest report in Prem Kanwar V. State of Rajasthan, (2009) 3 SCC 726.

“1. In an appeal against an order of acquittal, the High Court possesses all the powers and nothing less than the powers it possesses while hearing an appeal against an order of conviction.

2. 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 trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

3. Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.

4. 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 and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.

5. If the High Court on a fresh scrutiny and re-appraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

6. The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanor of witnesses and observing their conduct in the Court especially in the witness box.

7. The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused."

8. This Court finds none of these elements present and is in agreement with the trial court's conclusion to the extent that the material on record is insufficient, to conclude the guilt of accused Sanjay, the respondent herein, leading to his acquittal. In view of the above discussion, the petition is to fail and it is accordingly dismissed.

S. RAVINDRA BHAT
(JUDGE)

G.P. MITTAL
(JUDGE)

JANUARY 27 , 2011