

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

Reserved on: 21st May, 2013

Pronounced on: 9th July, 2013

+ **CRL.A. 67/2007**

STATE

..... Appellant

Through

Ms. Rajdipa Behura, APP for the State.

Mr. Saket Mishra, Advocate

versus

NAND JI PRASAD

..... Respondent

Through

Mr. S.S. Ahluwalia, *Amicus Curiae*

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This Appeal is directed against a judgment dated 08.01.2006 passed in Sessions Case No.250/2006 whereby the Respondent was acquitted of the charges for the offence punishable under Sections 363/376/323 of the Indian Penal Code (IPC).
2. The FIR was lodged on the basis of statement Ex.PW-1/A of Smt. Bira, mother of the prosecutrix. The prosecution version can be culled out from the impugned judgment, paras 2 and 3 of which are extracted hereunder:-

“2. The case was initiated on report Ex. PW1/A lodged by the mother of the victim. The contents of the report are that on 15.9.2004 at 4.00 PM she left her house and went for doing job. At that time her daughter aged four years was in the house. When she returned at 6.00 PM, she did not find her daughter in the house.

The accused was residing at some distance from her house. He used to come and sit in front of her room after taking liquor for the last 2/3 days. He asked her and her daughter Urmila to cook meat for him but she refused. She went to the house of accused and asked him for her daughter. The accused replied that complainant's daughter was not there. Next morning at 6.30 AM, she started searching for her daughter and asked the accused who was standing in gali as to whether he had seen her daughter. The accused ran away after bolting his room. She became suspicious, opened the room of the accused and found the cardboard, gudhri and lungi stained with blood. She became sure that accused had done wrong act with her daughter. She chased the accused and found her daughter lying unconscious, with blood stains near Peepal tree in a park. In the meantime police came and removed her daughter to the hospital.

3. During investigation, the prosecutrix was medically examined. The articles lying in the room of the accused were seized. The accused was arrested. He made a disclosure. He was also got medically examined. Cloths of the prosecutrix seized in the hospital were sent to FSL for examination. Report has been received that all the cloths contained human blood but the blood group could not be detected except on underwear and frock. Statements of witnesses were recorded.”

3. In order to bring home the guilt of the Respondent, the prosecution examined eight witnesses. PW-4 Dr. Divya Aggarwal and PW-5 Dr. Y.K. Sarin deposed about the medical examination of the prosecutrix, who at the relevant time was a child aged four years. These two witnesses also deposed about the medical condition of the prosecutrix at the time of her admission in the hospital. PW-4 Dr. Divya Aggarwal found a big tear on the posterior wall of vagina involving the anterior

wall of rectum and whole of the perineum. It was also found that the whole of the anal canal was lying prolapsed.

4. PW-5 Dr. Y.K. Sarin performed the surgery on the prosecutrix and repaired the perineum injury and also performed a colostomy on the prosecutrix. The testimony of these witnesses was not challenged in cross-examination. Thus, it is established that there were serious injuries and rupture in the vagina of the prosecutrix going up to anus. Therefore, it is also established that the child was sexually assaulted by someone. The Respondent Nand Ji Prasad was medically examined by PW-6 Dr. Mahender Sukhija who reported nothing abnormal to show that the Respondent was incapable to perform sexual intercourse.
5. Learned Additional Sessions Judge ('ASJ') on the basis of the evidence produced by the prosecution opined that the prosecutrix's testimony who was a child aged about 4-5 years did not pin point that the Respondent was responsible for sexually assaulting her. The learned ASJ noticed that alleged recovery of bloodstained clothes etc. also did not connect the accused with the offence. Thus, the Respondent was acquitted by giving him benefit of doubt.
6. In the instant case, the prosecution relied on the testimonies of Smt. Bira (PW-1 the prosecutrix's mother), PW-3 Ms. 'P' the prosecutrix and the circumstantial evidence in the shape of recovery of some bloodstained clothes from the room of the Respondent and from the park (at the Respondent's instance) to connect the Respondent with the crime.

7. The Respondent used to reside in the neighbourhood of the prosecutrix's family. Smt. Bira (PW-1) the prosecutrix's mother had raised suspicion on the Respondent since the beginning. PW-1 returned to her home at about 7:00 P.M. and noticed that the prosecutrix was missing. She knocked at the door of Respondent's house to enquire about the prosecutrix. The Respondent slightly opened the door and informed PW-1 that the prosecutrix was not with him. She searched for the prosecutrix the whole night. However, she could not be found. On the next morning, at about 6:00 A.M. prosecutrix was found by PW-1 lying in a park totally naked with her underwear in one of the legs. She was bleeding from her private parts and was unconscious. PW-1 opined that this act was done by the accused, that is, the Respondent herein. From PW-1's testimony, it is apparent that she had not even talked to the prosecutrix as she was lying unconscious and yet laid her suspicion on the Respondent. The relevant portion of PW-1's testimony is extracted hereunder:-

"....It was 15th date of the last year but I do not remember the month. I went to my work at about 4:00 P.M. My children including my daughter Pooja aged about 4 years were at my house. I returned at about 7:00 P.M. My daughter was not found present at my house. I searched for her. Accused Nandji Prasad present in the Court was residing in my neighborhood and was known to me. One day accused asked my daughter Urmila to cook some vegetable for him but my daughter refused. My daughter told me about it. I went to the house of accused and knocked at the door of the accused and enquired about my daughter Pooja but the accused opened the door slightly and stated that Pooja was not with him. I searched for Pooja here and there but she could not be traced. On the next morning 16th date at about 6:00 A.M. I found

Pooja lying in the park in naked condition. Her Kachhi was only in one leg. She was bleeding from her private parts. She was unconscious. This act was done by the accused present in the Court. Police came there and my daughter was removed to hospital. I made statement to the police which is Ex.PW-1/A bearing my thumb impression at point A....”

8. Thus, from PW-1's testimony what can be gathered is that she raised suspicion against the Respondent on the ground that he was PW-1's neighbour; further one day he (Respondent) had asked Urmila (PW-1's elder daughter) to cook some vegetables for him but her daughter Urmila had refused; when PW-1 knocked at the door of the Respondent's house, he had slightly opened the door and informed PW-1 that the prosecutrix was not with him and that the prosecutrix was found lying injured bleeding from her private parts on the next day in the park. Thus, even without any enquiry from the small child her mother presumed the Appellant to be the culprit. In fact the prosecutrix (the child) was unconscious and was not in a position to make the statement at the time she was recovered from the park.
9. Thus, the very foundation of the case, that is, the FIR was lodged against the Respondent only on suspicion. The prosecutrix was sought to be examined under Section 164 Cr.P.C. during the course of investigation. But the learned Metropolitan Magistrate ('MM') opined that she was too small to understand the questions and, therefore, her statement was not recorded. She was examined in the Court as PW-3. The learned ASJ

discussed her testimony in Para 7 of the impugned judgment which is extracted hereunder:-

7. PW-3 Pooja is victim. She was examined in question answer form but still she could not tell much. She pointed out towards her private part and stated that she received injury over said part. Accused present in the court caused her injury. In response to the next question as to how the accused caused injury on her private part, she kept mum and did not reply inspite of repeatedly putting the question to her. In these circumstances she was tendered for cross examination. In cross examination she was asked whether anybody else was living in the house of accused and she again kept mum.”

10. It is very unfortunate that the small child ‘P’ was brutally assaulted by someone and the police somehow was unable to collect enough evidence to nail the accused. It has to be borne in mind that there is always possibility of tutoring a child witness. In the instant case, PW-3 the prosecutrix in answer to the question as to who caused the injury on her private parts, pointed out towards the accused, that is, the Respondent. But in response to the next question as to how the injury was caused, she kept quite inspite of the question being repeatedly put to her. In cross-examination she was unable to answer any question at all.
11. The IO of the case was not produced by the prosecution in order to prove the recovery of the bloodstained clothes from the Respondent’s room and from the park at his instance. Recovery, even otherwise does not connect the Respondent with the alleged crime in any way. Thus, the learned ASJ was justified in giving the benefit of doubt to the accused because suspicion, however, strong cannot take place of proof.

12. In *Arulvelu and Anr. vs. State represented by the Public Prosecutor and Anr.*, 2009 (10) SCC 2006, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against an order of acquittal. The High Court can interfere and overrule the findings of acquittal only if it has very substantial and compelling reasons for doing so. If two views are reasonably possible one taken by the Trial Court should not be interfered. In para 34 of the report in *Arulvelu* the Supreme Court summed up the principles for entertaining an Appeal against acquittal as under:-

“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 appellate 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 appellant 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."

13. In view of the above discussion, I am not inclined to interfere with the order of acquittal. The Appeal, therefore, has to fail; the same is accordingly dismissed.
14. Pending Application also stands disposed of.

(G.P. MITTAL)
JUDGE

JULY 09, 2013
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