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

Date of Decision : 16th September, 2014

+ CRL.L.P. 255/2011

GOVT. OF NCT OF DELHI

..... Petitioner

Through: Mr.Neeraj Kumar Singh, APP for the
State.

versus

MANOJ & ANR.

..... Respondents

Through: Mr.Marroof Ahmad, Adv.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (ORAL)

1. Being aggrieved by the acquittal of the Respondents/Accused persons in Sessions Case No.115/2007, FIR No.139/2007, under Sections 376(2)(g)/506/34 IPC, P.S. Alipur, the State is seeking leave to appeal under Section 378 Cr.P.C. against the judgment/order dated 22.11.2010 passed by the learned Addl. Sessions Judge, Rohini Courts, Delhi.

2. The State has sought leave to appeal on the following grounds that :

(i) Acquittal is based on wrong interpretation of the evidence without appreciating that there is still a sufficient evidence to convict the accused persons;

(ii) The victim as well as doctor had fully supported the case of

prosecution;

(iii) There is sufficient legal evidence to held that the Respondents have committed the offences complained of; and

(iv) Learned Addl. Session Judge failed to appreciate that in such type of matters like rape, the delay is often due to the reason that the victim of rape thinks about the pros and cons before lodging the complaint.

3. I have heard learned APP for the State as well as learned counsel for the Respondents and carefully gone through the record.

4. In this case, the Prosecutrix 'S' (name withheld to conceal her identity) is wife of Respondent No.1 Manoj and *Bhabhi* of Respondent No.2 Govind. The third brother was juvenile and sent before Juvenile Justice Board to face trial.

5. Briefly stating, the case of the prosecution is that the Complainant got married to Respondent No.1 Manoj on 21.05.2002 but they were not having cordial relations. On 20.04.2007 marriage of two sisters of her husband Manoj was to be solemnised and her father dropped her at her in-laws place to enable her to attend the marriage of her *nanads*.

6. On the night intervening, 24/25.07.2007, while she was sleeping in a room, her husband Manoj alongwith his two brother came to her and repeatedly committed sexual intercourse with her on that night as well as on the next night. When her father came to her matrimonial home, she informed him about the same and they visited the police station where they reported the matter to the police.

7. As per the prosecution case, initially the Prosecutrix did not level any allegations of sexual assault while making complaint which was recorded vide DD No.17-A and the allegations were only of assault. Subsequently, at

the time of her medical examination, she stated before the doctor about committal of rape by her husband and *devars* and thereafter a case committing the offences punishable under Sections 376(2)(g)/506/34 IPC was registered against all the three accused persons at PS Alipur.

8. The Prosecution has examined 12 witnesses in all to prove its case. The Accused persons in their statement under Section 313 Cr.P.C. denied the case of prosecution and pleaded their innocence.

9. After considering the testimony of the Prosecutrix as well the legal position laid down in *Madho Ram & Anr. v. State of U.P. AIR 1973 SC 469*, *State of Maharashtra vs. Chandraprakash Kewalchand Jain (1990) 1 SCC 550*, *Dinesh @ Buddha vs. State of Rajasthan AIR 2006 SC 1267 (1)* and *Abbas Ahmed Choudhary vs. State of Assam 2010 (2) JCC 888*, the accused persons were acquitted by learned Addl. Sessions Judge on the following grounds :

- (i) PW-1 W/ASI Anita who recorded DD No.17-A stated that no allegation of rape was ever made by the Prosecutrix.
- (ii) PW-8 ASI Mohd. Ismail and PW-5 Ct.Dheeraj, who had taken the Prosecutrix for medical examination, stated that the Prosecutrix did not complain about rape being committed on her by the accused persons.
- (iii) The medical examination report of PW-6 i.e. the Prosecutrix revealed some abrasions on her person with no sign of sexual assault due to gang rape.
- (iv) There are material contradictions in the testimony of the Prosecutrix which make her testimony unreliable.
- (v) Even there are material contradictions in the testimony of PW-6 i.e.the Prosecutrix and PW-9 Tika Ram, father of the Prosecutrix on vital

aspects including whether Devi Dutt accompanied PW-9 Tika Ram to her matrimonial home or not. It was for the reason that PW-9 Tika Ram claimed that Devi Dutt did not accompany him to the matrimonial house of the Prosecutrix whereas PW-6 – the Prosecutrix claimed that her father was accompanied by Devi Dutt and with the help of police officials, she was rescued by her father.

(vi) The scientific report including FSL result does not prove the commission of offence of gang rape, rather no semen could be detected in the vaginal smear of the Prosecutrix.

(vii) The testimony of PW-6 – the Prosecutrix, after close scrutiny, did not inspire any evidence any confidence regarding the committal of sexual intercourse by all the accused persons on the night intervening 24/25.04.2007 but only suggested that she was physically assaulted by her husband Manoj and might be by other two persons.

(viii) The Prosecutrix might be physically assaulted and out of her rage, she lodged a false complaint against her husband and his brothers. There is no evidence on record to prove the guilt beyond reasonable doubt.

10. It has been held and reiterated in numerous cases by the Hon'ble Supreme Court that the High Court's jurisdiction in examining a petition for leave to appeal is confined to considering whether the judgment impugned before it raises substantial and compelling questions which ought to be gone into for the purpose of granting a leave. The law makers in their wisdom did not permit a State to prefer an appeal against the acquittal by a competent court as it was to be considered as an affirmation of an accused's innocence. In these circumstances, the authorities have primarily ruled that the expression 'substantial and compelling reasons' would extend to only grave

misappreciation of evidence, grave misapplication of law and adoption of an approach by the trial court which would lead to miscarriage of justice.

11. 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."

12. When testimony of the Prosecutrix is examined on the above settled principles on which the testimony of the Prosecutrix is to be tested, I am of the considered view that there are inherent infirmities in her version which makes her testimony wholly unreliable.

13. No doubt, the conviction in the cases like rape, the Court can base the conviction on the solitary statement of the victim of sexual assault but while basing conviction on the sole testimony, the Court must consider that such witness is a 'sterling witness'.

14. In the case of ***Rai Sandeep @ Deepu vs. State of NCT of Delhi (2012) 8 SCC 21***, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. The Supreme Court held as under:-

'22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes

the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.'

15. In ***Tameezuddin @ Tammu v. State (NCT of Delhi) (2009) 15 SCC 566***, the Supreme Court held as under :

'It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.'

16. In the case of *State of U.P. vs. Nandu Vishwakarma AIR 2009 SC 3188*, it was observed that ‘*when on the basis of the evidence on record two views could be taken - one in favour of the accused and the other against the accused - the one favouring the accused should always be accepted*’.

17. Thus, I do not find it to be a fit case to grant leave to appeal. Accordingly, the leave petition is hereby dismissed. Trial Court record be sent back forthwith along with a copy of this order.

PRATIBHA RANI
(JUDGE)

SEPTEMBER 16, 2014
‘st’