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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.L.P. 627/2015

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Judgment dated 24.02.2016

STATE (GOVT OF NCT)

..... Petitioner

Through : Ms. Aashaa Tiwari, APP for State with
SI Rakesh, PS-Vasant Kunj (South)

Versus

KULDEEP KUMAR

..... Respondent

Through : Mr Siddarth Yadav, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Present leave to appeal petition has been filed by the State under Section 378 (1) of the Code of Criminal Procedure against the judgment dated 30.03.2015 passed by Ms. Neena Bansal Krishna, Additional Sessions Judge-01, Patiala House Courts, New Delhi in Session's Case No. 01/14, whereby the respondent was acquitted of the charges framed under Section 363/376/506 of the Indian Penal Code read with Section 4 of POCSO Act, 2012.
2. The brief facts of this case, as noticed by the learned Trial Court in the judgment are enumerated as under:

"The complainant Smt. Neelima Devi, gave a statement on 30.09.2013 that her younger daughter aged about fourteen years, had gone to her school in

the morning at about 6.30 AM, but she has failed to return back home. They made a search for her, but have not been able to trace her. On the complaint FIR under Section 363 IPC was registered. Investigations were carried by SI Sandeep Mann. The complainant informed the investigating officer that their earlier tenant Kuldeep kumar may have taken away her daughter. A search was made for kuldeep and he was found to be a resident of Gola Bazaar, Mainpuri, UP. Suraj, friend of accused Kuldeep came to the police station on 05.10.2013 and informed that about three four days back, the prosecutrix had borrowed his phone and talked to the accused and that he suspected that the prosecutrix was with the accused. On this information, SI Sandeep Mann along with constable Sandeep and W/Const. Indu Bala went to the house of the accused at Mainpuri and recovered the prosecutrix from his house. The prosecutrix out of fear did not reveal anything. The accused, however, informed the investigating officer that he and the prosecutrix loved each other and she had gone with him out of her own free consent. A notice under Section 160 Cr.P.C was served upon the accused and was told to come to the police station on 06.10.2013. The prosecutrix was brought back to the police station where she gave her statement that in September, 2013 when she was alone in her house, the accused had taken advantage of the situation and had done 'galat kaam' and also threatened that he would kill her as well as himself.

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On the said day when the school got over, the accused who was present at the school gate, met her and told her that he would commit suicide. She was taken in by his statement and she accompanied him to Mainpuri. The accused did 'galat kaam' with her on 2/3.10.2013 and also kept her at different places which she could not identify."

3. Statement of the prosecutrix was got recorded under Section 164 of Code of Criminal Procedure. The prosecutrix was taken to CWC, Lajpat Nagar, where her custody was handed over to her mother. The statements of all the witnesses were recorded and on completion of investigation the charge sheet was filed in the court.
4. Charges under Section 363/376 of the Indian Penal Code and under Section 4 of POCSO Act, 2012 and 506 of the Indian Penal Code were framed against the respondent to which he pleaded not guilty and claimed to be tried.
5. To bring home the guilt against the respondent, the prosecution examined 12 witnesses in all. Statement of the respondent was recorded under section 313 of the Code of Criminal Procedure wherein he reiterated his innocence and denied all prosecution charges. The respondent in his defence examined 4 witnesses.
6. The learned Trial Judge, after scrutiny of the evidence observed that the prosecution had utterly failed to prove the allegations of kidnapping, rape or extending threat against the respondent beyond reasonable doubt and accordingly, the respondent was acquitted.
7. Ms. Aashaa Tiwari, Additional Public Prosecutor for the State submitted that the impugned judgment is the result of wrong appreciation of the evidence.
8. Counsel for the State further submitted that the Trial Court has caused grave miscarriage of justice by not appreciating the settled position of law that the prosecutrix was a minor at the time of offence and therefore her consent was immaterial.

9. Counsel for the State vehemently urged that the Trial Court failed to appreciate the testimony of the prosecutrix that on 30.09.2013, the prosecutrix came out from her school at about 10:00am where respondent met her and enticed her to accompany him as the elder sister of the prosecutrix was not well and she was admitted in the hospital. It is further urged that the Trial Court failed to appreciate the testimony of the prosecutrix that the respondent brought the prosecutrix to the house of his mausi at Mainpuri and committed rape upon her two-three times without her consent.
10. Per Contra, supporting the impugned judgment, it was submitted by Mr. Siddarth Yadav, counsel for the respondent that while recording the findings of acquittal in favour of the respondent very sound and cogent reasons have been assigned by the learned Trial Judge. Counsel for the respondent further submitted that the testimony of the prosecutrix cannot be relied upon as it suffers from material contradictions and thus the story put forward by the prosecution is false and not trustworthy.
11. Counsel for the respondent further stated that prosecutrix herself came to village Mainpuri where the respondent was residing and he had informed the same to the parents and family of the prosecutrix and denied the allegations of rape.
12. We have heard the learned counsel for the parties and perused the record and also examined the judgment in detail rendered by the trial court.

13. PW7 Ms. Sushma, teacher of Nigam Pratibha School, Mahipalpur deposited as under:

"I have brought the original record/pasting file regarding age proof of prosecutrix daughter of Sh. Dafedar who took the admission in our school in 1st class as per record on 20.4.2005. As per the admission record the date of birth of prosecutrix is 10.10.1999."

PW8 Ms. Ranju Sehrawat, teacher of Amar Shahid Major Sehrawat, SKV, Mahipalpur deposited that the certificate Ex.PW8/D was issued to the prosecutrix from the school regarding her date of birth.

It is evident from the material on record that the prosecutrix is a child aged around 14 years at the time of the alleged incident which fact is evident from the testimonies of PW7 and PW8.

14. It is the case of the petitioner that the respondent had enticed the prosecutrix on the pretext of taking her to the hospital where the elder sister of the prosecutrix was claimed to be admitted and instead the respondent took her to the house of his mausi in Mainpuri and therein committed rape on her two- three times.
15. At the outset, we deem it appropriate to rummage through the testimonies of the material witnesses.
16. PW10, the prosecutrix in her examination in chief deposited as under:

"He took the room on rent in the month of September, 2013. On one day in the month of September, 2013 exact date I am not recollecting today I was alone at home. Accused upon seeing me alone entered into my room and he tried to do 'jabrdasti' with me. "isne mere saath jabardasti karne ki koshish ki aur mere

kapde utare lakin mane mana kar diya aur is ke sath rahne se inkar kar diya. Isne mere sath chedkhani ki. I refused him and he threatened me that if I disclosed about this to any one he threatened me stating “tujhe jaan se maar dunga”

Again on one other day he caught hold of my hand in my room. The same was however seen by my brother. On this issue there was a scuffle between accused and my brother Malkhan Singh. Thereafter accused left for his village at Mainpuri.

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On 30.09.2013 I went to school. On that day my sister did not go to school. At about 10 AM he came and met me outside the school. He enticed me and told me that my immediate elder sister is not well and she is admitted in hospital. On that day I was not feeling well so I believing his version accompanied him and he took me to the house of his mausi in Mainpuri. When he took me to Railway Station, Delhi I was not fully conscious so as to know where and how I will be taken. He made me to smell his handkerchief and after which I became partly unconscious.

After leaving me at the house of his mausi in Mainpuri he went to his village in Mainpuri. In Mainpuri in the house of his mausi he committed 2-3 times rape with me without my consent.

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Accused had however, come to Delhi one day prior to 05.10.2013. After reaching Delhi on 05.10.2013 I was interrogated and on 06.10.2013 I was sent to PRAYAS.

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It is correct that I had stated before the Magistrate when my statement was recorded that when I was alone in my house accused had committed rape upon me two times in my house in Delhi. After committing rape he threatened me that if I disclosed this fact to my parents then he will kill me.

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It is correct that I had stated before the Magistrate in my statement that in Mainpuri he kept me in different places but the name of those places I am not recollecting today."

The prosecutrix in her cross examination deposed as under :

"I know accused as initially he was our tenant. He remained as tenant in our premises only for one month. I do not know where he was living after vacating our premises after one month. He started living as tenant in our premises in the month of September, 2013. It is wrong to suggest that I know accused for the last one and a half year from the date of incident. Accused did state that he loves me. Vol. But I did not agree to his proposal. I always refused his advances towards me. Any thing good or bad that used to happen with me, first of all I used to tell to my mother.

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I was admitted in Safdarjung hospital one year back previously from the date of incident. Vol. There was some hot dispute between me and my immediate younger sister on some issue. I was got admitted by my first elder brother Malkhan. I was taken to Safdarjung hospital by my brother Malkhan Singh and his friend on bike. It is wrong to suggest that I was admitted in the hospital by accused Kuldeep. Again said accused Kuldeep was also accompanying my brother when I was taken to the hospital."

PW2 Ms. Neelam, mother of the prosecutrix in her deposition before Court stated *"IO informed me on 05.10.13 and requested me to join the investigation for search of my daughter Rani and asked me to accompany him to Mainpuri UP but as I was not feeling well so I refused to accompany him."* Further in her cross examination she

stated *"When IO asked me to accompany them in the investigation and on my inability due to unwell, to send any family member but none of my family member accompanied them..."*

PW4 Suraj in his deposition before Court stated *"On some of the time Rani used to talk to accused from my mobile phone. Some of the time accused also used to call on mobile phone with a request to get engaged Rani on my mobile so that he can talk to her but I refused. Later on I came to know that accused had an affair with Rani".* In his cross examination he stated *"Rani had made telephonic call to accused from my mobile phone 2-3 times..."*

PW5 Sh. Malkhan Singh in his examination in chief deposed that *"he started living as a tenant in our premises for the last about three months from the date of missing of my sister Rani. On 07.12.2013 (sic) I was returning from my work in the evening time I noticed accused Kuldeep was holding my sister with her hand and were walking. On seeing me accused left the hand of my sister and he ran away. I followed him and caught hold of him and gave him beatings and there was a fight between me and accused. After quarrel accused went to his village"*.

17. Section 361 of Indian Penal Code defines "kidnapping" from lawful guardianship as under :

"Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

18. In *Shyam and Another vs State of Maharashtra: AIR 1995 SC 2169*, the Apex Court held that unwillingness to go is necessary ingredient to prove an offence of kidnapping. This was reiterated in *Deep Chand @ Dipu vs State : 82 (1999) DLT 339*. Relevant para is reproduced below:

Lastly, Mr. Thakur cited the judgment of the Supreme Court in the case of Shyam and another Vs. State of Maharashtra. In that case their Lordships observed that if the prosecutrix appeared to be willing party, then culpability of the accused was not established. In this case, the conviction was set aside and the accused was acquitted by the Supreme Court.

19. Trial Court placed reliance upon the Apex Court's judgment in *S. Varadarajan vs State of Madras: AIR 1965 SC 942*. Relevant para of the judgment is reproduced as under:

*"11. It must, however, be borne in mind that there is a distinction between "taking: and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of **what she was doing voluntarily joins the accused person.** In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the*

intention of the minor to leave the house of the guardian”.

20. It has been admitted by PW4 Suraj, neighbour of the prosecutrix *that “later on he came to know that the accused had an affair with the prosecutrix.”* Moreso, the story of the prosecutrix that she was made to smell a handkerchief after which she was partly unconscious is highly unrealistic. Had she been partly unconscious she would have not been able to walk to the railway station. It is highly improbable that being present in the public area no one would have noticed her in that condition. Further she did not shout or raise an alarm in such a crowded place. On perusal of the testimonies as noted above, we are of the considered view that the element of ‘taking away’ or ‘enticement’ is found to be lacking and therefore, the offence of kidnapping is not made out as the prosecutrix went away voluntarily. She had the capacity to know what she was doing and had voluntarily joined the respondent and thus it could not be said that the respondent had taken her or enticed her.
21. Now the question arises as to whether rape was committed on the prosecutrix by the respondent.
22. Prosecutrix in her statement under section 164 of Code of Criminal Procedure stated that in the month of September she was at home alone so the respondent took advantage and on two days respondent had done zabardasti with her against her wishes “mere saath galat kaam kiya”. It is worthwhile to mention herein that the term ‘galat kaam’ has not been described in her testimony. Moreover, in her deposition before court she stated that *Accused upon seeing me alone*

entered into my room and he tried to do 'jabrdasti' with me. "isne mere saath jabardasti karne ki koshish ki aur mere kapde utare lakin mane mana kar diya aur is ke sath rahne se inkar kar diya. Isne mere sath chedkhani ki. I refused him and he threatened me that if I disclosed about this to any one he threatened me stating "tujhe jaan se maar dunga . She further stated that when I was alone in my house accused had committed rape upon me two times in my house in Delhi. The prosecutrix herein claims to be raped on two occasions however; in her deposition before court she contradicted her own statement by stating that it was restricted to only chedkhani at her house in Delhi as she refused him to go any further.

23. DW1, respondent in his examination in chief deposed as under:

"I got the call from Rani that she was asking me to come to Delhi and even her brothers told me to come to Delhi immediately. But I refused them and I told them I would come in the month of October. After the week my mother picked up the call of Rani and she told my mother that she is in Mainpuri with her relatives and asked about my whereabouts. On the next date, I found Rani was in my house and when we asked the reasons, she told us that she does not want to go to Delhi and wants to marry me. My mother immediately called her parents and asked them that their daughter is in Mainpuri and told them to take her back. But she was Adamant and told us that she will commit suicide if she goes back to Delhi. I went to delhi on 03.10.2013 and told about everything to the parents of the girl. They did not give any attention. I even told them that she will commit suicide but they abused me and said 'she is yours and you should take care of her'"

24. DW2 Smt. Sharda Devi, mother of respondent in her examination in chief deposed as under:

“When I saw Rani in Mainpuri, I called her parents and inform them about her presence in Mainpuri. After two / three days, I got a call from police and they asked me about the whereabouts of my son Kuldeep and Rani. I informed them that Rani is with her relatives who are residing in Mainpuri and my son Kuldeep is in Delhi. Thereafter, on 06.10.2013, I came to know that my son Kuldeep is arrested by the Delhi Police. On the very next date, I came to Delhi, I was in shock and learnt that Rani was alleging that Kuldeep had raped upon her.”

DW2 in her cross examination deposed:

“It is wrong to suggest that on 30.09.2013, accused(my son) had kidnapped the prosecutrix. It is further wrong to suggest that in between 30.09.2013 and 06.10.2013, accused had made sexual relation with the prosecutrix.”

25. DW3 Smt. Laxmi, mausi of respondent in her examination in chief deposed as under:

“Accused Kuldeep is the son of my sister. I know prosecutrix Rani since two/three years as she and her family used to come to Mainpuri for family functions. It was in my knowledge that Rani and her family are used to pressurise my sister’s family and their son to marry her daughter Rani but as the age of the Rani is more than the age of Kuldeep Kumar and as they were having a spinda relationship (door ke bhai behan). They were pressurizing us for the said marriage since two years.”

26. In ***Raju v. State of Madhya Pradesh: (2008) 15 SCC 133***, the Hon'ble Supreme Court has held that testimony of the victim of a rape cannot be presumed to be a gospel truth and observed that false allegations of rape can cause equal distress, humiliation and damage to the accused as well, in para 11, the supreme Court echoed the sentiments as under:-

"11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

27. In ***Abbas Ahmad Choudhary vs State of Assam: (2010) 12 SCC 115*** it was held as under:

"We are, therefore, of the opinion that the involvement of Abbas Ahmad Choudhary is doubtful. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully."

28. The admission of the prosecutrix and the testimony of the respondent go on to show that the respondent was in Delhi at the relevant time when the prosecutrix was recovered from Mainpuri Village. In the absence of any definite evidence that the prosecutrix resided with the respondent in Mainpuri village it is clear that there was no occasion or opportunity for the respondent to commit rape upon the prosecutrix.
29. It is clear from the testimonies and the MLC report Ex.PW10/B that no offence under Section 376 or Section 4 of POCSO Act, 2012 is made out. The prosecutrix and her family had known the respondent much before the alleged date of incident and the two were having an affair therefore, no offence under Section 506 IPC is made out against the respondent in the instant case.
30. On careful analysis of the testimonies, we find a large number of contradictions, inconsistencies, and exaggerations as noted above, which cast shadow of doubt and lead us to find it difficult to rely upon the story of the prosecution.
31. The law with regard to grant of leave is well settled by a catena of judgments. Leave to Appeal can be granted only 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 a petition merely because another view is possible or that another view is more conceivable.
32. In ***Sudarshan Kumar Vs. State of H.P. : 2014 (14) SCALE 276***, the Hon'ble Apex Court observed that :

“29. It has been stated and restated that a cardinal principle in criminal jurisprudence that

*presumption of innocence of the accused is reinforced by an order of the acquittal. The appellate court, in such a case, would interfere only for very substantial and compelling reason. There is plethora of case laws on this proposition and we need not burden this judgment by referring to those decisions. Our purpose would be served by referring to one reasoned pronouncement entitled **Dhanapal v. State by Public Prosecutor, Madras : (2009) 10 SCC 401** is the judgment where most of the earlier decisions laying down the aforesaid principle are referred to. In Para 39, propositions laid down in an earlier case are taken note of as under:*

*39. In **Chandrappa and Ors. v. State of Karnataka : (2007) 4 SCC 415**, this Court held:*

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such

phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

30. *Thereafter, in **Para 41**, the Court curled out five principles and we would like to reproduce the said para hereunder:*

41. The following principles emerge from the cases above:

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."

33. Keeping in view the above settled law and in totality of the facts and circumstances, we do not find any reason to interfere with the impugned judgment passed by learned Trial Court. Accordingly, present leave petition being devoid of merit is dismissed.

SANGITA DHINGRA SEHGAL, J

G. S. SISTANI, J

FEBRUARY 24, 2016 / gr//