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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: July 17, 2017

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CRL.L.P. 320/2017

STATE GOVT OF NCT OF DELHI

..... Petitioner

Through: Mr.Kewal Singh Ahuja, APP
for the state with SI Manoj
Tomar, PS Seelampur

versus

BANTI

..... Respondent

Through: None

PRATIBHA RANI, J. (Oral)

Crl.M.A.No.8670/2017 (Condonation of delay)

1. This is an application moved on behalf of the Petitioner/State praying for condonation of delay of 16 days in filing the present leave petition.
2. For the reasons given in the application, the delay of 16 days in filing the leave petition is condoned.
3. Application stands disposed of.

Crl.L.P. No.320/2017

1. By way of this petition, the State is seeking leave to appeal under Section 378(4) Cr.P.C. against judgment dated 20th January, 2017 passed by the learned Addl. Sessions Judge, Karkardooma

Courts, New Delhi in Sessions Case No. 76/05, FIR No.712/2004 registered at P.S. Seelampur under Section 363/376 IPC.

2. The grievance of the State is that despite the statement of the prosecutrix recorded under Section 161 and 164 Cr.P.C. and her deposition before the Court that the respondent/accused had kept her at his house in Village Aawla, District Bareilly, U.P. and committed rape, learned Trial Court has acquitted the respondent/accused on the ground of lapse in the investigation.

3. Mr.Kewal Singh Ahuja, APP for the State has submitted that any defect in the investigation cannot lead to acquittal as has been held in the decision reported as *State of U.P. Vs Jagdev & Ors., 2003 Crl. L.J. 844* hence the impugned judgment acquitting the respondent/accused is bad in law. Hence, leave to appeal may be granted to the State.

4. Case FIR No.712/2004 was registered on 6th December, 2004 at PS Seelampur on the basis of statement made by Smt. Zahida wife of Mohd. Naim. The facts enumerated in the complaint, which formed the basis of registration of FIR No.712/2004 at PS Seelampur are as under:-

(i) On 23rd October, 2004, the complainant along with her daughter/prosecutrix 'S' (name withheld to conceal the identity) aged about 16 years and two younger daughters as well with one boy namely Banti, who treated her as a sister, left for Jaipur and Ajmer Sharif to offer '*chadar*'.

(ii) After offering '*chadar*' at Jaipur Dargah, they reached Jaipur Railway Station for going to Ajmer Sharif. There was lot of rush at the

Jaipur Railway Station. She could manage to board the train along with her two younger daughters and was under the impression that Banti and her daughter 'S' must also have been able to board the train. However, she could not find both of them in the train.

(iii) After getting down at Ajmer Railway Station, she started looking at the other passengers getting down from the train and continued searching for Banti and her daughter 'S'. After waiting for a long time they could not be found. She lodged the complaint only on 6th December 2004 at PS Seelampur, Delhi suspecting that her daughter 'S' has been enticed away by Banti. She explained the delay by stating that till that date she was waiting for their return and when they did not return she lodged the complaint. She also gave the description of her daughter and the clothes which she was wearing on that date i.e. 23rd October, 2004 and prayed for legal action.

(iv) Her daughter 'S' was recovered from Village Aawla, District Bareilly, U.P. The charge-sheet was filed against Banti as Proclaimed Offender. Initially statements of the witnesses were recorded under Section 299 Cr.P.C. After the arrest of Banti the witnesses were again examined giving an opportunity to the respondent/accused to cross-examine them.

5. The learned Trial Court has acquitted the respondent/accused for the offences punishable under Sections 363/376 IPC for the following reasons:-

(i) The case pertains to the year 2004 and at that time the age for consent for sexual intercourse for a girl was 16 years. The age of the prosecutrix at the time of occurrence was 16 years 8 months and 16

days.

(ii) There is an inordinate delay in lodging the FIR for which no explanation was given.

(iii) The victim was lastly seen in the company of accused at Jaipur Railway Station but no effort was made to lodge any report or even to visit the house of the accused with whom her daughter was seen.

(iv) The accused has denied that he has ever accompanied the victim either in the Jaipur or in Ajmer and no railway ticket was produced to confirm the fact that respondent/accused had ever undertaken any such journey.

(v) The prosecutrix allegedly stayed at the house of the respondent/accused for almost two months. She had travelled by train upto Bareilly, U.P. and thereafter in a Maruti vehicle upto the village but at no point of time she had ever tried to draw the attention of the public or police about she being forcibly taken.

(vi) When the MLC of the prosecutrix was prepared, the victim gave alleged history of 'sexual intercourse' with Banti on several occasions.

6. Learned Trial Court was of the view that the prosecution case regarding taking away of the victim by the respondent/accused or having committed rape on her was doubtful as it was without any supportive evidence.

7. The learned trial Court convicted the respondent/accused only for the offences punishable under Section 174-A IPC for absconding and being declared as proclaimed offender for which he was sentenced to undergo the period already undergone by him i.e. three years four months and twenty five days with fine of ₹3,000/-.

8. No doubt for the conviction for the offence of rape, the Court can base the conviction on the solitary statement of the victim of sexual assault. But while passing the conviction on sole testimony of the prosecutrix it must be proved that such witness is a 'sterling witness'.

9. The statement of the complainant who is mother of the prosecutrix is full of contradictions on all material points. Even on the issue of undertaking the journey from Delhi to Jaipur and further to Ajmer, her testimony is self contradictory to the extent that it is difficult to make out as to from Jaipur she was coming to Delhi or was going forward to Ajmer.

10. While as per the complainant, she was going from Jaipur Railway Station to Ajmer Sharif, in her statement dated 20th May, 2006 recorded under Section 299 Cr.P.C., she has stated that they were returning from Ajmer Shariff Dargah and the train was bound for Delhi. However, neither during the journey nor when she get down at Delhi Railway Station, she could find her daughter 'S' and Banti. But the matter was not reported to the police either at Jaipur or Ajmer and even at Delhi immediately after her return. After waiting for more than 1½ months on 6th December, 2004 she reported the matter vide her report exhibit as PW-2/A.

11. Despite the fact that the complainant Zahida has no where stated that her husband Mohd. Naim has also accompanied her and her daughters to Dargah, her husband Mohd. Naim, PW-3 in his statement dated 20th May, 2006 has stated that he along with his wife, daughters and respondent/accused went to Ajmer Sharif Dargah. On the way to

Delhi after visiting the Dargah, there was lot of rush at Jaipur Railway Station. They could manage to board the train but they could not see their daughter 'S' and Banti either in the train or at the Railway Station.

12. However, prosecutrix, PW-1 has another story to tell. As per her, on way to Ajmer Shariff from Delhi they stopped at Jaipur as there was no direct train from Ajmer. They were to board another train from Jaipur for going to Ajmer Shariff. At Jaipur Railway Station, there was lot of rush for the train bound for Ajmer, though her mother and two younger sisters could manage to board the train but she could not board. While she was in the process of boarding the train, Banti pulled her hand and said that they would go to Delhi by another train. However, Banti brought her to his native place i.e. Village Aawla, District Bareilly, U.P.

13. Legal position is well settled 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 merely 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. (*Vide: 2009 (10) SCC 2006*).

14. 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'.

15. When the testimony of the prosecutrix, PW-1 and her mother, the complainant is examined in the light of the above settled principles, I am of the considered view that there are inherent infirmities in their version thus rightly disbelieved by the learned Trial Court while acquitting the respondent/accused for the offences punishable under Section 363/376 IPC.

16. In the instant case not only delay in lodging the FIR but also the entire story about the circumstances in which the prosecutrix accompanied the respondent/accused, is full of material contradictions. Whether the complainant was going from Jaipur to Ajmer or was returning from Jaipur to Delhi after offering 'chadar' at Ajmer, self-conflicting versions have been given by her. Despite the fact that it is not the case of the complainant that her husband had accompanied them, he has deposed that he could manage to board the train with his wife and two daughters but the eldest one was left behind. No complaint was lodged either at Jaipur Railway Station or at Ajmer Railway Station. Even GRP/TTE were not informed to search them. No complaint was lodged after the complainant along with her two younger daughters reached at Delhi Railway Station.

17. Learned ASJ has considered all the contradictions appearing in the version of the prosecutrix and the complainant, who is her mother, as well the medical evidence and the version of the prosecutrix recorded in the MLC. From the judgment impugned it cannot be said that acquittal has taken place merely on the ground of defect in the

investigation.

18. Thus, I do not find it to be a fit case to grant leave to appeal. Accordingly, the leave petition is hereby dismissed.

PRATIBHA RANI, J.

JULY 17, 2017

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