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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Miscellaneous Petition No.739 of 2013**

The State of Chhattisgarh through District Magistrate, District Kabirdham (Chhattisgarh)

---- Appellant

versus

Dhaneshwar Chandrakar, S/o Kunjram Chandrakar, aged about 26 years, Village Khandsara, Chowki Dashrangpur, Police Station Pipariya, District Kabirdham (Chhattisgarh)

---- Respondent

AND**Acquittal Appeal No.99 of 2014**

Indra Gandharv, aged 24 years, W/o Dharmendra Gandharv, R/o Village Khandsara, Chowki Dasarangpur, Police Station Piparia, Both District Kabirdham (Chhattisgarh)

---- Appellant

versus

1. State of Chhattisgarh, through Collector, Kabirdham, Police Station Piparia
2. Dhanesh Chandrakar, aged 26 years, S/o Kunjram Chandrakar, R/o Khandsara, Chowki Dasarangpur, Police Station Piparia, Both District Kabirdham (Chhattisgarh)

---- Respondents

Criminal Miscellaneous Petition No.739 of 2013

For State/Appellant : Shri B. Gopa Kumar, Deputy Advocate General
For Respondent : Shri C.P. Lahrey, Advocate

Acquittal Appeal No.99 of 2014

For Appellant : Shri Dinesh Tiwari, Advocate
For State/Respondent No.1 : Shri B. Gopa Kumar, Deputy Advocate General
For Respondent No.2 : Shri C.P. Lahrey, Advocate

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri Justice P. Sam Koshy

Order on Board**Per Navin Sinha, Chief Justice****17/8/2015**

1. I.A. No.1 of 2013 has been filed to condone delay of 32 days in filing Criminal Miscellaneous Petition No.739 of 2013 for leave to appeal against acquittal. Having heard Learned Counsel for the State and the Respondent, also considering the duration of delay, it is condoned.

2. Both Criminal Miscellaneous Petition No.739 of 2013 and Acquittal Appeal No.99 of 2014 arise out of common judgment dated 6.4.2013 in Sessions Trial No.49 of 2012 by Special Judge, Kabirdham (Kawardha), Chhattisgarh acquitting the Respondent of the charges under Section 450/376 of the Indian Penal Code. The former has been preferred by the State and the latter by the prosecutrix herself.

3. Learned Counsel for the State and the prosecutrix have made common submissions that acquittal was bad in law. The evidence of the prosecutrix alone was sufficient to uphold the truth of the allegations for conviction. The Respondent had forcibly intruded into her house at night while her parents were away. The Respondent had threatened the prosecutrix not to disclose the commission of the offence, forced himself upon her and warned of dire consequences as otherwise he would have her reputation tarnished in the entire village. Because of this reason, she kept quiet for six months. Only when she conceived because of that singular act and her parents also noticed it, then she informed them of the occurrence. The Respondent had also taken a nude photograph of the prosecutrix on his mobile phone and had threatened to make it public. Delay, if any, in instituting the report by the prosecutrix also stands fully explained.

4. Learned Counsel for the Respondent has opposed both the Criminal Miscellaneous Petition and the Acquittal Appeal submitting that the allegations have not been found true. The prosecution has not led any evidence in support of the allegation for having taken photograph on the mobile phone. They were known to each other. The prosecutrix was a married woman aged 24 years who was residing in her parents' house. The physical relationship was consensual in nature. The prosecution was highly belated and the explanation for it unacceptable.

5. We have considered the submissions on behalf of the parties and

are satisfied that the order of acquittal calls for no interference. Even though the Appellate Court may have the power to reassess the evidence, that cannot be sufficient justification to interfere merely because it may be of a different opinion on basis of the same evidence unless there has been improper appreciation of evidence leading to gross miscarriage of justice.

6. The police report was lodged six months later. The statement of the prosecutrix under Section 161 of the Code of Criminal Procedure, her deposition in the Court, the evidence of witness Naresh Chandrakar including the Investigating Officer Rohit Jha (PW-5) have all been considered by us.

7. Evidently, the prosecutrix was a married woman residing with her parents. The Respondent was known to her from before, apparent from her deposition. She opened the door late at night on a knock without verifying who was there, an act which lends credence to the fact that the parties were well known to each other.

8. While the evidence of the prosecutrix has been considered sufficient in a charge under Section 376 of the Indian Penal Code for conviction, it is not an invariable rule and its applicability will depend on the facts of each case. Presently, there was a delay of six months in instituting the prosecution. The prosecutrix acknowledges that she became aware within a month or two of the occurrence that she was pregnant. She admits not having told any of her family members or neighbours. The defence that she was scared of her reputation as the Respondent had taken her photograph on the mobile and had threatened to make it public could have been a good explanation provided proper evidence was led in respect of the same.

9. The prosecutrix and the Respondent were known to each other and

had met more than once according to the deposition of the former. She had more than one opportunity to see the Respondent's mobile phone. She could easily have led a minimum of evidence with regard to the design and appearance of the mobile phone if not the make raising a presumption that there was a facility available in it for taking photographs. Her bald assertion to that effect without supporting evidence is difficult to accept in view of the police statement of witness Ram Kumar son of Chainlal Chandrakar mentioning the mobile number of the Respondent as also that of the Investigating Officer (PW-5) that it was an old-fashioned mobile with no facility for taking photographs. If the mobile sim-card number was available, the International Mobile Equipment Identification (IMEI) number of the mobile could easily have been tracked down for identification of the nature of the handset and whether facility taking photograph was available in it or not.

10. In *Tomaso Bruno and another v. State of Uttar Pradesh*, (2015) 7 SCC 178, considering the availability of electronic evidence under Sections 65-A and 65-B of the Evidence Act drawing an adverse inference on non-production of the same it was observed as follows:

“24. With the advancement of information technology, scientific tempter in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents *stricto sensu* are admitted as material evidence. With the amendment to the Evidence Act in 2000, Sections 65-A and 65-B were introduced into Chapter V relating to documentary evidence. Section 65-A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65-B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by

Section 65-B of the Evidence Act. Sub-section (1) of Section 65-B makes admissible as a document, paper printout of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of Section 65-B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW 13 states that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

27. As per Section 114 Illustration (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. The presumption under Section 114 Illustration (g) of the Evidence Act is only a permissible inference and not a necessary inference. Unlike presumption under Section 139 of the Negotiable Instruments Act, where the court has no option but to draw a statutory presumption, under Section 114 of the Evidence Act, the court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under Section 114 Illustration (g) of the Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.”

11. We find no merit both in the Criminal Miscellaneous Petition and the Acquittal Appeal. They are dismissed.

Sd/-

(Navin Sinha)
CHIEF JUSTICE

Sd/-

(P. Sam Koshy)
JUDGE