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

+ CRL.L.P. 661/2013

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Judgment dated 05th February, 2015

STATE

..... Petitioner

Through : Mr.Sunil Sharma, APP for the State
along with SI B.K. Bharti, P.S. Inder Puri.

versus

PRADEEP BARIK

..... Respondent

Through : None.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

JUDGMENT (ORAL)

1. Judgment of acquittal dated 4.3.2013 passed by learned Additional Sessions Judge-Special Fast Track Court, Dwarka Courts, Delhi, in Sessions Case No.59/2013, in case FIR No.51/2010, registered under Sections 376/511 IPC at Police Station Inderpuri, has led to the filing of the present Criminal Leave to Appeal petition under Section 378(1) of the Code of Criminal procedure.
2. Learned Additional Public Prosecutor for the State submits that the learned trial court has passed the impugned judgment on hypothetical presumption, conjectures and surmises; the judgment passed by the trial court is perverse and lacks legality; and thus has resulted in grave miscarriage of justice. It is further submitted that the statements of the prosecutrix recorded during investigation and before the Court are consistent regarding the role of the respondent and hence brings out the guilt of the respondent. It is also urged before this Court that the FIR was

lodged on 14.3.2010 and, thus, there was no delay in lodging the FIR. Learned APP for the State further submits that based on the depositions made by PW-4, prosecutrix and PW-5, there would be no room for doubt that the respondent had attempted to rape the prosecutrix and outrage her modesty. It is next contended that the contradictions, if any, in the statements made by the prosecutrix are on account of her social background and age.

3. Before appreciating the submissions of learned APP for the State, we deem it appropriate to reproduce the facts of the present case as noticed by the learned trial court in the judgment dated 4.3.2013. Relevant portion of the judgments read as under:

“2. In brief the case of the prosecution is that on 13.4.2010, on receipt of DD No. 32A, SI Sanjiv reached the spot of incident i.e. WZ-39, Village Das Garha. Since the call was regarding an attempt to rape, the SHO, directed ASI Kusum also to reach the spot and to take suitable action. Accordingly ASI Kusum reached the spot of incident where she met SI Sanjiv Sharma and lady constable Neelam. She recorded the statement of victim Mamta, who stated that she is a resident of District Murshidabad, West Bengal and is aged 15 years. She further stated that for the last two months, she had been residing with her sister Lata Das at Shadipur. On 12.4.2010 she had come for work to M/s. Shivam Placement Agency and was sleeping in a room in the office. At about 12 midnight or 1 am, when she was in deep sleep, one Pradeep, who also worked in that office, came and lied besides her. He opened the string of her salwar, pushed down her salwar and panty, laid on her and attempted to rape her. That time Pradeep had not worn anything on his lower body part. She started weeping bitterly and Pradeep left her. An aunty, living in the adjoining room, came and saved her and she narrated the whole incident to her.

3. On the basis of the aforesaid statement of the prosecutrix,

ASI Kusum prepared rukka and got the FIR registered u/s 376/511 IPC. She commenced the investigation herself. She prepared the rough site plan of the incident at the instance of the prosecutrix and recorded the statement of the witnesses. She seized the clothes of the prosecutrix, which she had worn at the time of incident. The prosecutrix was got medically examined in Safdarjung Hospital. Exhibits, handed over by the doctor were seized. Accused Pradeep came to be arrested. Statement of the prosecutrix u/s 164 Cr.P.C. was got recorded. Exhibits were sent to the FSL for forensic examination. After the completion of the investigation, charge sheet was laid before the concerned Magistrate and the case was committed to the Court of Sessions for trial. On 18.1.2011, the accused was charged with having committed offences punishable u/s 376/511 IPC. The accused pleaded not guilty to the aforesaid charge and hence trial was held.”

4. We may notice that in this case the trial court was persuaded to acquit the respondent primarily on four grounds i.e. (i) there were material contradictions in the three statements recorded of the prosecutrix; (ii) there was delay in informing the Police and lodging of FIR; (iii) there were material contradictions in the depositions made by PW-8 and PW-9 in comparison to the depositions made by PW-4 and PW-5; and (iv) PW-8 and PW-9 have not supported the case of the prosecution. Both have deposed that prosecutrix only told them the accused is a bad man and nothing else.
5. It may also be noticed that the present case is manifest from the MLC of the accused (Ex.PW-20/A) which mentions specifically that he is not capable of performing sexual intercourse. This corroborates the statement of accused under Section 313 Cr.P.C. wherein he has stated that he is impotent and not able to establish physical relations with any girl.
6. In her examination-in-chief, the prosecutrix has clearly stated that “*he*

(respondent) did not do anything with her". It is only when a leading question was put to the prosecutrix she stated that *"It is correct that the accused, Pradeep, had lied down over me and had tried to commit rape. Vol. I had started crying and he was not able to do anything."*

7. Also, there was an impression that the prosecutrix was not familiar with Hindi language and was not able to speak, read or write the same. However, she had given her testimony before the trial court as PW4 in clear and understandable Hindi language.
8. We have examined the evidence of the prosecutrix and find the same to be unreliable and not trustworthy. In her testimony, prosecutrix has categorically deposed that the respondent herein did not do anything with her. Even when a leading question was put to her she stated that the accused had lied down over her and tried to commit rape and again volunteered to say that he was not able to do anything. We also find that there is unexplained delay in reporting the incident by the prosecutrix either to her sister (PW-5) or to the police. As per the prosecutrix the incident took place at 12 midnight or 1:00 a.m. Thereafter she spent night in the adjoining room of PW-8. The prosecutrix did not make a call to her sister at the time of the alleged incident neither she made a call to her sister early in the morning of the next day, which we find to be unusual. We also find that in her examination-in-chief the prosecutrix has deposed that she telephoned her brother-in-law (*jeeja*), whereas in the statement under Section 164 Cr.P.C. she had stated that she informed her sister, although as per the testimony of PW-5, sister of the prosecutrix she was informed on 13.4.2012, but there is absolutely no explanation why the matter was not reported to the police on 13.4.2012 and the FIR was registered on 14.4.2012. The trial court has noticed in para 15 of the judgment that the deposition of PW-8 and PW-

9 are in total contrast to what PW-4 and PW-5 have deposed. Para 15 is reproduced below:

“15. The deposition of PW-8 and PW-9 is in total contrast to what PW-4 and PW-5 have deposed. PW-8 and PW-9 have stated in their cross examination that the prosecutrix remained in their room during the night and in the morning of 13.4.2010, her sister Lata Das came to the Placement Agency and they handed over the prosecutrix to her. PW-4 has not mentioned any time in her testimony when her sister came to the Placement Agency and took her. However, in her statement u/s.164 Cr.P.C. she has mentioned that she informed her sister about the incident on the next date in the afternoon. Meaning thereby that her sister came to the placement agency either in the afternoon or in the evening time. PW-5 has mentioned in her deposition that the prosecutrix informed her about the incident on telephone at 3 p.m. on 13.4.2010 and thereafter, she alongwith her husband, went to the placement agency. Thus there is a clear contradiction regarding the fact as to when actually did the prosecutrix call her sister informing her about the incident and when her sister reached the placement agency to take her. This is a material contradiction and cannot be ignored as it shows conduct of the prosecutrix after the incident which is relevant, so far as offence, for which the accused is being tried, is concerned.”

9. We also find it unusual that the information to the police was neither given by the prosecutrix nor by her sister (PW-5) nor her brother-in-law (Jeeja), PW-6, but police was informed by PW-15. PW-8 and PW-9 who alleged to have rescued the prosecutrix have also not supported the case of the prosecution.
10. In the case of **Rai Sandeep @ Deepu vs. State of NCT of Delhi** reported at (2012) 8 SCC 21, the Apex Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. The Apex 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 correlation 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.”

11. Similarly, the Apex court in the case of **Raju v. State of Madhya Pradesh** reported at (2008) 15 SCC 133, observed that the testimony of a victim of rape has to be tested as if she is an injured witness but cannot be presumed to be a gospel truth. Para 11 of the judgment is reproduced below:-

“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.”

12. We find the judgment of the trial court to be a well-reasoned judgment. The trial court while passing the impugned judgment has taken into consideration the evidence of the material witnesses including the evidence of the prosecutrix; and the fact that the complaint was made to the Police neither by the prosecutrix nor by her aunt, who was present at the spot, nor by her sister nor by the jija, but was made by a third person, PW-15, against whom the respondent had alleged to have rivalry. There is also no explanation as to why at the first opportunity available the Police was not informed about the incident and an FIR was lodged only on 14.3.2010 while information was in fact supplied on 13.3.2010. Having regard to the nature of alleged offence, the FIR should have been lodged at the first opportunity available.
13. It is a settled legal position that the powers of the court in appeal against an order of acquittal are limited. The Apex Court in the case of **Ghurey**

Lal vs. State of U.P., reported at 2008 (10) SCC 450 has laid down the following principles before granting leave to appeal against an order of acquittal:

“1. 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.

A number of instances arise in which the appellate court would have 'very substantial and compelling reasons' to discard the trial court's decision. 'Very substantial and compelling reasons' exist when:

- i) The trial court's conclusion with regard to the facts is palpably wrong;
- ii) The trial court's decision was based on an erroneous view of law;
- iii) The trial court's judgment is likely to result in "grave miscarriage of justice";
- iv) The entire approach of the trial court in dealing with the evidence was patently illegal;
- v) The trial court's judgment was manifestly unjust and unreasonable;
- vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.
- vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable 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.

14. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and the prosecution has to prove a charge beyond

reasonable doubt. The accused has a right to fair trial and the presumption of innocence is in favour of the accused.

15. Having regard to the principles laid down by the Apex Court in the case of **Ghurey Lal** (supra), we do not find that there is any illegality or perversity in the reasoning given by the learned trial court in disbelieving the case of the prosecution. This court cannot lose track of the settled law that interference is called for only when there are substantial and compelling reasons for doing so.
16. In view of the aforesaid facts, we do not find any infirmity in the impugned judgment passed by learned trial court. We also find no reasons to take a different view than the view taken by the learned trial court. Consequently, leave to appeal stands dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 05, 2015

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