

*** IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRL.L.P 731/2014**

Date of Decision : 18th March 2015

STATE ... Appellant
Through: Mr. Feroz Khan Ghazi, APP for the State

Versus

MOHD PARVEZ ... Respondent
Through: Mr. Bahar Ul Barqui and Mr. Rais Farooqui
Advocate.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

Crl.M.A.No.19283/2014 & Crl.L.P. 731/2014

1. The present criminal leave petition filed under Section 378 of the Code of Criminal Procedure, the State seeks leave to appeal against the order of acquittal passed by the learned Additional Sessions Judge (ASJ) in Sessions Case No.32/2011, on the ground that the impugned judgment dated 11.07.2013 is assailable both on grounds of law and facts. The present leave petition has been filed along with an application for condonation of delay of 344 days.
2. Counsel for the respondent submits that the State has failed to offer a proper explanation for the delay except mentioning of the dates when

the file was transferred and the state failed to give any acceptable and cogent reasons sufficient to condone a delay of 344 days.

3. In support of his submissions, reliance is placed by learned counsel for the respondent in the case of ***Postmaster General & Ors. Vs. Living Media India Limited and Anr. reported at 2012 3 SCC 563***, it was held as under:

“29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government department. The law shelters everyone under the same light and should not be swirled for the benefit of a few.”

30. Considering the fact that there was no proper explanation offered by the department for the delay except mentioning of various dates, according to us, the department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay.”

4. Similarly, in the case of ***Brijesh Kumar & Ors. Vs. State of Haryana & Ors. Reported at AIR 2014 SC 1612***, the Apex Court has held as under:

“11. The courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. However the court while allowing such application has to draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. This Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathetic grounds alone.

12. It is also a well settled principle of law that if some person has taken a relief approaching the Court just or immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the court at a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.

*13. In **State of Karnataka and Ors v. S.M. Kotrayya and Ors.**(1996) 6 SCC 267, this Court rejected the contention that a petition should be considered ignoring the delay and laches on the ground that he filed the petition just after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. The Court observed that such a plea is wholly unjustified and cannot furnish any ground for ignoring delay and laches.*

*14. Same view has been reiterated by this Court in **Jagdish Lal and Ors. v. State of Haryana and Ors.** AIR 1997 SC 2366, observing as under:-*

Suffice it to State that Appellants kept sleeping over their rights for long and elected to wake-up when they

had the impetus from Vir Pal Chauhan and Ajit Singh's ratios...Therefore desperate attempts of the Appellants to re-do the seniority, held by them in various cadre.... are not amenable to the judicial review at this belated stage. The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well.

5. We are conscious of the fact that it has been repeatedly held that the court must take a liberal approach in considering the applications filed under section 5 of the Limitation Act seeking condonation of delay provided that the delay has not been caused on account of negligence, inaction, carelessness or for the reasons which are not explained.
6. For the reasons stated above and in view of the law laid down, we find no reason to condone the delay. We have also heard the petition on merits as well.
7. The facts of the case, as noticed by the learned Trial Court, are as under :-

On August 11, 2006 at about 10.22 PM, an intimation was received at police station Nabi Karim that galat-kam had been committed with a girl aged about three years old near H. No. A694 Sita Ram Mandir. On the basis of the information received, DD No.37 A (Ex. PW4/A) was recorded which was assigned to SI Rajbir Singh who along with constable Rishi Kumar reached the place of incident and were informed that the victim had already been taken to the hospital by PCR van. Accordingly, SI Rajbir Singh along with constable reached Lady Harding hospital and collected the MLC of victim whereupon doctor endorsed that hymen was found ruptured. The statement (Ex.PW2/A) of the Father of the victim was also recorded who alleged that on August 11, 2006 at about 10 PM while he was present at his house, his daughter i.e. victim aged about 4 years came to the house

weeping and on being asked victim told that one boy had lifted her in his lap and kissed her and she also complained pain in her vagina. Consequently, he checked the under-wear of his daughter (victim) and found that it was wet but could not ascertain about its cause as the colour of under-wear was black. Accordingly, he asked his wife (PW4) who after checking, told him that 'galat-kam' had been committed with their daughter. Further on being asked, victim told them that one boy had inserted his finger in her vagina and that boy was wearing black & white shirt and black pant. On reaching the place of incident Ashu (PW7) met them and told that Parvez had committed 'galat-kam' with the victim and he was residing in a house opposite to the temple. PW7 further told them that Parvez was kissing the victim while sitting on the stairs of temple”

8. A complaint was made to the police and during investigation, investigating officer seized the exhibits, arrested the respondent and sent the exhibits to the FSL and a charge was framed against the respondent for the offence punishable under section 354/377/323 of Indian Penal Code. Further vide order dated 19.09.2011, a charge for the offence punishable under section 376 of Indian Penal Code was framed against the Respondent.
9. To bring home the guilt of the respondent and to prove its case the prosecution examined 11 witnesses.
10. The learned counsel for the State submits that the judgment and order on acquittal passed by the learned trial court are contrary to the law and is based upon surmises and conjectures. He submits that the learned trial court has failed to appreciate that even though Victim

PW10 had not deposed that she was raped by the respondent but her testimony is sufficient to prove the culpability of the respondent for the offence punishable u/s 354 and 377 of IPC. Elaborating his arguments further counsel for the state submits that at the time of the incident the respondent had inserted his finger in the vagina of the victim by removing her salwar and undergarment and this clearly embodies the ill intention of the respondent to rape and outrage her modesty with the girl and hence the order of acquittal has resulted in miscarriage of justice.

11. Learned counsel for the State further argues that the trial court has erred in ignoring the testimonies of material witnesses Ashu PW-7 and Vishal PW-8 who clearly deposed in the court that the respondent is the same person who committed the crime. He further contended that since the respondent had lifted the victim in his lap it amounted to kidnapping and the respondent is liable for an offence punishable under section 363 of Indian Penal Code as well.
12. Learned counsel for the State further submits that the trial court erred in placing reliance on the fact that no Test Identification Parade of the respondent was conducted by the eye witnesses. Elaborating his arguments further counsel contends that there was no need to carry out the Test Identification parade as the respondent was arrested at the instance of the victim and was categorically identified by the eye witnesses during trial which fact trial court failed to appreciate and acquitted the respondent for wrong and unfounded reasons.

13. Counsel for the respondent submits that mistake in identification of the respondent cannot be ruled out in the present case as Test Identification Parade of the respondent has not been conducted and the testimonies of Ashu PW-7 and Vishal PW-8 cannot be relied upon as they have made substantial improvements in their depositions and there exists material contradictions in their testimonies. Thus the learned trial court rightly acquitted the respondent of all the charges framed against him by the prosecution.
14. We have heard the learned counsel for the State and have perused the impugned judgment and the testimonies of the material witnesses relied upon by the State. In order to appreciate the submission of learned counsel for the state with regard to eye witnesses, it would be useful to refer to the evidence of the material witnesses, Ashu PW-7, and Vishal PW-8. The trial court has recorded this finding in Para 21 of the judgment which reads as under:-

“21. PW7 & PW8 are also star witnesses of the prosecution case. PW7 in his examination-in-chief deposed that accused was doing ups and down the victim in his lap and at that time, accused had removed his pant half and also down the salwar of the victim. Similarly, PW8 in his examination-in-chief deposed that accused was kissing the victim and caressing the girl (victim) and further deposed that accused had removed the penty of the girl. However, in their cross-examination, the said testimony was got duly confronted. PW7 in his cross-examination deposed that police had recorded his statement and he did not state to the police that accused had put down the salwar of the girl and accused had put down his pant half and further deposed that he had not stated to the police that accused was doing the girl ups

and down in his lap. Thus, it becomes clear that PW7 had made substantial improvements in his deposition. Similarly, PW8 in his cross-examination deposed that police had recorded his statement Ex. PW8/DA and he had stated to the police that accused had removed the penty of the girl but the same is not recited in his statement Ex. PW8/DA, thus it becomes clear that he had also made substantial improvements in his deposition.”

15. The learned Trial Court observed that there were contradictions in the testimonies of PW7 and PW8 on material points and the witnesses had made improvements to the initial version of their testimonies, hence the depositions made by them cannot be relied upon.
16. After careful examination of the contradictions in the testimonies of the above witnesses we are of the view that the learned trial court has given valid and substantial reasons for disbelieving the depositions of the above two material witnesses. A bare perusal of the above testimonies of Ashu PW-7 and Vishal PW-8 clearly goes to show that they have made substantial improvement in their deposition without giving a reasonable explanation for the same. Hence we are of the opinion that no reliance can be placed on the testimonies of Ashu PW7 and Vishal PW8.
17. Our view is fortified by the law laid down by the Apex Court in ***Shaymal Ghosh v. State of West Bengal, reported at (2012) 7 SCC 646***, where it was held that every variation may not be enough to adversely affect the case of the prosecution and the Court must ascertain whether the variations are material and would affect the case substantially.

18. In case of ***Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and anr., reported at (2013) 12 SCC 796***, the Apex Court held as under:

*“As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See ***Leela Ram vs. State of Haryana and another, Rammi alias Rameshwar v. State of M.P. and Shyamal Ghosh v. State of West Bengal***).”*

19. In another case of ***State of Gujarat vs. Kishanbhai etc, reported at (2014) 5 SCC 108***, it was held that glaring inconsistencies and infirmities in statement of witnesses render their statements unreliable. Hence benefit of doubt must be given to the accused.
20. In light of the above discussion, we are of the considered opinion that no reliance can be placed on the testimonies of Ashu PW7 and Vishal PW8. Also their testimonies do not get support from the testimony of the victim PW10 who deposed that the wrongdoer had inserted his finger in her vagina and not his penis. Thus the testimony of material

witness, Victim PW10 does not corroborate the testimonies of PW7 and PW8. Further the FSL report suggests that no semen was found on the exhibits of the victim which further contradicts the testimonies of the PW7 and PW8.

21. Another submission of the counsel for the state is that the respondent had lifted the victim in his lap and committed an offence under section 363 of IPC. Victim PW-10 in her testimony deposed that the respondent had lifted her in his lap. As per the prosecution version, the alleged incident had taken place in the presence of Vishal PW-8 and Vijender PW-9. However as per the evidence produced, both PW-8 and PW-9 have nowhere deposed that they had seen the respondent taking the victim anywhere. They only deposed that they saw the victim with the respondent. In this regard, we are of the opinion that considering the present facts of the case, the act of only lifting the victim falls considerably short of attracting the offence punishable under section 363 of IPC.
22. In case of *re Khalandar Sahab AIR 1955 Andhra 59 (I)* Subba Rao, C.J. stated that the word 'take' in S. 361 meant to cause to go, to escort, or to get into possession.
23. Similarly in the case of *Abdul Sathar v. Emperor AIR 1928 Mad 585 (E)* Srinivasa Ayyangar J. gave the meaning of the relevant words thus:

“The expression ‘taking out of the keeping of the lawful guardian’ must therefore signify some act done by the accused which may be regarded as the proximate cause

of the person going out of the keeping of the guardian or in other words, an act but for which the person would not have gone out of the keeping of the guardian as he or she did”.

24. In ***Davalasab 1977 Cri LJ 1255 (Kant); Sachindra Nath Muzumder vs. Bistupada Das 1978 Cri LJ 1494 (Cal)*** , it was observed that merely because the minor girl was seen in the company of the accused it is not sufficient for his conviction unless some evidence is forthcoming as to the taking or enticing by the accused out of the keeping of her lawful guardianship.
25. In ***State of Himachal Pradesh vs. Rajesh Kumar and anr., reported at 2011(3)ShimLC22***, the court while dealing with the essentials of kidnapping observed in para24 which reads as under:

“24. In Thakorlal D. Vadgama v. State of Gujarat, AIR 1973 SC 2313 under para9 and 10:

9..... The two words "takes" and "entices", as 'used in Section 361, I.P.C. are, in our opinion, intended to be read together so that each takes to some extent its colour, and content from the other. The statutory language suggests that if the minor leaves her parental home, completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, I.P.C. But if the, 'guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed: with her in leaving her guardian's custody or keeping and going to the guilty party, then prima facie it would be, difficult for him to plead innocence on the ground that the minor had voluntarily come to him. If he had at an earlier stage solicited or induced her in any manner to leave her

father's protection, by conveying or indicating an encouraging suggestion that he would give her shelter, then the mere circumstance that his act was not the immediate cause of her leaving her parental home or guardian's custody would constitute no valid defence and would not absolve him....

10.... 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 Section 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 theft 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. It would, however, be sufficient if the, prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the

accused could be regarded as facilitating the fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip 'out of the keeping of her lawful guardian and is, therefore, not tantamount to 'taking'".

26. Thus, in the light of the above discussion, we are of the view that in the absence of any cogent evidence, mere lifting of a minor child in arm without any further evidence is not sufficient to bring home the act of the respondent within the four corners of Section 363 of IPC. Thus, we are in alignment with the view taken by the learned Trial Court in para29, which is extracted hereunder:

“29.To my mind “taking” is something more than lifting a minor girl in the lap. If we stretch the 'taking' to such an extent. In that eventuality if a person innocently lifts a minor child just due to affection, love etc. and thereafter leave the child even in that eventuality, the said person can be held liable for the offence kidnapping. In the instant case, as per the prosecution version while the victim was coming back to her home, accused met her on the way and he had outraged her modesty. It may amount that accused had wrongfully restrained the victim but by no stretch of imagination the said act can fall within the four corners of kidnapping. Further, PW-10 in her testimony nowhere deposed that that boy had taken her even at a distance of 1-2 paces”.

27. Regarding the identity of the respondent, the submission of the counsel for the state that the respondent was arrested at the instance of the victim and other eye witnesses and that there is no doubt about the identity of the respondent is without force and it would be useful to refer to the evidence of some of the material witnesses, as noticed by the trial Court:

“Father of the Victim PW2 in his examination in chief deposed that Ashu PW7 did not tell the name of the respondent but identified him when he was apprehended by the police. To the contrary Ashu PW7 in his cross examination deposed that he had seen the respondent first time on the day of incident and he did not know him previously.

Vishal PW8 in his cross examination deposed that due to darkness respondent was not visible and he did not know the respondent previously and he saw the respondent first time at the time of incident. PW8 further deposed that when he saw the respondent with the victim he was wearing black color shirt having white lines and black color pant and when he was apprehended he was wearing T-shirt and pant.

SI Rajbir Singh, IO PW11, in his testimony categorically deposed that when the respondent was apprehended, he was wearing black color shirt having white lines.”

28. In our opinion, from the examination of the testimony of Father of the victim PW2, it is clear that there is material contradiction to the extent that he deposed in his testimony that Ashu PW7 had identified the respondent after his arrest, which is not corroborated by PW7 in his deposition. Further there is contradiction in the testimony of Vishal PW8 and SI Rajbir Singh, IO PW11 regarding the clothes worn by the respondent when he was apprehended, and because of the glaring discrepancies and material contradictions in the testimonies of the above mentioned material witnesses of the prosecution, mistake in identification of the respondent cannot be ruled out. Further it is pertinent to note that Ashu PW7, Vishal PW8 and Victim PW10 did not know the respondent prior to the incident and were all children at

the time of commission of offence. Victim PW10 was merely four years old, Ashu PW7 was about 11-12 years old and Vishal PW8 was about 8-9 years old and hence they are susceptible to tutoring.

29. In ***Hari Nath v. State of U.P. 1988 Cr.L.J. 422***, it was held by the Hon'ble Supreme Court that in a case where eye witnesses did not know the appellant before the occurrence, identification of the accused for the first time in the dock after a long lapse of time, would have been improper. The following passage from Halsbury's Law of England was recalled:

“It is undesirable that witnesses should be asked to identify a defendant for the first time in the dock at his trial; and as a general practice it is preferable that he should have been placed previously on a parade with other persons, so that potential witness can be asked to pick him out.”

30. In ***Vasu Deo vs. State of Madhya Pradesh, reported at (2005)2MPJR372***, it was held that if there is doubt in respect to identity of accused persons then benefit of reasonable doubt shall be given in favor of accused persons.
31. In view of the above judicial precedents, we are of the view that the identity of the respondent has not been proved. Hence the argument raised by the learned counsel for the State with regard to invoking of section 377 of IPC cannot be sustained.
32. It is well settled that the High Court interferes in an order of acquittal when there are substantial and compelling reasons or there is grave miscarriage of justice. What are substantial and compelling

reasons were enumerated by the Supreme Court *in Chandrappa & Others v. State of Karnataka, : (2007) 4 SCC 415* as follows: -

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.

33. For the reasons stated above we do not find any substantial and compelling reasons to interfere in the order of acquittal. Even if two views are possible, it is not permissible for this court to interfere in the order of acquittal. The court must take into account the presumption of innocence of the accused and the acquittal by trial court adds to the presumption of his innocence. Since there is no infirmity in the judgment under appeal, the appeal is without any merit and the same is dismissed.

SANGITA DHINGRA SEHGAL, J.

G. S. SISTANI, J.

18th MARCH, 2015
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