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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : January 11, 2015

DECIDED ON : January 21, 2016

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CRL.A. 1561/2014

STATE OF NCT OF DELHI

..... Appellant

Through : Mr.Rajesh Mahajan, ASC.
SI Somil Sharma.

versus

AMIT KUMAR

..... Respondent

Through : Mr.O.P.Minocha, Advocate with
Mr.Chaitanya Sahoo, Advocate.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present appeal has been preferred by the State to challenge the correctness and propriety of a judgment dated 10.09.2013 of learned Additional Sessions Judge in Sessions Case No.86/2011 arising out of FIR No.395/2011 registered at Police Station Nand Nagri by which the respondent was acquitted of the charges under Sections 363/376/506 IPC. The appeal is contested by the respondent.

2. Briefly stated, the prosecution case as stated in the charge-sheet was that in between May 2011 and 13.09.2011 at a place near

District Park, Nand Nagri, Delhi, the respondent after kidnapping the prosecutrix 'X'(assumed name), aged around 16 years, from the lawful guardianship of her parents committed rape upon her at various places and also criminally intimidated her. The incident was reported to the police on 17.09.2011. The Investigating Officer after recording victim's statement (Ex.PW-2/A) lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C.statement. Documents concerning her age were collected. The accused was arrested and medically examined. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the respondent. The prosecution examined twelve witnesses to establish its case. In 313 statement, the respondent pleaded false implication and declined his involvement in the crime. He examined DW-1 (Tejdhar), DW-2 (S.I.Kunal Kishore) and DW-3 (Rajeev Ranjan) in defence. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment acquitted the respondent of all the charges. Being aggrieved and dissatisfied, State has filed the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. At the outset, it may be mentioned that learned Additional Standing Counsel challenged acquittal on the sole ground that the prosecutrix being below 16 years of age was incapable to give consent for physical relations (if any) with the respondent. The Trial Court committed grave error in determining her age 17 years merely because she was a student of XIIth standard. Learned counsel for the respondent urged that the prosecution was unable to place on record any clinching evidence regarding exact age of the prosecutrix and there is no illegality or irregularity in the impugned judgment to interfere.

4. On perusal of the statements of the prosecution witnesses including that of the prosecutrix, it stands established that physical relations (if any) between the prosecutrix and the respondent were consensual. Both of them were acquainted with each other since long. The respondent lived in the victim's neighbourhood and physical relations between the two had taken place on several occasions at various places. At no stage, the prosecutrix raised hue and cry or alarm to attract the neighbours or public persons. She had voluntarily accompanied the respondent on various dates and at no stage informed about the incident to her parents. The respondent examined DW-1 (Tejdhari) in defence to

prove that on 05.09.2011, the prosecutrix had not attended the school. Ex.PW-2/DA is the certificate issued by the school concerned intimating that in May, 2011, there were no extra classes for students of XIIth standard. It belied her statement that on the day of occurrence, she was going to take extra classes. As per MLC (Ex.PW-2/B), no visible external injuries were noticed on her body including private parts; hymen was found ruptured (an old tear). Inordinate delay in lodging the FIR has remained unexplained. It may be noted that during the pendency of the trial, the prosecutrix again went missing from her house without informing her parents on 26.07.2013 and it resulted in lodging of FIR No.119/2013 dated 04.08.2013 under Section 365 IPC at Police Station Harsh Vihar. Apparently, the Trial Court did not commit error to conclude that physical relations between the two who were in love were with consent as they wanted to marry.

5. Crucial question that arises for consideration is as to what was the age of the prosecutrix on the day of incident. It is vehemently contended by the learned Additional Standing counsel that she was below 16 years of age being born on 03.06.1995 as depicted in birth certificate (Ex.PW-8/A). I have examined the Trial Court record and find that the 'X' was admitted directly in 5th standard in St.Marks Sr.Public School,

Harsh Vihar, Delhi without furnishing any document about her getting education at any specific school from 1st to IVth standard. Age in the school record was recorded on the basis of affidavit (Mark 'X') in which victim's father declared her date of birth as 03.06.1995. The original birth certificate could not be produced during trial. PW-8 (Ashwani Nagar) informed the court that this document was not available in their office. Mark 'X' does not reveal when the affidavit was sworn by the deponent. Photo-copy of the order (Mark 'Y') from the office of Deputy Commissioner (North East District) Delhi has been placed on record where on the basis of affidavit (Mark 'X'), the date of birth of the prosecutrix was ordered to be entered in the Municipal record. Even original of Mark 'Y' is not traceable in the concerned office. It is further relevant to note that the victim's father filed another affidavit Mark 'DX' to claim that her younger daughter Pooja was born on 01.01.1999. Again, this affidavit (Mark 'DX') does not contain any date of its preparation. Exhibit 'DY' is another affidavit of the victim's father wherein he had given date of birth of her daughter Pooja as 28.08.1997. He again claimed that she had studied upto Vth privately and was fit to be admitted in class VI. Mark DZ is a discharge slip from I.G.E.S.I. hospital, Jhilmil, Delhi, where the birth of a female child on 28.08.1997 has been shown. Copy of

the ration card Mark DZ-1 shows that the prosecutrix was born in the year 1996 and Pooja was born in the year 2000. Apparently, no certain date of birth of the prosecutrix and her sister Pooja has surfaced on record. Date of birth of the prosecutrix i.e. 03.06.1995 is based only upon the affidavit of the victim's father. He has not explained as to why soon after the birth of the child, no entry was recorded in the Municipal records. It was also not elaborated as to where the victim was born. Besides this, even after admission of the child in the school in 5th standard, the victim's father did not register her birth in the Municipal record promptly. The application for getting her birth registered in the Municipal record was moved in 2010. Exhibit PW-8/A reveals the date of registration of the birth on 11.03.2010. Hence, it cannot be claimed with certainty that the prosecutrix was born on 03.06.1995. No ossification test was conducted to ascertain her age during investigation/trial. Actual date of birth of the victim was not disclosed either in the FIR or in the statement under Section 164 Cr.P.C.

6. Benefit of doubt is to be given to the respondent as there was no cogent document to ascertain the exact date of birth of the prosecutrix. I find no illegality or material irregularity in the impugned judgment.

7. In a recent case *Govindaraju @ Govinda vs. State by Sriramapuram P.S. and Anr.* AIR 2012 SC 1292, the Supreme Court discussed the law while dealing with appeals against acquittal.

13. "When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of the evidence is apparent on the face of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

14. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trial are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if , points irresistibly to the conclusion that the accused is guilty then the court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon

misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

15. We may now refer to some judgments of this Court on this issue. In State of M.P.v..Bacchudas, the Court was concerned with a case where the accused had been found guilty of an offence punishable under Section 304 Part II read with Section 34 Indian Penal Code by the trial court; but had been acquitted by the High Court of Madhya Pradesh. The appeal was dismissed by this Court, stating that the Supreme Court's interference was called for only when there were substantial and compelling reasons for doing so. After referring to earlier judgments, this Court held as under: (SCC pp.138-39, paras 9-10).

9. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilty of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is not less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty of cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh v.State of M.P.). The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for

doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. The aspects were highlighted by this Court in Shivaji Sahabrao Bobade v.State of Maharashtra, Ramesh Babulal Doshi v.State of Gujrat, Jawant Singh v.State of Haryana, Raj Kishore Jha v.State of Bihar, State of Punjab v.Karnail Singh, State of Punjab v.Phola Singh, Suchand Pal v.Phani Pal and Sachchey Lal TGiware v.State of U.P.

10. When the conclusions of the High Court in the background of the evidence on record are tested on the touchstone of the principles set out above, the inevitable conclusion is that the High Court's judgment does not suffer from any infirmity to warrant interference."

8. In the light of the above discussion, I find no merit in the present appeal preferred by the State against acquittal. It is dismissed. Trial Court record be sent back forthwith.

(S.P.GARG)
JUDGE

JANUARY 21, 2016

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