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**IN THE HIGH COURT OF DELHI AT NEW DELHI
CRIMINAL LEAVE PETITION No. 661/2015**

Date of Judgment : 15th March, 2016

STATE

..... Appellant

Through : Ms. Aashaa Tiwari, APP for the State with
Inspector Avnish Tyagi, PS-Swaroop Nagar.

versus

MAHENDER

.....Respondent

Through : Mr. Aseem Bhardwaj and Mr. K. K. Vijay,
Advocates.

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J. (ORAL)

1. The present Criminal Leave Petition has been filed under section 378(1) of the Code of Criminal Procedure by the Appellant seeking leave to appeal against the impugned order dated 06.04.2015 passed by learned Additional Sessions Judge, (North-West)-01, Rohini Courts, New Delhi in Sessions Case No. 01/13.
2. The factual narration for disposal of the present appeal lies in a narrow compass. The respondent herein was charged with commission of an offence under Section 376 (2) (f) read with Section 511 of the Indian Penal Code for committing rape on a minor girl. Her parents were working with the respondent as labourers. On 25.09.2012, Smt.Shanta Devi, sister-in-law of mother of the child victim took the child victim to her house on her responsibility that she would drop her back after

2-4 days. On 01.10.2012, the respondent, relative of Smt. Shanta Devi took the child victim and daughter of Smt. Shanta Devi to his house on the pretext of giving company to his children as his wife was hospitalized. In the night of 01.10.2012, respondent sent the daughter of Smt. Shanta Devi with food to the hospital. The respondent taking advantage of the absence of the guardian parents of the prosecutrix, took off his clothes as well as clothes the child victim and tried to do 'Galat Kaam' with her. As the child cried, the respondent ran away from the spot and left the child victim at the house of Smt. Shanta Devi from where she was dropped to her own house when the child victim was taking a bath, her mother had seen redness in her private part. Child victim narrated the entire incident to her mother. DD No. 31A was recorded to the effect that on 30.09.2012 rape of a minor girl was committed by one Mahender. First Information Report was registered and respondent was arrested. During the course of investigation, witnesses were examined, seizures were effected and the child victim was medically examined by the doctors. Upon completion of investigation, charge-sheet against the respondent for commission of offences under Sections 376(2)(f) read with 511 of the Indian Penal Code was filed and charges for the said offences has been framed against the respondent to which he pleaded his innocence and claimed trial.

3. In order to substantiate the charge the prosecution examined 14 witnesses in all. Statement of respondent was recorded under Section 313 of Code of Criminal Procedure wherein he reiterated his innocence and took up a plea that he has been falsely implicated by

the parents of the child victim over a monetary dispute with them. One witness has been examined in defence.

4. After considering the testimonies of material prosecution witnesses especially the prosecutrix and her father, disbelieving the testimony of the prosecutrix, observing that it was not gospel truth and also that the prosecution failed to explain any plausible reason for registering the First Information Report after a delay of 12 hours, the accused was acquitted in terms of the impugned judgment dated 06.014.2015 for the charged offences.
5. Assailing the impugned Judgment, Ms. Aashaa Tiwari, learned counsel appearing for the State contended that the judgment passed by the Trial Court is based on conjectures, surmises contrary to law and the proved facts; that the delay in registering the First Information has been satisfactorily explained and such delay is not fatal to the prosecution case; that the Trial Court erred in not appreciating the testimony of the mother of the child victim in the right perspective and acquitted the respondent on the basis of minor contradictions; that the sole testimony of the prosecutrix can form the basis of conviction in a case of rape and in the instant case the minor victim has categorically alleged to have been raped by the respondent; that the victim is a minor girl, aged 7 years and had absolutely no motive to resort to any false implication.
6. Mr. Aseem Bhardwaj, learned counsel for the respondent, with all force countered the arguments addressed by learned counsel for the State. Counsel has specifically contended that the Trial Court has appreciated the material on record by taking care and caution by equal

importance to the evidence of the prosecution witnesses and also the defence witness. The Trial Court has also appreciated the evidence considering the improvements and contradictions which are serious in nature elicited during the course of cross-examination of the witnesses proved through the evidence of other witnesses.

7. Learned counsel for the respondent further submitted that the respondent has been falsely implicated in this case by the parents of child victim over a monetary dispute between them. Counsel further submitted that the case of the prosecution is fatal as the prosecution is unable to explain the delay in recording the FIR in the matter.
8. Mr. Bhardwaj has supported the impugned judgment and submitted that the Trial Court has rightly canvassed the acquittal of the respondent by concluding that the prosecution failed to prove its case beyond reasonable doubt. Mr. Bhardwaj further submitted that while dealing with the judgments relating to acquittal, the Appellate Court must be very careful in reversing the judgment unless the judgment of the Trial Court is so erroneous, illegal and it shocks the conscious of the Court. Thus, it is contended that there is no room for this Court to interfere with the well-reasoned judgment passed by the learned Trial Court. Hence, counsel prays for confirmation of the said judgment of acquittal passed by the learned Trial Court.
9. We have heard learned counsel for the State and also examined the material available on record.

Delay in lodging First Information Report

10. Firstly, we shall proceed to discuss the argument raised by learned counsel for the State that there was no delay in registering the First

Information Report and the delay has been well explained but the trial court failed to appreciate the evidence in the right prospective.

11. Delay in lodging the FIR is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the court to minutely examine the version of the prosecution to satisfy itself as to whether any innocent person has been implicated in the crime or not. Insisting upon the accused to seek an explanation of the delay is not the requirement of law. It is always for the prosecution to explain such a delay and if reasonable, plausible and sufficient explanation is tendered, no adverse inference can be drawn against it.
12. In the instant case, the prosecution has apparently failed to explain the delay in registering the First Information Report. This aspect has been highlighted by the learned trial Court in para 24 which reads as under :

" A perusal of the record reveals that on 02.10.2012, the child victim and her parents, had reached the PS at 9:30 pm, where they remained stranded for about four hours till the time the child victim was medically examined in B.S.A. Hospital at 01:35 am. Even thereafter, from 01:35 am till 1:05 pm i.e. almost for 12 hours, they remained in Police Station, where ultimately the FIR was registered. It is quite understandable that the IO might have taken some time in getting the child victim and her mother counseled before recording the statement of the mother of child victim, but this counseling can never take about 16 hours. There is hardly any explanation for the delay of about 12 hours in recording the FIR after the medical examination of the child victim."

13. In *Kilakkatha Parambath Sasi and Ors. Vs. State of Kerala* reported in *AIR 2011 SC 1064*, it has been observed that when an FIR has been lodged belatedly, an inference can rightly follow that the prosecution story may not be true but equally on the other side, if it is found that there is no delay in the recording of the FIR, it does not mean that the prosecution story stands immeasurably strengthened.
14. In *Ashok Kumar Chaudhary and Ors vs. State Of Bihar* reported in *AIR 2008 SC2436*, Hon'ble Apex Court held that mere delay in lodging the first information report is not by itself fatal to the case of the prosecution. Nevertheless, it is a relevant factor of which the Court is obliged to take notice and examine whether any explanation for the delay has been offered and if offered, whether it is satisfactory or not. If no satisfactory explanation is forthcoming, an adverse inference may be drawn against the prosecution. However, in the event, the delay is properly and satisfactorily explained; the prosecution case cannot be thrown out merely on the ground of delay in lodging the FIR. Obviously, the explanation has to be considered in the light of the totality of the facts and circumstances of the case.
15. In *Ramdas and Ors. v. State of Maharashtra* reported in *AIR 2007 SC 155*, it has been observed that the question whether the delay in lodging the report adversely affects the case of the prosecution has to be considered in the light of the totality of the evidence. This is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation, there may be host of circumstances appearing on record which may provide reasonable explanation for the delay

16. In *The State of Karnataka Vs. Mapilla P. P. Soopi* reported in *AIR 2004 SC 85*, the Apex Court while considering an order of acquittal in a case of rape held as under:

“1. ... The High Court did not accept the evidence of the parents of the victim on the ground that though they came to know of the incident on 23.9.1981 itself the Police complaint was lodged only on the next day evening and the explanation given by the prosecution for the delay was unacceptable.

4. Undue delay in lodging the complaint without acceptable evidence has also contributed to the doubt in the prosecution case. Hence the High Court was justified in allowing the appeal.

5. For the reasons stated above this appeal fails and the same is dismissed.”

17. Applying the aforesaid principle to the present case, we are of the view that the prosecution miserably failed to explain the delay in registering the First Information Report, there is a possibility of embellishment and false implication of the accused due to rivalry between the complainant and the accused.

Contradictions / improvements in the testimonies

18. Since, the testimonies of PW11 (Child victim) PW12 (Mother of the child victim) has been strongly relied upon by the learned counsel for the State, we deem it appropriate to discuss the evidence adduced by the prosecution through this witness in detail.
19. Prosecution examined the child witness as PW11 and deposed that her *Bua* came to her house and had taken her to her house. From the residence of her *Bua*, accused took the child victim as well as the daughter of her *Bua*, on 01-10-2012 to his residence, on the pretext

that his wife Smt. Rukmani was lying hospitalized. In the night of 01.10.2012, the accused sent the daughter of her *Bua* to the hospital with the food and kept her at his residence '*aur mere sath gandi gandi baat karne laga*'.

20. Smt. Sonu, mother of the child victim in her complaint Ex.PW12/A stated that on 01.10.2012 Mahender went to the house of her sister in law and took her daughter and daughter her sister's in law Manju on the pretext that his wife was hospitalized and there was no one at home to do the work. Mahender sent Manju to the hospital with the food and kept the child victim back at his residence and in night did '*chedchad*' with my daughter and when she cried loudly he ran away and on the next day dropped her to the house of her *Bua*. She further stated that on 02.10.2012 when she was giving bath to the child victim, she noticed redness at her private part and when asked, the child victim told her about the act of Mahender.

21. When this witness stepped into the witness box as PW12, she deposed that:

"My daughter i.e. prosecutrix was called by her Bua Shanta Devi at her residence Pitampura for 2-4 days. I sent my daughter along with her as Shanta has also got a daughter namely Manju, who was about of the same age group of my daughter. From the house of my sister-in-law Smt. Shanta Devi, accused Mahender took my daughter and daughter of my sister in law namely Manju to his house on the pretext that his small son would play with them as his wife was hospitalized. After 2 days accused Mahender left my daughter at the house of her Bua and at that time she was suffering from fever. I went to my sister-in-law's house and found that my daughter was down with fever and she had rashes on her body. I

asked from my daughter as to what had happened with her. She started crying and asked me that if she would tell something she should not be scolded by me. She was scared at that time. I assured her that I would not scold her and she should tell me frankly as to what had happened with her. My daughter told me that accused left Manju at hospital with his wife and took her to his house where in the night, he did wrong act with her. She told me that accused took out his clothes as well as her clothes. She told me that accused showed her some guda gudi (toys) and he put his private part in her mouth. My daughter further told me that she got scared and she screamed and on this accused put a kambal (blanket) on her mouth. Next day when she had fever in the morning, accused left her to her Bua's house. I narrated the entire facts to my husband. I also checked my daughter and found redness on her private part. "

22. In **Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan** reported in (2013) 5 SCC 72, the Hon'ble Apex Court held :

"It is a settled legal proposition that, while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of the prosecution, must not prompt the Court to reject the evidence thus provided, in its entirety. The irrelevant details which do not in any way corrode the credibility of a witness, cannot be labeled as omissions or contradictions. Therefore, the courts must be cautious and very particular, in their exercise of appreciating evidence. The approach to be adopted is, if the evidence of a witness is read in its entirety, and the same appears to have in it, a ring of truth, then it may become necessary for the Court to scrutinize the evidence more particularly, keeping in mind the deficiencies, drawbacks and infirmities pointed out in the said evidence as a whole, and evaluate them separately, to determine whether the same are completely against the nature of the evidence provided by the witnesses, and whether the

*validity of such evidence is shaken by virtue of such evaluation, rendering it unworthy of belief. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." It is in fact, the entirety of the situation which must be taken into consideration. While appreciating the evidence, the Court must not attach undue importance to minor discrepancies, rather must consider broad spectrum of the prosecution version. The discrepancies may be due to normal errors of perception or observation or due to lapse of memory or due to faulty or stereotype investigation. After exercising such care and caution, and sifting through the evidence to separate truth from untruth, embellishments and improvements, the Court must determine whether the residuary evidence is sufficient to convict the accused. (Vide: **Bihari Nath Goswami v. Shiv Kumar Singh and Ors. : (2004) 9 SCC 186; Vijay @ Chinee v. State of Madhya Pradesh : (2010) 8 SCC 191 and Sampath Kumar v. Inspector of Police, Krishnagiri : AIR 2012 SC 1249**).*"

23. We also find the testimony of the child victim, i.e. PW11 and the testimony of her mother i.e. PW12 to be highly unreliable and unsafe to convict the respondent herein. As per the evidence of PW11 and PW12, except for the fact that the respondent had disrobed the child victim and also disrobed himself, no other overt act having been done by him with the sexual intent has been established. Further, as per PW11, the respondent had touched her everywhere on her body and then handed over some round thing to her and thereafter, made her to wear her clothes, whereas as per PW12 after disrobing PW11 the respondent shoed her some gudda-guddiya and put his private part in her mouth, which fact was never deposed by PW12 in Ex.PW12/A.

we may also note further contradictions in the statement, Ex.PW12/A and her evidence recorded in the Trial Court with regard to the mode of commission of sexual assault, which was communicated to PW12 by the child victim and noticing the redness by her on the body of child victim. In Ex.PW12/A, she had deposed that when the child victim returned home on 02.10.2012 she noticed redness on the private parts of the child victim, whereas in her evidence, she has stated that she was informed by Smt. Shanta Devi about the redness over the entire body of the child victim as well as fever to her.

24. In the instant case, the testimonies of the prosecution witnesses have not been fully corroborated by the testimony of PW3 Dr. Rinkesh Meena, who examined the child victim and opined that hymen was intact. However, redness was found present on vulval and perineal area on the body of the child victim. During cross examination PW3 admitted that "Inflammation/redness observed on the vulvel and perineal area could be caused if the patient causes itching having big nails on the portion because of infection." The version of PW12 that the alleged incident took place on 01.10.2012 as disclosed by the child victim is further falsified by the certificate Ex.PW14/D obtained by the Investigating Officer from Bhagwati Hospital where the wife of the respondent was getting treatment. As per Ex.PW14/D, the wife of the respondent was discharged only on 29.09.2012 at 2:45 p.m. Therefore, we hold that the testimonies of the prosecution witnesses do not inspire confidence and casts a serious doubt on its truthfulness and creditworthiness. Moreso, prosecution failed to bring forward the very vital piece of evidence through Smt. Shanta Devi, sister-in-law of

the complainant, her daughter and children of the respondent to connect the respondent with the alleged crime.

20. The law with regard to the grant of leave is well settled by a catena of judgments. Leave to Appeal can be granted only where it is shown that the conclusions arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle. The law relating to an appeal against an order of acquittal was succinctly laid down by Hon'ble Supreme Court in ***State of Goa v. Sanjay Thakran and Another* (2007) 3 SCC 755**. Relevant para has been reproduced as under:-

*14. By a series of decisions, this Court has laid down the parameters of appreciation of evidence on record and jurisdiction and limitations of the appellate court, and while dealing with appeal against order of acquittal this Court observed in **Tota Singh and Anr. v. State of Punjab** (1987) 2 SCC 529, as under:*

6....The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court

below on its consideration of the evidence is erroneous.

15. Further, this Court has observed in *Ramesh Babulal Doshi v. State of Gujarat (1996) 9 SCC 225*:

7....This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then-and then only-reappraise the evidence to arrive at its own conclusions....

25. In the case of ***State of Madhya Pradesh v. Dal Singh & Ors., reported at JT 2013 (8) SC 625***, the Hon'ble Supreme Court has held that the appellate court while considering the appeal against the judgment of acquittal shall interfere only when there are compelling and substantial reasons for doing so and if the judgment is unreasonable and relevant materials have been unjustifiably ignored, it would be a compelling reason for interference.

26. 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.
27. In the light of the aforesaid dictum and for the reasons stated above, we do not find any infirmity in the impugned judgment passed by trial court. Consequently, present appeal stands dismissed.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

MARCH 15, 2016 / gr

