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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.L.P. 702/2015**

% *Judgment delivered on : 10th March, 2016*

STATE

..... Petitioner

Through : Ms. Aashaa Tiwari, APP for the State with
SI Nagender, PS-Sarita Vihar.

Versus

LAL BABU MAHTO

..... Respondent

Through : Mr. Bhagwan Jha, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

CRL.MA.15876/2015

1. By the present application, the petitioner seeks condonation of 100 days' delay in filing the present criminal leave to appeal petition.
2. Heard. For the reasons stated in the application and in the interest of justice, present application is allowed. Delay in filing the present criminal leave to appeal petition is condoned. Let criminal leave to appeal petition be taken on record.
3. Applicaiton stands disposed of.

CRL.L.P.702/2015

4. Present leave to appeal petition has been filed by the State under Section 378 (4) of the Code of Criminal Procedure against the judgment dated 13.04.2015 passed by Ms. Renu Bhatnagar, Additional Sessions Judge-01, Saket Courts, New Delhi in Session's Case No.75/12 whereby the

respondent was acquitted of the charges framed under Section 376 (2)(f) of the Indian Penal Code.

5. The brief facts of this case, as noticed by the learned Trial Court are as under:

"On 11.08.2012 DD No. 10 A was received by SI Satish Kumar who along with Ct. Dinkar More reached at the spot i.e. Dairy Farm Madanpur Khadar Sarita Vihar where they came to know that rape has been committed with a 8 months old baby girl. SHO also reached at the spot and SI Josepha Kujur was called who reached at the spot and recorded the statement of complainant who stated that she is residing as tenant along with her family and running raidi. She has two daughters namely Jia aged about 3.5 years and prosecutrix 'R' (name withheld to keep her identity confidential) aged about 8 months. On 09.08.2012 at around 10 PM she along with her husband and daughters came to home and went to terrace for keeping utensils. She sent her husband for taking potatoes. She came downstairs to feed her daughter Jia as she was crying for food. Her daughter 'R' was sitting on the terrace and playing. On the terrace her neighbour Lal Babu aged about 30 years was also present. At 11 PM when she came to terrace she saw accused Lal Babu playing with her daughter 'R' and holding her in his lap. While playing he took her inside his room and after some time she heard cries of her daughter 'R' and she came to the room of accused Lal Babu. She saw that Lal Babu was not wearing his pant, holding her daughter hand 'R' and he was rubbing the vagina of her daughter 'R' with his penis by shaking her daughter 'R' who was not wearing her Kacchi. On seeing her, he put her daughter 'R' on the floor, discharged his semen on a piece of paper and threw it outside. She took her daughter and came to her room. She disclosed the entire fact to her husband. They did not report the matter to anyone due to fear of Lal Babu. After gathering courage she called the police on 100 number. On the complaint, case was registered. Prosecutrix 'R' was medically examined at AIIMS Hospital. Accused was arrested and he was also got medically examined from AIIMS Hospital. Exhibits were sent to FSL, Rohini for examination. Bone age examination of prosecutrix 'R' was also got conducted wherein her date of birth came between 1

to 2 years. Thereafter, statement of witnesses were got recorded by the Investigating Officer and after completion of investigation, charge sheet under Section 376 IPC was filed against the accused in the Court.

6. Upon committal of the case to the court of Sessions, the respondent was charged with having committed the offence punishable under Section 376(2)(f) of the Indian Penal Code to which he pleaded not guilty to the charged offence and claimed to be tried.
7. To substantiate the accusation, prosecution examined thirteen witnesses in all. Statement of the accused under Section 313 of Code of Criminal Procedure was recorded wherein he pleaded innocence and claimed to be tried. Three witnesses were examined in defence.
8. The learned Trial Court, upon analysis, examination and evaluation of the prosecution evidence and after considering the rival submissions recorded the acquittal of the accused for the charged offence.
9. Aggrieved by the impugned judgment, the State has filed the present leave petition contending that the view and the ultimate conclusion reached by the learned Trial Court in acquitting the accused for the offence under Section 376 (2) (f) of the Indian Penal Code is manifestly perverse, unsustainable, tainted with non-application of mind to vital evidence, a result of wrong interpretation of evidence of the sole eye witness of the case i.e. PW1 (mother of minor victim girl) and other substantial evidence, which has resulted into grave miscarriage of justice. Counsel further contended that the Trial Court has failed to accept the explanation regarding delay of 2 days in registration of the FIR.
10. Per contra, Mr. Bhagwan Jha, learned counsel for the respondent while supporting the impugned judgment contended that the Trial Court after considering the entire material brought on record by the parties had rightly

recorded the finding of acquittal of accused and the same does not require any interference by this Court.

11. We have heard learned counsel for the parties and perused the entire material available on record.
12. Undoubtedly, where the statement of an eye-witness is found to be reliable, trustworthy and consistent with the course of events, the conviction can be based on her sole testimony. There is no bar in basing the conviction of an accused on the testimony of a solitary witness as long as the said witness is reliable and trustworthy. The entire case of the prosecution rests upon the testimony of the sole eye witness i.e. mother of the child victim.
13. In ***State of Maharashtra Vs. Ramlal Devappa Rathod and Ors.*** reported in (2015) 10 SCALE 347, Hon'ble Supreme Court held that :

"The law on the point is well settled that a conviction can well be founded upon the testimony of a sole witness. However, as laid down in State of Haryana v. Inder Singh : (2002) 9 SCC 537 the testimony of a sole witness must be confidence inspiring and beyond suspicion, leaving no doubt in the mind of the Court. In Joseph v. State of Kerala : 2003 (2) SCC 465 it was stated that where there is a sole witness, his evidence has to be accepted with an amount of caution and after testing it on the touchstone of other material on record. It was further stated in Ram Naresh v. State of Chhattisgarh (2012) 11 SCC 257 that the statement of the sole eye-witness should be reliable, should not leave any doubt in the mind of the Court and has to be corroborated by other evidence produced by the prosecution."

14. In ***Gulam Sarbar Vs. State of Bihar (Now Jharkhand)*** reported in (2014) 2 SCJ 677, the Hon'ble Supreme Court held that :

"In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be

examined to prove/disprove a fact. It is a time- honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in Probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eye witness, if the same inspires confidence."

15. In ***Sunil Kumar v. State (Govt. of NCT of Delhi)***, (2003) 11 SCC 367, the Hon'ble Supreme Court has held that:

"9. xxxxxxxxx As a general rule the court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). But, if there are doubts about the testimony the courts will insist on corroboration. It is for the court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise."

16. In ***State of Rajasthan Vs. Chandu & Ors.*** Reported in ***JT 2002 (10) SC 427***, wherein the Hon'ble Supreme Court held that:

"6. It is no doubt true that conviction can be based on the sole testimony of an interested eye-witness. There is no dispute that the eye-witnesses including PW1 in the present case were all interested parties. There was severe enmity between the complainant group and accused group. There relations were fiercely inimical. The aforesaid rule that the

conviction can be based on the sole testimony of an interested eye-witness is subject to the limitation that the testimony of such a witness is trustworthy and consistent and court finds it safe to fully rely upon the deposition of such a witness in regard to the nature of the occurrence and the involvement of the accused. In present case, however, it was prudent to look for corroboration on material particulars.

xxxx xxxx xxxx

8. The High Court on appreciation of evidence has held that no independent witness had been examined as also that the prosecution had failed to explain the injuries received by the accused persons. What seems to have heavily weighed with the High Court is that the prosecution witnesses in particular the eye-witnesses have been held by the trial court not to be reliable and the facts were so intermingled that it was not possible to separate chaff from the grain and it was unsafe to base the conviction of the three accused on the sole testimony of PW1."

17. In order to ascertain whether the conviction of the appellant can be sustained on the evidence of the solitary eye witness i.e. mother of the child victim and whether the same inspires confidence or not it would be useful to extract herein below the relevant portion of her statements recorded at different stages.
18. On 11.08.2012 Smt. Meenu, mother of the child victim lodged a complaint (Ex.PW1/A) wherein she stated that she saw the accused carrying the child victim on his lap and was playing with her and took her to his room. After sometime, she heard the cries of the child victim and went to the room of the accused and saw that accused was not wearing anything below his waist and was rubbing his penis with the child victim who was also not wearing her Kachhi. On seeing her, accused put the child on the ground and discharged his semen and wrapped the same on a piece of a paper and threw it outside.

19. Smt. Meenu, mother of the child victim appeared as PW1 before the Court and deposed on oath that :

"xxxxx I was providing food to my elder daughter which took some time. By that time, I heard the cry of my younger daughter Ritika. I immediately went upstairs (terrace) where I saw that accused Lal Babu Mehto was not wearing his lower (trouser/underwear etc.) and he was rubbing the vagina of my daughter Ritika with his penis by shaking Ritika. Ritika was not wearing the pant/Kachi as she had passed urine some time back in her kachhi. Seeing me, the accused immediately separated my daughter from him and thereafter the accused discharged his semen on a piece of paper and threw the said paper towards the dairy meant for bufflaows. We were scared of accused Lal Babu Mehto and for this reason did not inform the police, however, after two days I gathered the courage to inform the police and made a call to the police."

20. When this witness was put to cross-examination by defence counsel, she stated that :

" I had already removed the underwear/kacchi of my daughter as she had passed urine. When I came downstairs the accused was only in Baniyan on his body and was having my daughter in his lap i.e. in the position that he was rubbing the vagina of my daughter with his private part. The accused was doing the said act in his room. The room of the accused was not bolted from inside and the door was slightly opened. When I came downstairs after hearing the cry of my daughter, the accused put/threw my daughter aside seeing me and I immediately lifted my daughter and brought her inside my home. In my presence, the accused discharged the semen on a piece of paper and threw the same after coming out of the room from the railing."

21. In our view the trial court has correctly analysed the testimony of the sole eye-witness, who is the mother of the victim. The trial court has noticed the contradictions and improvements made by this witness. According to this witness her child was playing on the roof when the

respondent was also present. At 11.00 p.m., when she returned to the roof, she found that the respondent had taken the victim child in his lap and was playing with her. He thereafter took her to his room and then she had heard the cries of her daughter. Thereafter she described that when she entered into the room of the accused, she found that the accused removed his lower garments and had taken the victim on his lap. He had caught hold of both the hands of the victim, spread her legs on his lap and was touching his penis with the vagina of the victim after shaking her. When PW-1 appeared in the Court, she had not stated that she had returned to the roof after feeding her elder daughter or that in her presence only the accused had taken the child to his room where the incident had happened. She has also not narrated the manner in which the accused was committing wrong act with the child in her statement in the Court.

22. We find the testimony of the sole eye-witness, mother of the victim, to be unreliable. The statement of this witness is unreliable for the reason that, firstly, it is highly improbable that the respondent would dare to commit such an act with the child knowing fully-well that her mother was present. Secondly, in case, he was to commit a wrong act with the child, he would have bolted the room from inside and not left it open as per the testimony of PW-1. The statement of this witness, we find to be unreliable and untrustworthy as the conduct of the mother is highly unusual as upon seeing the respondent committing an unnatural and immoral act she did not raise any hue and cry, knowing fully well that the building was having around 30 tenants. This conduct of PW-1 coupled with the delay of two days in lodging the FIR makes her testimony unbelievable. Her testimony is also not supported by the medical evidence, which shows that the hymen was intact and which

creates a doubt in the testimony of this witness. The testimony of the Doctor also does not conclusively point towards the commission of offence of rape.

23. The respondent had examined three witnesses in his defence. Before the testimonies of the defence witnesses can be examined, it may be noticed that in his statement under Section 313 Cr.P.C., the respondent stated as under:

“.... That on 09.08.2012 he returned from his duty at around 8.30 PM and at that time Sonu was preparing food for his business purposes in morning after spreading his utensils and other articles in front of his room. He objected to this and asked him not to spread his utensils and other articles in front of his room and that he will not allow him to cook food in this manner as he is residing on the ground floor and has no occasion to come to the top floor in front of his rented room to cook food. Sonu Alam refused to remove articles whereupon he asked him that he will throw the articles from roof. Thereafter, Sonu Alam pushed him and a scuffle took place between them. Sonu threatened him that he will get him beaten up for his objections. At that time other neighbour in the surrounding rooms namely Pintu, Ram Babu, Ram Khilaan and himself were present. His landlord Sanjeev Baniya had also come to the spot and after the quarrel had taken place and tried to pacify the same. Due to said quarrel he has been falsely implicated by Sonu Alam in this case. Sonu and his family members were also using bathroom of his floor despite the fact that they were having their own bathroom on their own floor but stopped using the said bathroom. He also made complaint to his landlord who also asked Sonu Alam not to cook food but Sonu Alam also threatened the landlord to falsely implicate him.....”

24. DW-1, Sh.Sanjeev Kumar, who is the landlord of the complainant and the respondent, had deposed as under:

“..... DW-1 is Sh.Sanjeev Kumar who is the landlord of complainant and accused. He deposed that complainant Meenu was his tenant and was residing at second floor and accused Lal Baby Mehto was also tenant and residing at the roof of his property. There are two rooms at the roof of his house and due to this there used to quarrel between the accused and complainant. On 09.08.2012 quarrel occurred between complainant and accused. Accused complained before me regarding his quarrel. He also directed Meenu not to prepare food on roof but she did not mend her ways. Due to quarrel Meenu threatened accused that she will plant a false case upon him. On 09.08.2012 nothing was happened at the roof at around 11 PM as all the five tenants were present at the roof and he had not got any complaint from Meenu regarding such incident. He stated that more than thirty persons were residing at his address at that time but none of them got aware about the incident.....”

25. In his testimony DW-2, Ram Khilawan, has deposed as under:

“... that he was residing in a tenanted room with the accused and Ram Babu. Complainant Meenu was preparing meals on the roof of the building and used to leave the garbage on the roof and in front of the tenanted room. They used to clean the garbage and made objections to Meenu not to scatter garbage in front of their room but she did not pay any heed to their words. They also made complaint to landlord of the building who also tried to make Meenu understand but she did not mend her ways. On 09.08.2012 Meenu was cooking meals on the roof which was objected by accused Lal Babu. Hot arguments were exchanged between both the sides whereupon the complainant Meenu threatened accused Lal Babu that she will falsely implicate him in the case. On the same day he went for his duty and returned back in the evening at around 8.30 PM. On the said day when the quarrel had taken place between Meenu and Lal Babu there were around thirty tenants of the surrounding rooms present there. No incident has happened as alleged by Meenu in the night of 09.08.2012 as five persons were sleeping together on the roof.....”

26. DW-3 has also deposed before the trial court as under:

“... that he was residing in a tenanted room with the accused and Ram Khilawan. Complainant Meenu was preparing residing on the second floor of the building in a rented room. She was putting up a rehri of meals which was being cooked by her at the tenanted premises. Complainant Meenu was preparing meals on the roof of the building and used to leave the garbage on the roof and in front of the tenanted room. They used to clean the garbage and made objections to Meenu not to scatter garbage in front of their room but she did not pay any heed to their words. They also made complaint to landlord of the building who also tried to make Meenu understand but she did not mend her ways. On 09.08.2012 Meenu was cooking meals on the roof which was objected by accused Lal Babu. Hot arguments were exchanged between both the sides whereupon the complainant Meenu threatened accused Lal Babu that she will falsely implicate him in the case. On the same day he went for his duty and returned back in the evening at around 8.30 PM. On the said day when the quarrel had taken place between Meenu and Lal Babu there were around thirty tenants of the surrounding rooms present there. No incident has happened as alleged by Meenu in the night of 09.08.2012 as five persons were sleeping together on the roof.....”

27. There is nothing on record to disbelieve the testimony of the defence witnesses.
28. It is settled law that equal weightage is to be given to the testimony of the defence witnesses as that of the witnesses of the prosecution.
29. In the case of ***State of Haryana v. Ram Singh***, (2002) 2 SCC 426, it was held as under:

“20....Incidentally be it noted that the evidence tendered by defence witnesses cannot always be termed to be a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution. The issue of

credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution. Rejection of the defence case on the basis of the evidence tendered by defence witness has been effected rather casually by the High Court.....”

30. Similar view has been expressed by the Apex Court in a recent judgment in the case of ***Jumni and Others v. State of Haryana***, 2014(3) Scale 588, whereby it was held that the plea of *alibi* should be held at an equal footing to the evidence provided by the prosecution. In para 27 of the judgment, it was held as under:

“27. On the standard of proof, it was held in Mohinder Singh v. State, 1950 SCR 821 that the standard of proof required in regard to a plea of alibi must be the same as the standard applied to the prosecution evidence and in both cases it should be a reasonable standard. Dudh Nath Pandey goes a step further and seeks to bury the ghost of disbelief that shadows alibi witnesses, in the following words:

“Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses.”

31. In ***State of Himachal Pradesh v. Shree Kant Shekari*** reported in (2004) 8 S.C.C. 153, wherein the Hon'ble Apex Court held :

"The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging the first information report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the court is to only see

whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand, satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case."

32. Normally the delay in lodging the First Information Report by itself may not be sufficient to bring the case of the prosecution under suspicion. Mere delay in institution of a First Information Report may not prove fatal to the case of the prosecution if there is some kind of reasonable explanation in registration of FIR after such an inordinate delay.
33. In the instant case, the alleged incident took place on the night of 09.08.2012 and the matter was reported to the police after two days i.e. on 11.08.2012. The prosecution took a stand that the parents of the child victim were afraid of the accused and as such there was delay in lodging the complaint to the police. However, the prosecution failed to bring any material on record to suggest that the parents of the child victim were afraid of the accused, moreover, PW1 Sanjeev Kumar who also appeared in defence of the accused as DW1 categorically stated that "The complainant Meenu was doing the work of installing 'Rehri' of food. She used to prepare food at the roof of my house and due to this there (sic) used to be a quarrel between the accused Lal Babu Mehto and complainant Meenu." which goes to show that the parents of the child victim were not scared of the accused and the explanation tendered by the prosecution with regard to delay in registration of First Information Report does not inspire confidence.
34. The law with regard to leave to appeal petition is well settled. In ***Govindaraju @ Govinda vs. State by Sriramapuram P.S. and Anr. AIR 2012 SC 1292***, the Hon'ble Supreme Court discussed the law while

dealing with appeals against acquittal in the following words:

“13. When an accused is acquitted of a criminal charge, 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 guilt 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 is 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. 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.

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."

35. 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.

36. In view of the above, 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 Trial Court. Consequently, leave to appeal stands dismissed.



G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 10, 2016
gr/msr