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

+ **CRL. L.P. 782/2015**

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Date of Judgment: 1st March, 2016

STATE (GOVT OF NCT)

..... Appellant

Through : Ms. Aashaa Tiwari, APP for the State.

Versus

SHAHZADE @ MASTAN & ORS.

.... Respondents

Through : None

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J.

1. The present leave to appeal has been filed by the State under Section 378 (3) of the Code of Criminal Procedure, being aggrieved by the judgment dated 15.01.2015 passed by the Sessions Judge in Sessions case No. 1/13 by virtue of which the respondents were acquitted for the offences punishable under Section 363/366/376/506/34 of the Indian Penal Code.
2. In a nutshell, the case of the prosecution is that PW3 Sh. Girish filed a complaint regarding his missing daughter namely 'S' (name withheld to keep her identity confidential) wherein he stated that on 18.12.2009 he left his daughter PW1 'S' aged about 14 years at the gate of her school situated at Sangam Vihar, New Delhi at about 7.30 AM but 'S' (hereinafter referred to as the prosecutrix) did not reach the school and went missing. She was searched but she could not be found. The father

of the prosecutrix suspected Shahzade. On a complaint, a case was registered. Subsequently, the accused Shahzade @ Mastan was arrested and he was medically examined. On 08.01.2010 prosecutrix 'S' reached Delhi and she was also medically examined. The statement of prosecutrix 'S' was recorded under Section 164 of the Code of Criminal Procedure. Non bailable warrants were issued against the other co-accused Sanjay Banarjee and Noor Nabi.

3. After completion of the investigation, charge sheet was filed under Sections 363/366/376/506/34 of the Indian Penal Code against all the accused persons. Charges under Sections 363/34, 366/34 and 506 of the Indian Penal Code were framed against the accused persons and in addition a charge under Section 376 of the Indian Penal Code was also framed against the accused Shahzade @ Mastan.
4. To bring home the guilt of the accused persons, the prosecution examined fifteen witnesses in all. The statement of the accused persons were recorded under section 313 of the Code of Criminal Procedure to which they pleaded not guilty and claimed that they have been falsely implicated.
5. Ms. Aashaa Tiwari learned counsel appearing on behalf of the State submits that the trial court has erred in disbelieving the testimonies of the prosecutrix PW1 and PW2 Suman (younger sister of the prosecutrix). The counsel further submits that the trial court has overlooked the testimonies of PW1 and PW2 and ignored the evidence which surfaced during the course of trial.

6. It is also contended by the counsel for the State that the trial court has not appreciated the fact that prosecutrix was a minor and as such her consent is not relevant. Counsel further contends that the case of the prosecution is based upon testimony of the prosecutrix which unequivocally points towards the guilt of the accused persons that could not be brushed aside.
7. We heard learned counsel for the State and have carefully examined the judgment of the trial court.
8. Before delving into the merits of the submissions made by the learned counsel for the State, it would be relevant to examine the testimonies of PW1 prosecutrix and PW2 Suman as the prosecution has relied on their testimonies to prove its case.
9. PW1 'S' (the prosecutrix) in her testimony testified that she was studying in 7th standard in Sarvodaya Convent School, J-Block, Sangam Vihar. On 18.12.2009 at about 7.30 am, her father dropped her and her sister near the school as there was lot of mud on the road. Since she was carrying a shawl, she and her sister came out of the school in order to return the shawl to her father but she could not find her father. The prosecutrix next deposed that while she was returning to her school she saw one auto rickshaw parked near the school and that accused Shahzade was standing near the school. She further deposed that two persons, namely Noor Nabi and one other person were sitting inside the auto rickshaw. It was further deposed by the prosecutrix that Shahzade caught hold of her and kept a handkerchief on her mouth, she was made to smell something and then was pushed

into the auto. She next deposed that her sister Suman raised an alarm but Noor Nabi showed a knife to her and told her “***Agar chillai to tumhari behen ko maar denge***”, after which she became unconscious and when she gained consciousness she found herself at New Delhi Railway Station, where she was forced to drink tea laced with some intoxicating substance thereafter she became unconscious again. She further deposed that she was made to sit near the toilet in the train, when she gained consciousness she found herself at Mumbai in a Kholi. She raised an alarm on which accused persons threatened to kill her, her brother and sister. Thereafter, accused Shahzade gave her food mixed with something and committed rape upon her. On 06.01.2010, accused Shahzade brought her back to Delhi. She raised an alarm and accused Shahzade left her near Batra Hospital in an auto. On 08.01.2010, she along with her parents went to the police station and lodged a complaint. She has duly identified her signatures on Ex.PW1/A and Ex.PW1/B. She deposed that she had given a brief history to the doctor that accused had committed rape upon her. She has duly identified the accused persons in the court. She further stated that accused Shahzade had taken away and thrown the school uniform worn by her at the time of commission of rape in the kholi in Mumbai and he had brought new clothes for her.

10. PW1 in her cross examination stated that her school uniform comprised of white shirt (suit) and brown salwar and white shoes. PW1 further stated that she knew accused Shahzade for the last one year prior to the date of incident. She also stated that it took her 15

minutes from the school gate to return her shawl to her father. She further stated that the distance of the place where the auto was parked from the school gate was 15 minutes on foot. PW1 next stated that when she was travelling in train the ticket-checker and the food suppliers, waiters and vendors were coming and going.

11. PW2 Ms. Suman deposed in her testimony that it was the incident of 18th day but she did not remember the month. On the fateful day her father had gone to drop her and PW1 to the school at about 7:30 a.m. and as the checking was taking place in the school, her sister PW1 went to return the shawl of her father. They were looking for their father at a distance of 10-15 minutes of walking. An auto was parked there in which Shahzade and Noor Nabi were present. Shahzade had pushed her sister and Noor Nabi put handkerchief on the face of her sister. Noor Nabi had shown a knife to her and stated "*main teri behen ko pakad kar le ja raha hun, agar tune kisi ko bataya, to kaat kar faink dunga*". Thereafter, one more person came on the motorcycle and sat inside the auto. **Noor Nabi stated that chal Babu Bhai auto chala.** Thereafter, they left in the auto with her sister and auto was driven by Babu bhai. PW2 further deposed that she went to school and due to fear she did not tell anybody. After attending the examination, she came back to her house and informed about the incident to her mother.
12. PW2 in her cross examination stated that there was a monetary dispute between her family and the family of the accused Shahzade. She further stated that accused Noor Nabi and Shahzade's family had

taken Rs. 50,000/- from her mother against property documents of the accused persons. She next stated that the family of accused persons had not returned the money and the property documents were in possession of her mother. PW2 stated that when her mother asked them to repay the loan, her mother was beaten by the accused persons.

13. After careful analysis of testimonies of PW1 and PW2, it appears that there are innumerable and irreconcilable contradictions in their testimonies. The material contradictions and discrepancies on the following aspects are noteworthy which are as under:

- There is a difference in the version relating to the school uniform as deposed by PW1 and in the rukka.
- There is contradiction with respect to place where accused Shahzade left her after reaching Delhi.
- Contradiction as to who put the handkerchief on the face of the prosecutrix.
- Contradiction as to who showed knife to PW2 Suman.
- Contradiction as to who were present in the auto rickshaw.

14. Furthermore, the circumstances which belies the case of the prosecution and goes to the root of the case are pertinent to mention which are as under:

1. Factum of loan taken by the mother of the accused persons Shahzade and Noor Nabi:

All the accused persons in their statements under Section 313 of the Code of Criminal Procedure have mentioned about the loan advanced by the mother of the prosecutrix to the mother of the accused Shahzade against the original documents of the house property kept

with her as collateral security. They further stated that when they came to know that the mother of prosecutrix was planning to sell their house, the accused Noor Nabi (younger brother of Shahzade) went to enquire about the same. On reaching there, the mother of the prosecutrix threatened him and his family to falsely implicate them in a rape case. Pursuant thereto complaints vide DD No. 27B dated 03.09.2009 and DD No. 51B dated 31.08.2009 were lodged in P.S. Sangam Vihar by the accused persons. It is on record that the major amount of the loan was repaid to the mother of the prosecutrix vide Ex. PW5/DX1 to DX4. It is also relevant to mention here that the fact of this monetary dispute was well within the knowledge of PW1 and PW2 which can be gathered from their respective testimonies.

2.The unnatural conduct of PW2 Suman (younger sister of the prosecutrix)

It is not believable that PW2, sister of the prosecutrix took the kidnapping of her sister so casually that she neither tried to inform the school teachers nor made any effort to inform her parents. She narrated the story of kidnapping of her elder sister to her parents only after she went back to home from the school. Such a conduct makes the testimony of PW2 unreliable.

3. Non-mentioning of all the three accused persons in FIR

Being a girl of tender age, we may accept that PW2 under apprehension and fear did not disclose the kidnapping of her sister to anyone in the school. However, when she gave a vivid account of the alleged kidnapping to her mother, we fail to understand as to why the

names of the accused persons were not mentioned in the FIR lodged by the parents of the prosecutrix.

4. Kidnapping of PW1 by the accused persons

The prosecution story unfolds that the prosecutrix along with her sister went to return her father's shawl and walked up to 10 minutes from the school. We feel that it is unbelievable that the accused persons knew that both of them will come out of school and will walk upto 10 minutes to return the shawl. Again, it is admitted by PW1 and PW2 that there were few persons near the place where TSR was parked. But strangely, nobody witnessed the forcible kidnapping of PW1. More so, the prosecutrix in her cross examination had mentioned about the crowd in the train, ticket checker, food suppliers, waiters and vendors who were coming and going. In the above backdrop it is not possible that even though she had an opportunity, she did not raise an alarm. The prosecution has failed to give any explanation to fill these lacunas.

5. Taking of Transfer Certificate from the school on 24.12.2009

As per the prosecution, the prosecutrix was missing from 18.12.2009 to 06.01.2010. The prosecution has failed to explain as to how she went on 24.12.2009 to her school to get her Transfer Certificate and in case she had not gone but her parents had gone, it is controvertible as to why the parents had obtained the Transfer Certificate at a time when their daughter was missing.

6. Presence of PW1 on 06.01.2010 is disputed

The prosecutrix in her cross examination stated that on 06.01.2010 she reached Delhi at around 4.00 pm in an unconscious state and further

stated that she had not appeared in any Court or made any statement to the police. However, the evidence on record Ex. PW1/DA proves that on 06.01.2010 she was present in the Court of learned ASJ Ms. Poonam Bamba where the accused persons had applied for the anticipatory bail. This casts a shadow of doubt on the prosecution story.

7. Affair between the accused Shahzade and PW1

PW1 prosecutrix has admitted that she was having an affair with the accused Shahzade. This fact is further proven by the photographs on record in which she seems to be happy and comfortable.

8. Consent of the prosecutrix

It is contended by the counsel for the State that the trial court failed to appreciate the fact that the prosecutrix was a minor and her consent should not be taken into consideration to fasten criminal liability against the accused Shahzade. However, we are of the view that it is not necessary to deal with this question. It is evident that there are major inconsistencies and contradictions in the testimonies of material witnesses which failed to prove the case against the accused persons.

15. From the aforesaid evidence, it is apparent that the prosecution story with regard to involvement of respondents is doubtful and cannot be relied upon for convicting them for the offences they are charged with. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution which has to be proved beyond any shadow of doubt.
16. It is a cardinal principle in criminal jurisprudence that the presumption of innocence of the accused is reinforced by an order of the acquittal.

17. In ***Tota Singh and Anr. Vs. State of Punjab*** reported in ***AIR 1987 SC 108***, the Hon'ble Supreme Court made the following observation:

“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 it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous.”

18. In ***State of Rajasthan Vs. Raja Ram*** reported in ***AIR 2003 SC 3601*** the Hon'ble Supreme Court held as under:

“7. There is no emerge 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 no 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 re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The principle to be followed by 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, it is a compelling reason for interference.”

19. In ***Sudershan Kumar v. State of Himachal Pradesh 2014 (14) SCALE 276*** the Hon’ble Supreme Court reiterated the view taken by the Apex Court in ***Chandrappa and Ors. v. State of Karnataka*** reported in ***(2007) 4 SCC 415***, wherein it was held as under:

“(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of

innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

41. The following principles emerge from the cases above:

- 1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.*
- 2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.*
- 3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanor of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.*
- 4. 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.*

5. *If two reasonable or possible views can be reached-one that leads to acquittal, the other to conviction-the High Courts/appellate courts must rule in favour of the judgment of the trial court which would call for interference in the proceedings. Resultantly, we do not find any merit in the petition.”*

20. Keeping in view the above settled law, we find no illegality or infirmity in the judgment of the trial court impugned before us which would call for any interference. Accordingly, the leave to appeal is dismissed.

21. Trial Court Record be returned.

G. S. SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 1, 2016

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