

\$~4

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

%

Date of Decision: July 21, 2017

+

CRL.L.P. 137/2017 & CRL.M.A.4027/2017

GEETA SHARMA

..... Petitioner

Through: Mr.Manoj K.Mishra &
Mr.Umesh Dubey, Advocates

versus

STATE NCT OF DELHI & ANR

..... Respondents

Through: Ms.Kusum Dhalla, APP for the
State with W/ASI Kiran Sethi
PS Patel Nagar

PRATIBHA RANI, J. (Oral)

1. By way of this petition, petitioner is seeking leave to appeal against judgment and order of acquittal dated 21st March, 2016 passed by the learned Addl. Sessions Judge, Tis Hazari Courts, New Delhi in Sessions Case No. 16/16 arising out of FIR No.163/2015 registered at P.S. Patel Nagar. In the above noted case, respondent No.2, Saurabh Upadhyay was charged for committing the offence punishable under Sections 328/376 IPC.

2. Learned counsel for the petitioner has submitted that petitioner has made the statement before the learned Trial Court as she was persuaded to do so by the respondent No.2/accused and she has now also filed a criminal complaint against him under Sections 406/498-A IPC. Learned counsel for the petitioner has also relied upon one decision of Hon'ble Supreme Court reported as ***Bablu Kumar &***

Another Vs. State of Bihar & Another, (2015) 8 SCC 787 in support of his submissions urging this Court to ensure fair trial in the matter and justice to the petitioner who has been misled by the respondent No.2.

3. Learned counsel for the petitioner further submits that accused has also not been examined under Section 313 Cr.P.C.

4. The law with regard to the grant of leave is well settled by catena of judgments. Leave to appeal can be granted 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 High Court cannot entertain petition merely because another view is possible or that another view is more plausible. In *Arulvelu and Anr. Vs. State represented by the Public Prosecutor and Anr. 2009 (10) SCC 2006*, while referring with approval the earlier judgment in *Ghurey Lal vs. State of Uttar Pradesh, (2008) 10 SCC 450*, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an appeal against acquittal. The principles are:-

“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 appellant 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 demeanour 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 accused.

6. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either 'perverse' or wholly unsustainable in law."

5. Before the learned trial Court the statement of prosecutrix 'GS' (name withheld to disclose the identity) has been recorded which is to the following effect:-

"On SA

I know the accused Saurav Upadhyay since March, 2013 through Facebook. I can identify accused Saurav Upadhyay, if shown to me. At this stage the witness has seen the accused through screen and correctly identified him, who is present in the Court today. At that time the accused was preparing for second attempt to appear in Civil Services Examination. He had already been selected for IRS (Indian Revenue Services). At that time I was doing job at Noida as EOTA (Engineering Operation Technical Asstt.). We became friends for one month and then developed love. Thereafter, we started live in

relationship. Now I got married with him on 29.11.15. Today I have brought digital marriage certificate in the Court. The photocopy of the same is Ex.PW1/A. Our parents have also accepted our marriage. The complaint was lodged by me due to misunderstanding. Earlier our parents were not agreeable for our marriage and the accused was under training at Nagpur at that time. I lodged the complaint Ex.PW1/B at the PS, which bears my signatures at point A. I was taken to the hospital, where I refused for my internal examination. The MLC is Ex.PW1/C, which bears my signatures at point A. I was also produced before Ld. MM, where my statement u/s 164 Cr.P.C. was recorded.

At this stage, a sealed envelope sealed with the seal of SS is opened and proceedings u/s 164 Cr.P.C. are taken out. The statement u/s 164 Cr.P.C. is shown to the witness who identified her signatures at point A. The statement is Ex.PW1/D. The statement before Ld. MM was also given under misunderstanding and depression as it was recorded on the same day i.e. day of lodging the report.

The physical relations were made with the accused with my own consent. I do not want to pursue with the present case as I am living happily with the accused. I pray that the accused may be acquitted as he is innocent and did not commit any offence against me.

At this stage, Ld. Addl. PP for the State seeks permission to cross-examine the prosecutrix as she is resiling from her previous statement.

Heard. Allowed.

Xxxxxxxxxx by Ms.Madhu Arora, Ld. Addl.PP for the State

It is wrong to suggest that I did not lodge the complaint before the police and made the statement before Ld. MM due to misunderstanding and depression. It is wrong to suggest that I had given the alleged history at my own before the doctor at the time of my medical examination. It is wrong to suggest that I did not maintain physical relations with the accused at my own free will and consent. It is wrong to suggest that I had given a free statement before the police and before Ld. MM that I maintained physical relations at different placed with the accused on his promise to marry me. It is wrong to suggest that on 06-08/04/13 accused administered some drink to me with intent to facilitate the commission of offence of rape upon me. It is wrong to suggest that today I am deposing falsely being married with accused.

Xxxxxxxxxx by Ms.Tania Singh, Ld. Counsel for accused.

NIL. (opportunity given)

RO & AC

Sd/-

***ASJ (SFTC)-01, West, THC,
Delhi/21.03.16”***

6. The learned Trial Court vide judgment dated 21st March, 2016 acquitted the accused for the offences charged under Sections 328/376 IPC for the following reasons:-

“9. The prosecutrix, has not deposed an iota of evidence of her being raped by the accused. She has deposed that accused has not committed any offence against her and

nor deposed anything incriminating against the accused. She has deposed that she had physical relations with the accused with her free consent and accused had honoured his promise by marrying her. She has deposed that the accused is innocent and has also prayed that he may be acquitted.

10. In the circumstances, as PW1, the prosecutrix, who is the star witness has turned hostile and has not supported the prosecution case and more importantly has not assigned any criminal role to the accused not deposing anything incriminating against the accused. The precious Court time should not be wasted in recording the evidence of formal or official witnesses when the prosecutrix herself, the most material witness, as well as the complainant has not supported the prosecution case and is hostile.

11. Statement under section 313 of the Cr.P.C of the accused Saurav Upadhyay is dispensed with as there is nothing incriminating against him when the prosecutrix is hostile and nothing material has come forth in her cross examination by the prosecution.

12. In the light of the aforesaid nature of deposition of the prosecutrix, PW1, who happens to be the material witnesses, I am of the considered view that the case of the prosecution cannot be treated as trustworthy and reliable. Reliance can also be placed upon the judgment reported as Suraj Mal versus The State (Delhi Admn.), AIR 1979 S.C. 1408, wherein it has been observed by the Supreme Court as:

“Where witness make two inconsistent statements in their evidence either at one stage or at two

stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witness.”

13. Similar view was also taken in the judgment reported as Madari @ Dhiraj & Ors. v. State of Chhattisgarh, 2004(1) C.C. Cases 487.

14. Crucially, the materials and evident on the record do not bridge the gap between “may be true” and must be true” so essential for a Court to cross, while finding the guilt of an accused, particularly in cases where the prosecutrix has herself claimed that the accused is innocent and has not committed any offence.

15. Consequently, no inference can be drawn that accused Mr.Saurav Upadhayay is guilty of the charged offence under section 376/328 of the IPC. There is no material on record to show that accused Saurav Upadhayay since 06-08/04/2013 at different places (address mentioned in file and withheld to protect the identity of the prosecutrix), committed rape upon the prosecutrix several times on the pretext of marrying her and also threatened her.

16. From the above discussion, it is clear that the claim of the prosecution is neither reliable nor believable and is not trustworthy and the prosecution has failed to establish the offence of rape and threat. The evidence of the prosecutrix makes it highly improbable that such an incident ever took place. She has categorically deposed that she had physical relations with the accused with her free consent and accused had honoured his promise by marrying her.

17. Consequently, accused Mr. Saurav Upadhyay is hereby acquitted of the charge for the offence under section 376/328 of the IPC.”

7. It is not a case where on the date of her examination during trial by exercising some influence or pressure, she was persuaded to make a statement favouring the accused. Prior to that they had already approached the Court seeking quashing of FIR. The prosecutrix in this case is a matured lady who was aged about 27 years at the time of registration of FIR. She was having friendly relations with the respondent No.2 since the year 2013 and as per the FIR she had given consent to have physical intimacy on the promise of respondent No.2 to marry her.

8. Even during hearing of Crl.M.C.1824/2015 on 3rd August, 2015 she informed this Court that she is an adult aged about 27 years and the FIR was got registered by her under some misunderstanding and that she, in fact, wanted to marry the accused.

9. In the leave petition the factum of marriage on 29th November, 2015 between the parties is admitted. Thus, the petitioner cannot claim that she was misled to make a statement before the Court on 21st March, 2016 which led to the acquittal of the respondent No.2.

10. This Court had observed on number of occasions that the number of cases where both persons, out of their own will and choice, develop consensual physical relationship, when the relationship breaks due to some reason, the women use the law as a weapon for vengeance and personal vendetta. They tend to convert such

consensual acts as an incident of rape may be out of anger and frustration thereby defeating the very purpose of the provision. This requires a clear demarcation between the rape and consensual sex especially in the case where complaint is that consent was given on promise to marry.

11. The petitioner has annexed the copy of order dated 3rd August, 2015 passed by this Court in CrI.M.C.No.1824/2015 whereby prayer was made by the complainant & accused for quashing of FIR No.163/2015 PS Patel Nagar. The CrI.M.C.No.1824/2015 was dismissed by passing the following order:-

“This is a petition seeking quashing of the FIR No.163/2015 registered under Section 376 of the IPC at the behest of respondent No.2. Respondent No.2 is present. She is an adult stated to be 27 years of age. Her presence has been identified by the Investigating Officer. She states that she in fact wishes to marry the petitioner and the FIR has been got registered under a misunderstanding. She does not wish that any action should be taken against the petitioner. The petitioner is stated to be a Government servant.

In view of this factual matrix, the petitioner be not arrested till the time when the statement of the prosecutrix is recorded before the Sessions Judge.

Learned Public Prosecutor for the State under instructions from the Investigating Officer states that challan is almost ready and shall be filed positively within two weeks. The trial Judge will endeavour to record the statement of the prosecutrix as early as possible.

This Court is otherwise not inclined to entertain a quashing petition under Section 376 of IPC in view of the judgment of the Apex Court reported as 10 SCC 303 Gian Singh Vs. State of Punjab and Anr.,

With these directions, petition disposed of.

Order dasti under the signatures of the Court Master.”

12. Feeling aggrieved by the order dismissing the petition seeking quashing of FIR No.163/2015 PS PS Patel Nagar, SLP was filed before the Hon'ble Supreme Court which was also dismissed on 8th February, 2016. Thereafter, the petitioner was examined as PW-1 on 21st March, 2016 wherein she did not make any incriminating statement against the respondent No.2/accused. Since in a case under Section 376/328 IPC to prove the factum of alleged sexual assault, she is the only star witness and she preferred not to support the case of the prosecution, learned Trial Court was justified in closing the evidence and acquitting the accused/respondent No.2. There was no purpose to examine other witnesses which were either formal in nature or relating to their medical examination or part of investigation.

13. Since the prosecutrix did not support the case of the prosecution at all there was hardly any incriminating evidence which required examination of the accused/respondent No.2 under Section 313 Cr.P.C.

14. The petitioner is not able to show how in the facts of this case the decision of Hon'ble Supreme Court in **Bablu Kumar's case** (supra)

is applicable and requiring re-trial. On perusal of the LCR, it is revealed that it is a case where the parties not only got married on 29th November, 2015, they sought quashing of criminal case. During trial she did not make any incriminating statement against the respondent No.2/accused.

15. When testimony of the Prosecutrix is examined on the above settled principles on which the testimony of the Prosecutrix is to be tested, I am of the considered view that in the absence of any incriminating statement against the respondent No.2, the Court had hardly any option but to acquit him.

16. Having regard to the standard which the Courts are bound to follow while considering the petition for leave against the order of acquittal passed by the trial Court i.e. existence of substantial and compelling reasons, I am of the opinion that this is not an appropriate case for grant of leave to appeal.

17. The petition is, therefore, dismissed.

PRATIBHA RANI, J.

JULY 21, 2017

'pg'