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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: August 02, 2017

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CRL.L.P. 155/2017

AYESHA KHATOON

..... Petitioner

Through: Mr.Anirudh Yadav &
Mr.Ashok Ahlawat, Advocates

versus

STATE (GOVT. OF NCT OF DELHI) & ANR..... Respondents

Through: Mr.Kewal Singh Ahuja, APP
for the State

PRATIBHA RANI, J. (Oral)

1. The instant petition has been filed by the complainant/petitioner seeking leave to appeal against the judgment dated 9th December, 2016 passed by the learned Additional Sessions Judge whereby the respondent No.2/accused, Deepak Dahiya has been acquitted of the charges under Sections 376/328/506 IPC.

2. On the basis of allegations made by the complainant/petitioner in the complaint Ex.PW1/A, FIR No.316/2014 under Section 376/328/506 was registered at PS Mianwali Nagar. The accused/respondent No.2 was arrested and chargesheeted for the offences complained of.

3. As per the complaint Ex.PW1/A, on 1st May, 2014 at about 11 a.m., the prosecutrix was taken by the accused in auto from

Bahadurgarh towards G.T.Karnal Road by-pass Delhi. On the way, he offered Jal-Jeera containing some intoxicant to her. Thereafter the prosecutrix was taken to a secluded place where he raped her. At that time another friend of the accused was also present in the auto and he was sitting on the driving seat when the alleged offence was committed.

4. On respondent No.2 pleading not guilty to the charges, the prosecution examined eight witnesses. PW-1, the prosecutrix is the star witness. The accused himself appeared as a witness in his defence and also examined DW-1, Mr.Sunil, his cousin. The trial Court after appreciating the prosecution evidence especially the testimony of the prosecutrix, observed that in view of the material contradictions and variations in her version and improbability in the prosecution case, it was not safe to rely on her testimony without corroboration. Thus, the respondent No.2 was acquitted of the charges.

5. Learned counsel for the Leave Petitioner has submitted that learned Trial Court erred in disbelieving the testimony of the prosecutrix on the ground that she is Muslim and cannot go to Mandir for idol worship. She even does not know how to worship Shivaling. The prosecutrix stated that she is Muslim but she has faith in Hindu Gods and she used to go to Shiv Mandir at Bahadurgarh to offer prayers. It has also been contended that learned Trial Court has wrongly observed that the prosecutrix was left at the place where she wanted to go i.e. Nangloi whereas she was supposed to go G.T.Karnal Road and not to Nangloi where she was thrown. The learned Trial Court has rejected the testimony of the prosecutrix even in respect of

the site plan despite the fact that prosecutrix stated that she does not understand the site plan but she led the police to the place of occurrence. It has also been contended that since the prosecutrix was a married lady and mother of the two children hence absence of any injury on her private part was not fatal to the prosecution case. Even the CFSL report was not sufficient to acquit the accused for the reasons that semen stains could have been only on her underwear but at the time of production of case property though her salwar, shirt and bra were produced, but her underwear, was not produced.

6. Learned counsel for the leave petitioner has further contended that minor variations in the testimony of the prosecutrix have been given undue importance to extend the benefit of doubt to accused. Hence the order dated 9th December, 2016 acquitting him is liable to be set aside and leave to appeal may be granted to the petitioner.

7. Perusal of the judgment impugned shows that the learned Trial Court was conscious of the legal position that in the cases of sexual assault conviction can be based only on the testimony of the victim provided the evidence inspires confidence. The Trial Court observed that in this case the testimony of the prosecutrix contained major contradictions and that in the circumstance, it was unsafe to rely on her testimony without corroboration. The learned ASJ also observed that the prosecutrix's testimony was not even corroborated by the MLC which did not show any external or internal injury on the person of the prosecutrix though she was medically examined soon after the incident. The reasons given by the learned ASJ for disbelieving the testimony of the prosecutrix are as under:-

‘36. As per the testimony of prosecutrix, PW1 and PW-8/IO SI Sharmila, prosecutrix has given only the name of the accused as well as his mobile no. to the IO in her complaint. PW-4 HC Rajesh Kumar had stated that he had gone to Bahadurgarh and from Bahadurgarh he had received telephone call from the IO of the present case i.e. PW-8 to bring the “accused Deepak Dahiya son of Om Parkash resident of Bahadurgarh, Haryana” as he was wanted in the rape case which was being investigated by SI Sharmila. In the testimony PW-8, SI Sharmila has nowhere stated that prosecutrix was aware of the name of father of the accused or that she had carried out any investigation for knowing the name of father of the accused prior to the arrest of the accused. PW-4 HC Rajesh and PW-8 SI Sharmila and PW-1/prosecutrix have not been able to explain as to how the father’s name of accused was communicated to PW-4 HC Rajesh Kumar by the IO/SI Sharmila on 02.5.14 is very next day of the alleged incident or rape, whether it was disclosed by prosecutrix to the IO or not? This also raises doubt against the genuineness of the prosecution case and it also proves that accused has been falsely implicated at the behest of his family members, against whom, he is having property dispute pending. Otherwise there was no occasion for the IO to know the name of the father of the accused as Om Parkash Dahiya, as till date time neither accused was arrested nor complainant/prosecutrix had given the parentage of accused to IO.

37. Even otherwise, PW4 HC Rajesh had stated that he was present in Bahadurgarh for some investigation in another matter, where as PW-8 SI Sharmila had stated that police team had also gone to Bahadurgarh from PS Mianwali Nagar for investigation in this case, therefore she telephone HC Rajesh and told the registration no. of the auto and driver of the auto as Deepak Dahiya and asked him to search for the auto as well as driver. PW-8

has no where stated that she had disclosed the name of the father of the accused to PW-4 HC Rajesh Kumar and PW-8/SI Sharmila which has not been reconciled by the prosecution in any manner.'

8. There is no dispute about the proposition of law that the testimony of a prosecutrix can be acted upon without corroboration in material particulars. A victim of sexual assault stands on a higher pedestal than an injured witness, however, in the instant case in view of the wide variations in the testimony of the prosecutrix, the Trial Court rightly declined to believe her statement without any corroboration.

9. In the decision report as Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra, (2010) 13 SCC 657, the Hon'ble Supreme Court considered various aspects of dealing with a case of acquittal and after placing reliance upon earlier judgments of this Court particularly in Balak Ram & Anr. v. State of U.P., AIR 1974 SC 2165; Budh Singh & Ors. v. State of U.P., AIR 2006 SC 2500; S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors., AIR 2008 SC 2066; Arulvelu & Anr. v. State, (2009) 10 SCC 206; and Babu v. State of Kerala, (2010) 9 SCC 189, held that:

"22. It is a well-established principle of law, consistently re-iterated and followed by this Court is that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial Court had placed the burden of proof incorrectly or failed to take into

consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanor of the witnesses is the best judge of the credibility of the witnesses.

23. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration.

The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the Trial Court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.

24. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. A finding may also be said to be perverse if it is 'against the weight of evidence', or if the finding so outrageously defies logic as to suffer from the vice of irrationality."

Thus, unless there are substantial and compelling circumstances, the order of acquittal is not required to be reversed in appeal.

10. The prosecutrix in her cross-examination has been confronted with a photograph where she is seen with a person named Naveen. Her version in respect of said photograph is as under:-

“It is correct that I am visible in the photograph. The photograph is exhibited as Ex.PX-2 and I am visible at point A. I have seen the man wearing a green shirt who is visible in the photograph as Ex.PX-2 at point B. I do not know this man. I do not know whether or not his name is Mr.Naveen.

It is wrong to suggest that I have come to the Court with Mr.Naveen on 19.06.2014 at the time of filing of the charge-sheet and on 10.07.2014 at the time of the committal of the charge-sheet to this Court. It is wrong to suggest that I have falsely implicated the accused at the instance of Mr.Naveen who is visible at point B in the photograph Ex.PX-2. I have never talked to the man who is at point B in the photograph Ex.PX-2.

I am not aware that accused Deepak is complainant in a case at Sonapat i.e. FIR No.228/11 PS Kharkhoda under Section 307, 447, 148 IPC and father of the accused was injured in the said case by Mr.Naveen and others.

It is wrong to suggest that in order to pressurize accused and his father in FIR No.228/11 to settle the same, I have filed the present false case against the accused at the instance of Mr.Naveen.”

11. Learned Trial Court has noted the version of DW-1, another cousin of the accused wherein he has specifically stated about enmity between Naveen and the family of the accused Deepak Dahiya.

Even accused Deepak Dahiya has appeared in the witness box and proved the charge-sheet and another document pertaining to the criminal case under Section 307 IPC wherein Naveen, who is seen in photograph with the prosecutrix, is an accused. It is also relevant to mention here that despite the prosecutrix being examined immediately after the occurrence, no semen was detected either on her clothes or on the vaginal swab. Not only that, her version that her underwear was also seized is not supported by any documentary evidence like seizure memo. In the complaint Ex.PW1/A, the complainant has mentioned herself to be wife of Hafiz Nasim whereas in the copy of her Election I-Card, annexed with this petition as Annexure-A6, the name of her husband is mentioned as Riyaj. The prosecutrix has claimed that she had been living alone as her husband had left her after the death of their two children. However, the voter I.D. card placed as Annexure A-6 with this petition prepared on 10th September, 2013 records her husband name as Riyaj which could not have been there in case she has been divorced by Riyaj. Although the prosecutrix stated that she demanded water from the accused and he offered her Jal-Jeera and thereafter, she became unwell. She was medically examined just a few hours after the occurrence and at that time she was conscious and oriented and not suffering from any kind of dizziness. No stomach wash was taken or any treatment was given to her for any medical problem caused due to Jal-Jeera.

12. As per the version of the petitioner/prosecutrix, the auto in which she was raped, was having Haryana registration number and running on diesel. The incident is of 1st May, 2014 and auto running

on diesel are banned in Delhi. The TSR with registration number of Haryana having permit to ply only in Haryana could not have been hired by the complainant to travel from Bahadurgarh to G.T.Karnal Bypass, Delhi. Learned Trial Court has found the testimony of the prosecutrix to be wholly unreliable suffering from inconsistency and not supported by medical or scientific evidence and due to lack of corroboration on almost on all material aspects has acquitted the accused.

13. Since the leave petition does not disclose any merit, I am not inclined to grant leave to appeal. Accordingly, the leave petition is hereby dismissed.

PRATIBHA RANI, J.

AUGUST 02, 2017

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