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

DECIDED ON : 14th FEBRUARY, 2017

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CRL.A.568/2015

STATE

..... Appellant

Through : Mr.Amit Gupta, APP.

versus

ASHOK KUMAR & ANR.

..... Respondents

Through : Mr.Sanjay Aggarwal, Advocate for
R1.

Mr.T.N.Tyagi, Advocate for R2.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J. (Oral)

1. Instant appeal has been preferred by the State to challenge the legality and correctness of a judgment dated 20.04.2010 of learned Addl. Sessions Judge in Sessions Case No.57/08 emanating from FIR No.792/07 registered at PS Najafgarh by which the respondents – Ashok Kumar (hereinafter referred as ‘R-1’) and Sonia (hereinafter referred as ‘R-2’) were acquitted of the charges for committing offences punishable under Sections 363/366A/34 IPC; in addition R-1 was acquitted of the charge for committing offence punishable under Section 376 IPC.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 16.08.2007 at around 06.00 or 07.00 p.m. at Dichao Enclave, the respondents in furtherance of common intention kidnapped ‘X’ (Assumed name), a minor, out of lawful guardianship of her parents with an

intention that she might be forced to illicit intercourse with others. From 16.08.2007 to 26.08.2007 the victim was kept at R-2's residence where R-1 committed rape upon her.

3. After recording victim's statement (Ex.PW-1/A) on 02.09.2007, the Investigating Officer lodged First Information Report. 'X' was medically examined. Both the respondents were arrested and medically examined. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against both the respondents in the Court. In order to establish its case, the prosecution examined twelve witnesses. In 313 Cr.P.C. statements, the respondents denied their involvement in the crime and pleaded false implication. After considering the rival contentions of the parties and on appreciating the evidence, the Trial Court acquitted both the respondents of the charges mentioned previously. Being aggrieved and dissatisfied, the State has filed the instant appeal.

4. I have heard the learned counsel for the parties and have examined the file. On 16.08.2007 'X' had left her house, she did not return thereafter. On 25.08.2007 victim's father PW-2 (Ramesh Biliyam Dass) lodged report vide DD No.21 (Ex.PW-8/A) at Police Post S.B.Dairy, Police Station Bawana informing that his mentally retarded daughter 'X' aged around 16 years had left the house on 16.08.2007 at around 09.30 p.m. without informing them. She was searched at various places but could not be traced.

5. In her initial complaint (Ex.PW-1/A) recorded on 02.09.2007 forming basis of registration of FIR, the victim stated that on 16.08.2007, due to mental tension, she had left the house. When she reached at

Sagarpur, an individual aged around 40 – 45 years driving a motorcycle met her and on the pretext to drop her at her residence, took her to his shop at around 06.00 or 07.00 p.m. Thereafter, the said individual took her to Dichao Enclave at his friend R-2's house. R-2 told 'X' that she would have to indulge in physical relationship. 'X' further disclosed that thereafter R-1 committed rape upon her against her wishes. The said individual divulging his name as Ashok claimed himself to be owner of RCM. After committing rape, he left at 12.00 midnight. Thereafter, R-2 forced her to indulge in prostitution; it continued from 16.08.2007 to 26.08.2007. On 26.08.2007, finding an opportunity, she fled the spot and reached her house. She further disclosed that on Raksha Bandhan, when she was going to meet her friend, R-2 met her; forced her to sit in a TSR at Sector-17, Rohini and brought her to her house. Again, she was forced to indulge in prostitution. On 01.09.2007, she was present outside R-2's house owing to birthday of her son. When she was rebuked and abused by R-2 for not coming inside the house, she went to the Police Station and informed about the commission of rape and prostitution.

6. Apparently, the complainant had assigned a specific and definite role to each of the respondents in the crime; they were named in the complaint (Ex.PW-1/A). 'X' claimed that she remained at R-2's residence initially from 16.08.2007 to 26.08.2007.

7. In her Court statement as PW-1, 'X' deposed that in the year 2007, she was a student of Class Seven. On 16.08.2007 due to mental tension, she had left house to go to her Mausi's house and when she reached Sagarpur, R-1 who was driving a motorcycle met and promised to leave her at her house. R-1 enticed her to R-2's residence at village Dichau. During

night after committing rape upon her, R-1 left. R-2 after confining her in the room forced her to work as a prostitute. After sixteen days, she managed to escape and came to her house. On 28.08.2007, when she was going to her brother's house near Sector-17, Rohini on Raksha Bandhan, on the way, R-2 forcibly took her to her house in a TSR. She threatened to kill her and asked her not to disclose the incident to her parents. She also offered money to her. On 02.09.2007, she went to the Police Station Najafgarh but her complaint was not registered. She volunteered to add that one police official namely Krishna had slapped her at the Police Station. Her statement (Ex.PW-1/A) was recorded.

8. In the cross-examination, she disclosed that she had never visited Najafgarh prior to the incident. She came to know R-1's name from R-2 and he had visiting terms with her. She fairly admitted that earlier also, she was raped within the jurisdiction of PS R.K.Puram by an individual. She reiterated that during her stay for about sixteen days, R-2 did not allow her to leave the house. R-1 used to come to visit R-2's residence on alternate days; he had committed rape upon her two or three times and had also extended threat to her. After sixteen days, she escaped R-2's residence and went to Police Station Najafgarh. She narrated her ordeal to the police who called her father. Her father took her to Police Post Shahbad Dairy. She stayed there throughout the night with her father. Again she was brought back to Police Station Najafgarh where SI Nirmal recorded her statement. She remained at Police Station Najafgarh till the next day. R-1 was brought at the Police Station and was arrested. She further admitted that prior to lodging the instant FIR, she had lodged a complaint against a boy at Police Station Najafgarh. She volunteered to add that on that occasion, she had

gone to attend some classes where she was teased and had to lodge a complaint at Police Station Najafgarh. She denied if false cases used to be lodged by her. She denied that R-2 was implicated to extort money.

9. Before evaluating victim's statement, it is to be noted that she was aged around sixteen years on the day of occurrence. PW-12 (Subhash Chander) has produced her birth certificate (Ex.PW-12/A) showing her date of birth as 21.07.1991. The authenticity and genuineness of the birth certificate containing date of birth as 21.07.1991 remained unchallenged in the cross-examination.

10. It is to be noted further that 'X' was not mentally sound. The Investigating Agency had moved an application to record her 164 Cr.P.C. statement which could not be recorded due to her getting medical treatment at a mental hospital. PW-10 (WHC Anita) had gone to Institute of Human Behaviour and Allied Sciences, Shahdara, on 11.10.2007; there she met 'X' and her mother. On an application to record X's statement, she was declared 'unfit for making statement'. Medical papers made available by X's mother were seized vide seizure memo (Ex.PW-3/A). PW-11 (Dr.R.P.Beniwal) deposed that 'X' aged around fifteen years admitted at Department of Psychiatry, RML Hospital on 02.02.2006 was discharged on 14.03.2006. She was admitted second time on 07.04.2006 to be discharged on 28.04.2006. He proved her detailed report (Ex.PW-11/A). Victim's parents Ramesh Biliyam Dass and Munni in their deposition also informed that the victim was suffering from mental problem and was getting treatment at RML Hospital. Apparently, the child aged around sixteen years suffering from mental problem was exploited by many individuals forcing her to lodge various complaints.

11. On perusal of the statements recorded initially before the police and the one given before the Court, it can be inferred with certainty that victim 'X' was sexually assaulted by R-1. In both her versions, she attributed a specific and definite role to R-1 and identified him to be the perpetrator of the crime. Her testimony on this aspect has remained un rebutted in the cross-examination. The victim was not acquainted with R-1 prior to the incident and chanced to meet him unexpectedly on the way to Sagarpur. R-1 finding 'X' alone and a mentally retarded girl took her to R-2's residence on the false pretext to leave her at her house on the motorcycle. Instead of taking her to her parents' house, R-1 took her to R-2's residence and subsequently committed rape upon her. She was kept at R-2's residence from 16.08.2007 to 26.08.2007. During arguments, specific question was asked from the learned counsel for the respondents whether 'X' had remained at R-2's residence during that period. It was admitted that 'X' was at R-2's residence during this period. No plausible explanation has however been offered as to why a mentally challenged girl child aged around sixteen years who was away from her parents without any inkling to them was kept for so long at R-2's residence and why no information was given to the police or her parents. Nothing has come on record to show if during this period, any attempt was made by the respondents to contact X's parents. Contrary to that, she was sexually assaulted by R-1 and was pushed into prostitution at R-2's behest. In the absence of prior animosity or ill-will, 'X' was not expected to level serious allegations of rape and prostitution against the respondents. Nothing has surfaced on record if any time any money was attempted to be extorted from the respondents by 'X' or her parents. X's parents were not aware of her whereabouts after 16.08.2007. When they

failed to find her for number of days, finally on 25.08.2007, they lodged her 'missing person' report. Even at that time, they did not suspect respondents' involvement in the crime. No compelling and substantial reasons exist to discard the testimony of the prosecutrix and to disbelieve her. X's statement is to be examined as a whole to find out the truth.

12. Soon after lodging the FIR, 'X' was medically examined vide MLC (Ex.PW-7/A) on 02.09.2007 at around 07.10 p.m. Bruises / scratches / abrasions were found on her body. She was counselled by PW-4 (Sudhir Kumar Rai) who testified that on 02.09.2007, on receipt of a call from Police Station Najafgarh to have counselling with 'X', he had a talk with her in the presence of SI Nirmal Sharma. After having conversation, he prepared a report (Ex.PW-4/A); the complainant had informed him that she was sexually assaulted. He further deposed that after recognising 'X', he remembered that she was counselled previously also at Police Station R.K.Puram in a case registered there. Report (Ex.PW-4/A) records that her parents had expressed helplessness to look after 'X' due to her mental distress for which her treatment was going on.

13. X's statement has been corroborated in material particulars by PW-3 (Munni), her mother who confirmed that 'X' aged around 16 years was under treatment from RML Hospital for mental problems. 'X' was born in a hospital at Sarojini Nagar and her birth certificate was seized vide seizure memo (Ex.PW-3/A). In August, 2007, the exact date, she did not remember, she had left the house suddenly to go to her mausi's house. In the cross-examination, she denied if 'X' was aged around 20 years. She elaborated that 'X' came back at home after 16 days of the incident. Her husband had received a telephone call from Police Station Najafgarh about

her recovery at around 11.30 p.m. She had accompanied her husband to the Police Station to bring 'X' back at home and they all remained at Police Station for about 2 – 3 days. FIR was registered on 02.09.2007. She admitted that 2 or 3 more cases were pending in different Courts in which her daughter 'X' was the victim. One such case related to victim's sexual assault pending at Police Station R.K.Puram. She denied that false cases used to be lodged to extract money.

14. PW-2 (Ramesh Biliyam Dass) – victim's father also disclosed that 'X' was having mental problem due to head injury. On 16.08.2007 she had left the home to go to her mausi's house. On receiving a telephone call from Police Station Najafgarh about her daughter 'X's presence, he went there. Both the respondents were arrested by the police and their personal searches were conducted vide memos (Ex.PW-2/A to Ex.PW-2/D). In the cross-examination, he admitted that 'missing report' was lodged by him on 25.08.2007. 'X' returned to home on 01.09.2007.

15. On perusal of the statements of the victim's parents, it reveals that the prosecutrix remained 'missing' from her house for about 16 days and was brought by victim's parents from Police Station Najafgarh after getting information of her recovery. It lends credence to the victim's statement that after getting an opportunity to escape, she had gone to Police Station Najafgarh directly.

16. The respondents did not produce any credible evidence to infer their false implication. They did not explain as to how and under what circumstances, they were apprehended and identified by the victim. They did not deny X's presence at the house of respondent No.2. In 313 Cr.P.C. statement, R-2 merely alleged that a false case was lodged at the behest of

the complainant to blackmail her. She, however, did not elaborate as to how and in what manner, she was blackmailed by the complainant or her family members. Nothing has emerged on record to show if any time any illegal demand was made by X's parents from her. R-1 – Ashok Kumar took similar defence without producing any proof about blackmailing. Defence deserves outright rejection. The respondents did not produce any evidence in defence to falsify incriminating circumstances proved against them.

17. Well settled position is that conviction can be based on the sole testimony of the prosecutrix unless there are compelling reasons to look for corroboration. In the instant case, the victim was a mentally retarded child who was not aware of the consequence of the 'act'. Her innocence was exploited by many individuals and she had to lodge various cases from time to time. In the present case, she was exploited by R-1 who on allurement to take her to her home took her at R-2's residence and established physical relations without her consent.

18. During the course of arguments, it was urged that R-1 was member of RCM and the victim was being provided some training. No evidence has however surfaced to substantiate this defence. No document whatsoever has been filed to show any nexus between the respondents and RCM Company. Apart of it, R-1 had no business to impart any such 'training' to the minor without the consent and permission of her parents.

19. R-2 was privy to the crime. After 'X' was brought by R-1 at her residence, she did not raise any objection. She allowed the prosecutrix to stay in her house for number of days. During this period, she was sexually assaulted by R-1. She even pushed her into prostitution. She did not attempt to inform victim's parents or the concerned police station or any other

authority. The victim's innocence was exploited by her. The victim was not related or acquainted with R-1 and was stranger to both. Under these circumstances, R-2 was not expected to keep the victim at her residence after coming to know about her kidnapping by R-1 on the pretext to leave her at her house. Though initially she was not instrumental in X's kidnapping and it was the handiwork of R-1 who met all of a sudden to 'X', but, after she was brought at her residence, she (R-2) kept her in illegal detention and did not allow her to move outside. There is cogent evidence on record that she participated and supported the main accused i.e. R-1 in his nefarious design. X's presence inside the house for number of days without any justifiable reasons establishes her intention and knowledge prescribed under Section 366A IPC.

20. This Court is conscious that appeal against acquittal has always been altogether on different pedestal from that of appeal against conviction.

21. In a recent judgment '*Sadhu Saran Singh vs. State of Uttar Pradesh & Ors.*', 2016 (4) SCC 357, the Supreme Court held :

“18. Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. This Court, while

enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal, in the case of Sambasivan and Ors. v. State of Kerala : (1998) 5 SCC 412, has held:

The principles with regard to the scope of the powers of the appellate Court in an appeal against acquittal are well settled. The powers of the appellate Court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate Court cannot substitute its view in the place of that of the trial Court. It is only when the approach of the trial Court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate Court can interfere with the order of acquittal.

19. This Court, in several cases, has taken the consistent view that the appellate Court, while dealing with an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded. If the appellate Court, on scrutiny, finds that the decision of the Court below is based on erroneous views and against settled position of law, then the interference of the appellate Court with such an order is imperative.

20. This Court in Chandrappa v. State of Karnataka : (2007) 4 SCC 415, after referring to a catena of decisions, has laid down the following general principles with regard to powers of the appellate Court while dealing with an appeal against an order of acquittal:

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42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate Court while dealing with an appeal against an order of acquittal emerge:

(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 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.”

(Emphasis given)

22. The impugned judgment deserves to be set aside for the compelling and substantial reasons. The reasons which persuaded the Trial Court to acquit the respondents were trivial and based upon unreasonable view.

23. The Trial Court did not believe the prosecutrix as there was unexplained delay in lodging the FIR. I find no merit in it. In sexual offence cases, delay in lodging the FIR is not always fatal. It may occur due to variety of reasons. The prosecutrix remained confined at R-2's residence from 16.08.2007 to 31.08.2007. Finding an opportunity to escape, she immediately went to the Police Station but her FIR was not lodged. She even informed about 'slap' given to her by a police official namely Krishna. She was taken from one Police Station to the other before lodging the report on 02.09.2007. The delay in lodging the FIR has, thus, been duly explained. The prosecutrix was a mentally unstable girl and had dared to approach the police after getting an opportunity to escape from the spot. The police officials, subsequent to her approaching the police informed her parents about her recovery. X's father had lodged a missing report vide DD No.21 (Ex.PW-8/A) on 25.08.2007. There was no inordinate delay in lodging the FIR and victim's version cannot be suspected or ignored on that account. In '*Tulshidas Kanolkar vs. The State of Goa*', 2009 (8) SCC 590, the Supreme Court observed :

“.....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 first information report cannot be used as a ritualistic formula for discarding 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 a 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 prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle.”

24. The Trial Court fell in grave error to observe that the prosecution was unable to explain as to how and in what manner the respondents were arrested. It has come on record that the respondents were brought at the Police Station in the presence of the complainant and were identified by her. Failure of the Investigating Agency to conduct Test Identification Proceedings during investigation did not cause dent in X's statement / version. In her Court statement, both the respondents were identified without any hesitation by the victim. Moreover, it is not denied by the respondents that 'X' was not kept at the residence of R-2 for about

sixteen days. It hardly matters as to how and in what manner, the respondents were apprehended.

25. Trial Court did not trust the prosecutrix due to certain discrepancies and contradictions in her statements. It is well settled preposition of law that minor / insignificant discrepancies, contradictions and infirmities are of no consequence if these do not affect the core of the prosecution case. Trivial deviations in the cross-examination on some aspects do not efface her entire deposition and should not be a ground for throwing out an otherwise reliable prosecution case. If the testimony of the prosecutrix is consistent, worthy of credence and reliable, it requires no corroboration. In the instant case, testimony of the prosecutrix being cogent, reliable and credible is sufficient to base conviction. . 'X', a hapless girl belonged to poor strata of the society; she was illiterate and rustic witness. She was suffering from mental problem and was not expected to recapitulate all minute details of the incident. She was, however, categorical in her deposition before the Court that R-1 had committed rape upon her and R-2 kept her for sixteen days at her residence and pushed her into prostitution.

26. The Trial Court further observed that the prosecution was unable to prove if the victim was below sixteen years of age on the day of crime. Since the physical relationship with the victim was not with her free consent, her age in the episode was of no relevance.

27. Investigation carried out by the Investigating Agency is not up to the mark. Statement of the prosecutrix under Section 164 Cr.P.C. was not got recorded; the FIR was not lodged promptly and the victim was detained at the Police Station for long hours. She was shifted from one Police Station

to other. For remissness of the Investigating Agency, however, the statement of the prosecutrix cannot be discarded.

28. In the light of above discussion, the impugned judgment giving benefit of doubt to respondents cannot be sustained and is set aside.

29. R-1 is held guilty for committing offence punishable under Sections 366A/376 IPC; R-2 is convicted for commission of offence under Sections 366A/34 IPC.

30. Regarding sentence, crime committed by R-1 is horrible, he betrayed the trust of an innocent child. Instead of taking her to her residence to hand over her safe custody to her parents, he took her at the residence of his acquaintance (R-2) and committed sexual intercourse with her against her wishes. R-1 being a married man was aware of the consequences of his act. He deserves no leniency and is sentenced to undergo RI for seven years with fine ₹5,000/- under Section 376 IPC; default sentence being SI for one month; to undergo RI for five years with fine ₹5,000/- under Section 366A IPC; default sentence being SI for one month.

31. R-2 was also a married lady and had a child. She not only kept the minor girl at her residence for number of days but also pushed her into prostitution. She is sentenced to undergo RI for five years with fine ₹5,000/- under Section 366A; default sentence being SI for one month.

32. Sentences shall operate concurrently. The convicts shall have the benefit under Section 428 Cr.P.C. and the period already undergone by them in custody shall be counted and set off against substantive sentence.

33. The respondents shall surrender before the Trial Court to serve out the remaining period of sentence on 27th February, 2017.

34. Reasonable compensation, as per rules, shall be given to the complainant by the Delhi State Legal Services Authority at the earliest.
35. The appeal is allowed in the above terms. Trial Court record be sent back forthwith with the copy of the order.
36. Copy of the judgment be sent to Delhi State Legal Services Authority for information and compliance.
37. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

FEBRUARY 14, 2017 / tr

