

\$~12

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

CRL.L.P. 381/2017

STATE GOVT OF NCT OF DELHI

..... Petitioner

Through: Mr. Rajat Katyal, Additional Public
Prosecutor for the State with
Inspector Daya Sagar, SHO Sonia
Vihar, Delhi, Inspector Mithlesh
CAW Cell, North East, Sub-Inspector
Subhash, Police Station Sonia Vihar
and Sub-Inspector Manu Dev, Police
Station Amar Colony, Delhi.

versus

KAPIL

..... Respondent

Through: Mr. Sunil Kumar, Advocate with
respondent in person.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

30.10.2017

%

P.S. TEJI, J.

**Crl. M.A. No. 10825/2017 (Condonation of delay of 37 days in
filing the leave petition)**

1. The State has filed the application under Section 5 of the Limitation Act read with Section 482 of Cr. P.C. for seeking condonation of delay of 37 days in preferring the accompanying leave petition to challenge the impugned judgment dated 23.02.2017 passed by learned Additional Session Judge (North-East)-01, Karkardooma Courts, Delhi in S.C. No.44735/2015 in case FIR No. 112/2012, registered under Section 363/376/328/342 of IPC at Police Station Sonia Vihar, Delhi.

2. In the application for condonation of delay, it has been submitted that the judgment was delivered on 23.02.2017 but the certified copy of the judgment was applied on 09.03.2017 and the same was delivered on 15.03.2017. The file was sent to the Lt. Governor seeking permission to file the appeal on 04.03.2017 which was assigned on 27.04.2017 to Directorate of Prosecution and then the case was received in the office of Standing Counsel on 08.05.2017 and ultimately the matter was entrusted to Additional Public Prosecutor on 11.05.2017.

3. Argument submitted by the learned Additional Public Prosecutor for the State is that there is a cumbersome procedure to process the matter for filing the leave to appeal and it is formulated after the opinion of the legal experts and the opinion formed by various officers, as a result the present appeal could not be filed within the prescribed time and the same caused a delay of 37 days. He has referred to a judgment of Hon'ble Supreme Court in case of ***State of Nagaland v. Lipok AO and others* 2005 (3) SCC 752**

4. Keeping in view the explanation and the law laid down in case of ***State of Nagaland v. Lipok AO and others*** (supra), this Court is of the opinion that the object of the judicial system is to provide justice. The present case is involving the offences under Section 363/372/328/342 IPC. The delay is substantial. Consequently, the application for condonation of delay is allowed and the delay in filing the application for the grant of leave is hereby condoned.

Cr.L.P. 381/2017

5. The present application has been filed by the State under Section 378(1)(a) of the Cr.P.C. seeking leave to appeal against the judgment dated 23.02.2017 passed by the Court below.

6. Leave to appeal has been sought by the State feeling dissatisfied by the judgment of acquittal delivered by the Court below. It has been submitted that the trial court erred in observing that there is no cogent evidence on record to corroborate the allegations of rape; that the place of incident could not be identified through all the witnesses; that there are considerable inconsistencies and discrepancies in the statements of the victim qua the incident of rape; that contradictory version was given by two set of witnesses making their testimony unreliable and unworthy of credence. It is further submitted that the medical report clearly shows that the hymen of the victim was torn with fresh bleeding and the history given by the victim before the doctor was well connected with the version of the victim. It was further submitted that the recovery of victim from the jhuggi of accused proves the taking away of the minor by the accused. There is enough evidence on record to prove the factum of rape and kidnapping of victim by the accused.

7. As per FIR of the instant case, the allegations levelled are that on 21.08.2012, complainant Hukum Singh lodged a missing report of his daughter/victim aged about 12 years to the police which was converted into an FIR. On 22.08.2012, the victim was produced

before the police by the complainant with the allegations that she was abducted by accused Kapil. Accused was apprehended and thereafter arrested. It was alleged by the victim that she was kidnapped by the accused along with his associates after she was made to inhale something. It was also alleged that the accused had committed rape upon her.

8. After completion of investigation, charge sheet was filed in the Court. Charge under Section 363/328/342/376 IPC was framed against the accused to which he pleaded not guilty. To prove its case, the prosecution examined 19 witnesses, namely, Hukum Chand (PW1), victim (PW2), Ct.Sandeep (PW3), Ct.Chahak Singh (PW4), Ct.Surender Singh (PW5), Kamlesh (PW6), Shri Ram @ Ramu (PW7), HC Jai Prakash (PW8), Sh.Brijesh Kumar (PW9), Ms.Rajeshwari Varshney (PW10), Ct.Aarti (PW11), HC Reena (PW12), SI Manu Dev (PW13), Ct.Jitender Sigh (PW14), SI Mithlesh (PW15), SI Subhash Chand (PW16), Dr.Sushma Kumari (PW17), ASI Naresh (PW18) and Dr.Priya Sinha (PW19).

9. The main witnesses examined by the prosecution to prove the guilt of the accused were the victim herself (PW2), her father (PW1) and the doctors PW17 and PW19. A perusal of the testimony of the victim (PW2) shows that it is full of discrepancies and inconsistencies. She had stated that accused met her at 5th Pushta, Sonia Vihar and asked her to accompany him but on her refusal, he made her to inhale something. In the statement Ex.PW2/B, she had given a different version that the accused had forcibly put her in an

auto and then made her to inhale something. In her statement recorded under Section 164 Cr.P.C., she gave a different version stating that when she had left for her tuitions, accused and his friends came there, picked her up and put her in a rickshaw, shut her mouth and made her to inhale something. During her cross-examination, she stated that she had not seen the accused with any spray or cloth in his hand. It has come in the testimony of the victim that there was traffic movement at the place from where she was allegedly kidnapped by the accused. The place of incident being a public place and also congested with traffic, was not a conducive place for the accused to pick up the victim or put her in a rickshaw or make her to inhale something or forcibly put her in an auto.

10. Another glaring discrepancy in the testimony of the victim (PW2) is that in her statement Ex.PW2/B she had stated that she regained her senses at Azadpur, but in her deposition before the Court she did not depose the place where at she came back to her senses. The victim was declared hostile by the prosecution as she did not support the case of the prosecution.

11. Apart from the distorted testimony of the victim (PW2), testimony of PW1-Hukum Chand, father of the victim shows that it is also of no consequence. PW1 had stated that on the day of the alleged incident, the victim had gone for tuitions but did not return to her house, whereupon he searched for the victim, but to no avail, following which on the next day he reported the matter to the police. He further stated that on the day of registration of the case, he

received a phone call from the victim on the mobile phone of his son who told him that she was confined at a place and then the phone got disconnected. At that time, his son and brother-in-law of the accused were present in his house and he called the PCR who advised him to contact the concerned police station. As per his version, brother-in-law of the accused had redialled the number and scolded the person on the other side and asked him to leave the victim at the house of the complainant. Thereafter, PW1 along with brother-in-law of accused and some other persons went to the house of the accused at Azadpur and on the way, they saw the mother of the accused coming along with the victim and accused.

12. PW1 was declared hostile by the prosecution and was cross-examined by the learned Addl. PP for the State during which he stated that the victim had not disclosed the place where she was confined, nor disclosed the name of the person who had confined her. He denied that the victim disclosed the said place either as the jhuggi, or the name of the accused.

13. Perusal of the above mentioned testimony of victim (PW2) and her father (PW1) show that they are replete with contradictions and discrepancies. The medical examination of the victim also did not establish the case of the prosecution. Dr. Priya Sinha (PW19) had proved the report of the victim as Ex. PW19/A. PW19 had stated that there were no signs of external injury on the person of the victim. Though she stated that the hymen of the victim was torn and there was bleeding, she admitted that it was not

mentioned whether it was a fresh or an old tear, nor was it mentioned whether the victim had any menses.

14. The FSL report Ex.PW13/A shows that DNA profile was generated from the blood sample of the victim and the accused. It was recorded in the report that a comparison of DNA profile could not be made due to the non-availability of the DNA profile from the source of exhibits of the victim, as semen could not be detected on the source of exhibits of the victim, which makes the case of the prosecution doubtful to substantiate that any rape was committed upon the victim by the accused.

15. In ***Atender Yadav vs State Govt Of Nct Of Delhi 2013 (4) JCC 2962***, it was observed that :

“It is true that in a case of rape, the evidence of the prosecutrix must be given pre-dominant consideration and in certain cases even without any corroboration, testimony of the prosecutrix should be given due credence and weightage as in all the rape cases the prosecutrix suffer a great stress, trauma, humiliation and due to this factor alone many cases of rape are not even reported by the victims. However, at the same time, it cannot be denied that false allegation of rape can cause equal damage, humiliation, embarrassment, harassment, disgrace and agony to the accused as well”

In the case of ***Tameezuddin @ Tammu vs. State of (NCT) of Delhi (2009) 15 SCC 566***, the Hon’ble Apex Court held as under:

“It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable.”

16. It also appears to us that the investigation in this case was not conducted meticulously. It came up in the statement of the victim recorded under Section 161 of Cr.P.C. that she had made a call from the mobile phone of the accused to the mobile phone of her brother, after she had been kidnapped. Despite this statement being made by her, no efforts were made to obtain the call details either of the accused, or the brother of the victim to pinpoint the location wherefrom the call was made, if at all it was made. If the same had been done, it would have been relevant, at least, in respect of the offence under Section 363 IPC.

17. In view of the aforesaid circumstances, we are not inclined to interfere with the impugned judgment. Therefore, the present leave petition filed by the state is dismissed.

P.S. TEJI, J

VIPIN SANGHI, J

OCTOBER 30, 2017/pkb