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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of hearing and order: December 7, 2017.

+ CRL.L.P. 700/2017
THE STATE GOVT OF NCT OF DELHI

..... Petitioner
Through: Ms. Aashaa Tiwari, Additional Public
Prosecutor for the State with Inspector
Balbir Singh, Police Station Vijay
Vihar, Delhi

versus

HARI KISHAN @ BUNTY & ORS

..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P.S.TEJI
ORDER

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VIPIN SANGHI, J. (Oral)

Crl. M.A. No. 20190/2017 (Exemption)

Exemption is allowed subject to all just exceptions.

Application stands disposed of.

**Crl. M.A. No. 20189/2017 (Condonation of delay of 86 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 86 days in preferring the accompanying leave

petition to challenge the impugned judgment dated 13.04.2017 rendered by the learned Additional Sessions Judge in Sessions Case No.19/2015 titled as *State vs. Hari Kishan @ Bunt and 3 others*, arising out of FIR No.121/2013 registered at Police Station Vijay Vihar, Delhi.

2. In the application for condonation of delay, it has been submitted that the judgment was delivered on 29.05.2017 but the appellant could not prefer the leave petition within the stipulated period as the file pertaining to the case was sent to the various authorities and after passing through various channels, the file-alongwith the opinion regarding the case being fit for appeal, was sent to the Department of Law Justice and Legal Affairs. The chief prosecutor gave his opinion to challenge the impugned judgment on 13.04.2017, which was forwarded to Director of Prosecution, who forwarded the same on 07.11.2017 to the Office of Ld. Standing Counsel on 10.11.2017. Thereafter, the petition got signed and received in the office of Additional Public Prosecutor for the State on 27.11.2017 and the appeal was filed on 28.11.2017. According to the learned Additional Public Prosecutor for the State, the delay of 86 days in filing the appeal was not deliberate or intentional but it was due to procedural aspects. It has been submitted that the appeal filed by the State that the refusal to condone the delay can result in meritorious matter being defeated. It is further contended that when substantial justice and technical considerations are pitted against each other, cause of justice deserves to be preferred for the other side

cannot claim to have vested right in injustice being done because of non-deliberate delay. In support of his contention the State has relied on the decision in the case of ***Collector Land Acquisition vs. Katiji, 1987 (2) SCC 107; State of Nagaland vs. Lipok AO, 2005 (3) SCC 752.***

3. Keeping in view the explanation and the law as laid down in the case of ***State of Nagaland v. Lipok AO and others***(supra), this Court would have issued notice on this application to the respondent, but for the fact that, on merits, after hearing learned Additional Public Prosecutor for the State and perusing the record, we are not inclined to interfere with the impugned judgment.

Crl. L.P. No. 700/2017

4. The present leave petition has been filed by the State under Section 378 of the Cr.P.C. seeking leave to appeal against the judgment dated 13.04.2017 passed by the Court below.

5. Leave to appeal has been sought by the State feeling dissatisfied by the judgment of acquittal delivered by the Court below.

6. The case in brief is that on 12.02.2013, prosecutrix had met accused Rehana (respondent No. 4 herein) at Golaghat Station, whom she knew previously, as she had lived as a tenant in her house. She asked the prosecutrix at Golaghat Railway station as to where she was going to which the prosecutrix replied that she was going to Guwahati for an interview, whereupon respondent No. 4 told her that she was

also going there for some official work. Prosecutrix and respondent No. 4 boarded the same train and sat on the same berth. Co-accused Mukesh, husband of the accused Rehana was also accompanying her and after reaching Guwahati Railway Station on 13.03.2013 at 4.00 AM, accused Rehana got the prosecutrix introduced to accused Shabnam by telling that she is her sister. Prosecutrix wanted to make telephone call to her elder sister Farha from PCO who resided at Hidayatpur Guwahati, but Rehana tore the paper on which phone number of her sister was written. Since the prosecutrix did not remember the phone number of her sister, therefore she could not make the call. Accused Rehana told the prosecutrix that she would drop her at Hengrawari and would thereafter go for her own work and the prosecutrix believing her remained with them.

7. The further prosecution story is that accused Shabnam told the prosecutrix that she wanted a courageous girl like her as a caretaker for her children at a monthly salary of Rs.2,500/- to which prosecutrix agreed as having been in urgent need. Thereafter, accused Rehana, her husband co-accused Mukesh, and Shabnam alongwith prosecutrix came to Delhi by train. They kept the prosecutrix at Delhi in the house of one Aslam, and husband of accused Rehana, i.e., accused Mukesh forcibly committed rape upon her. Thereafter, accused - Bunty also committed rape upon her. It is also the case of the prosecution that they poured kerosene oil over her and threatened to burn her and gave her several beatings. Thereafter, all the accused persons started bringing customers and forced her for prostitution. They used to take

money from the customers. The prosecutrix was not permitted to go anywhere.

8. Statement of the prosecutrix under Section 164 of Cr.P.C. was recorded on 06.03.2013 in which she reiterated these averments. She stated in her statement that-the day before, the accused had brought four customers, out of which three had committed rape upon her and one had asked her name and her address and police reached the spot after an hour. Thereafter, law set into motion, vide DD No.70B dated 05.03.2013; FIR was registered at Police Station Vijay Vihar; Sub-Inspector Gajender went to the spot and the prosecutrix was taken to hospital for medical examination. Accused Hari Kishan was arrested at the spot, and the other accused Rehana and Mukesh were arrested from Golaghat, Assam.

9. After completion of investigation, charge sheet was filed in the Court. Charge under Section 344/365/368/120B of IPC and Section 4, 5, and 6 of the Immoral Traffic (Prevention) Act, 1956 were framed against all the accused. However, charge under Section 376D was framed against accused Hari Kishan @ Buntty and Mukesh and the accused Rehana and Shabnam @ Jannatul Ferdus. All the accused persons pleaded not guilty and claimed trial. To prove the case of the prosecution, in all 24 witnesses were examined. They are; Constable Ranjeet Singh (PW-1), Dr. Deepti Bhalla (PW-2), WCT. Sandhya Rani (PW-3), Constable Tara Chand (PW-4), Constable Narender (PW-5), Head Constable Rakesh Kumar (PW-6), Dr. Nitika Gupta (PW-7), H.C. Chandermohan (PW-8), Constable Vikram Kumar (PW-

9), Constable Yogendra (PW-10), Constable Om Prakash (PW-11), Dr. Kaustuv Kiran (PW-12), Inspector Ajay Kumar Singh (PW-13), Learned MM (PW-14) who recorded the statement under Section 164 of Cr.P.C., Ms. L. Babyto Devi (PW-15), WCT. Roshni (PW-16), Ct. Neelam (PW-17), Aslam Ali (PW-18), prosecutrix (PW-19), Dr. Vijay Dhankar (PW-20), HC Narender Kumar (PW-21), SI Gajender (PW-22), SI Sunita (PW-23) and Constable Dinesh Kumar (PW-24).

10. After hearing the case and considering the depositions, the learned trial court has acquitted all the respondents/accused persons vide impugned judgment against which the State has preferred the instant leave petition seeking leave to appeal against the impugned judgment.

11. The grounds taken by the State to challenge the impugned judgment are that one gentleman who came forward and helped the prosecutrix wanted to hide his identity and therefore, the Investigating Officer chose not to examine him and cite him as prosecution witness, which proved the missing link in the prosecution case. It is contended that the prosecutrix in her statement has herself stated that the accused had forcefully tied her and committed rape on her against her wish. Thus, there was no consent given by the prosecutrix to establish several relationship with any of the accused. It was also contended that the prosecutrix was forced into the prostitution against her wishes, and accused persons tied her hands, legs and mouth and also gave beatings, cut marks, cutting on her body after she refused the accused persons to do such work. Allegations of pouring kerosene oil on the

prosecutrix and threat of killing her were also leveled, in case she did not submit to their dictates. It is further contended that the prosecutrix has deposed that the customers were sent into the room where she was kept, which was locked from outside and the accused remained present by sitting outside the room. It is contended that the statement of the prosecutrix alone is sufficient to prove the guilt of the accused, and no corroboration is required, unless there are compelling reasons. The evidence of a victim of sexual assault stands almost at par with evidence of an injured witness and, to an extent, is even more reliable.

12. We have heard the submissions of Ms.Aashaa Tiwari, learned Additional Public Prosecutor for the State and gone through the contents of the appeal as well as the impugned judgment.

13. A perusal of the testimonies of PW-15, who is the FSL expert and conducted the examination of exhibits and gave a detailed report shows that semen was not detected on Ex.1a to 1l, which are vaginal swab, cervical mucus collection, underwear, brassier, breast swab, swab in between finger, body fluid swab, rectal swab, oral swab, culture swab, pubic hair and matted pubic hair respectively. The testimony of doctor (PW-7), who medically examined the prosecutrix, shows that there were no sign of external injury at the time of examination of the prosecutrix. It was further reported that on local examination: labia minora and majora looked normal. The doctor also deposed that Hymen was torn, no bleeding p/v. There were no rectal injuries, external anal sphincter was normal, genital was normal, and pubic hair was normal. The medical examination was done and

samples for forensic examination proximate to the point of time when the prosecutrix claimed to have been raped by customers.

14. The impugned judgment notices that there was no missing report lodged in respect of the prosecutrix at Assam, despite the prosecution case being that she was missing for almost 18 days. No witness or the customer pertaining to the acts was apprehended by the police or brought on record. In fact, no statement of neighbor or landlord was recorded for the purpose of confirming the prosecution case. Shri Aslam Ali (PW-18) who was the owner of the premises, even he did not deposed about the prosecutrix staying there, or public persons usually coming or going from there.

15. This court further observes that SI Ravi-who was present at the spot, was not examined and there was no clarity as to the mobile No.8744041277 as to whom it belonged. Even no articles were seized from C-59, Avantika despite the fact that it was the case of surprise raid within one hour of going out of four persons on 05.03.2013 when, allegedly three of those persons had forcibly established physical relations with prosecutrix. The learned trial court also recorded that it was not clear at all as to when police reached the spot for the first time; who opened the door; what was the position inside; how many rooms were there; in which room prosecutrix was found; how many persons were present there, and; whether prosecutrix was found locked in any room. The brother of prosecutrix was also not examined.

16. For proving the case under Section 376, the following judgment would be a guiding factor to reach the conclusion:

In ***Atender Yadav vs State Govt Of Nct Of Delhi*** 2013 (4) JCC 2962, the Court 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 Supreme 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.”

17. From a careful reading of the impugned judgment and the deposition of the material witnesses, including the testimony of prosecution witnesses, we find that the trial Court had given clear,

cogent and convincing reasons for disbelieving the testimony of the prosecutrix, and we are not inclined to interfere the reasoning given by the learned Trial Court.

18. In view of the aforesaid discussion and in the facts and circumstances of this case, we are not inclined to grant leave to appeal to the petitioner – State. Consequently, the present petition for seeking leave to appeal filed by the State is dismissed.

VIPIN SANGHI, J

P.S. TEJI, J

DECEMBER 07, 2017

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