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

+ CRL.L.P. 549/2019

STATE (GOVT. OF NCT OF DELHI) Petitioner
Through Mr. Rajat Katyal, APP for State with
SI Ranvir Singh, P.S.: Roop Nagar.

versus

MAYANK KARDAM Respondents
Through None.

% Date of Decision: 22nd October, 2019

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J: (Oral)

CRL. M.A. 37685/2019 (exemption)

Allowed, subject to just exceptions.

CRL. M.A. 37684/2019 (condonation of delay)

Keeping in view the averments in the application, the delay in filing the leave petition is condoned.

Accordingly, the application stands disposed of.

CRL.L.P. 549/2019

1. Present criminal leave petition has been filed on behalf of the State challenging the judgment and order of acquittal dated 27th April, 2019

passed by Additional Sessions Judge-01 (POCSO), Central Delhi arising out of FIR No.327/2015 registered with Police Station Roop Nagar.

2. The Trial Court in the impugned judgment while acquitting the respondent-accused under Sections 376(2)(i) and 376 (2)(n) IPC and Section 6 of the POCSO Act has held as under:-

“ 29.the victim in her statement recorded under Section 164 Cr. P.C. did not allege any sexual assault by the accused and infact stated that the accused had not done any wrong act with her. She also denied that the complaint Ex. PW3/A was written at her instance and stated that the same was written by the police and she and her mother only signed the same and she had not even read the contents of the said complaint.

30. Pertinently, in her testimony recorded before the Court, the Victim has supported the allegations made in her complaint and deposed that she did not give a correct statement before the Ld. MM as the parents of the accused had assured her that they would get her married with the accused. She also stated that the Ld. MM recorded the same statement which she had given.

31. It is noteworthy that the victim also deposed that she did not meet the parents of the accused or the accused himself between the period intervening the registration of the FIR on 03.06.2015 and recording of her statement before the Ld. M.M. under Section 164 Cr.P.C. Ex. PW3/B on 06.06.2015 and she volunteered that she was asked by the previous Advocate to give a wrong statement to the Ld. MM.

32. Another relevant factor to be considered is that the victim at the time of her medical examination Ex. PW15/A stated that she established physical relations with the accused out of her own free will. However, she refused for her internal medical examination. The victim was again medically examined vide Ex. PW8/A and she again stated that she established physical relations with the accused willingly and was not physically assaulted by him. She again refused her internal medical examination.

33.As regards, the fact that she did not tell the Doctor about being raped by the accused forcibly, the Victim stated that the

family of the accused told her that the accused would be sent to jail if she stated so. Significantly, the victim also deposed that she did not meet the parents of the accused in the period intervening between the registration of the FIR and recording of her statement under Section 164 Cr.P.C. The medical examination of the victim was also conducted on 04.06.2015 during the intervening period itself. Significantly, the victim also deposed that the accused had assured her that he would marry her and therefore she did not tell the doctor that the accused had established physical relations with her forcibly.

34. From the aforesaid, it is revealed that the victim has given different accounts as regards accused establishing physical relations with her. At one stage i.e. in her complaint Ex. PW3/A and her testimony recorded before the court, the victim has stated that the accused established physical relations with her forcibly or on the pretext of marriage. At the time of her medical examination, she stated that she established physical relations with the accused willingly, whereas in her statement recorded by the Ld. M.M. under Section 164 Cr. P.C. Ex. PW3/B, the victim has given yet another account and stated that no physical relations were established between her and the accused.”

3. Mr. Rajat Katyal, learned APP for State contends that the Trial Court has failed to appreciate that the prosecutrix (PW-3) was aged about 12 years at the time of the first incident. He further states that the Trial Court completely ignored the fact that the testimony of the prosecutrix (PW-3) is consistent, cogent and reliable as she had explained the reasons due to which she had changed her statement recorded under Section 164 Cr.P.C.

4. He submits that the Trial Court failed to appreciate that there is a presumption under Sections 29 and 30 of POCSO Act against the respondent-accused and it is for the respondent-accused to prove to the contrary.

5. Having heard the learned APP for State, this Court is of the view that it is essential first to outline the relevant facts of the present case.

6. In the present case, a complaint dated 3rd June, 2015 was lodged with police station Roop Nagar by the prosecutrix (PW-3) stating that she had known the respondent-accused for two years prior to the lodging of the FIR and that the respondent-accused had established physical relations with her repeatedly despite her refusal. She also alleged that the respondent-accused had continued to establish physical relations on the pretext of marriage. The prosecutrix (PW-3) had stated that the respondent-accused had relations with her for the last time on 4th May 2015 and subsequently, he ran away from his house on 10th May 2015. The prosecutrix (PW-3) had further stated that whenever she went to the house of the respondent-accused to enquire about him, his parents would ask her to go away. In pursuance to the said complaint, FIR No. 327/2015 dated 3rd June 2015 was registered under Section 376 IPC and Section 6 POCSO.

7. Perusal of the impugned judgment reveals that the prosecutrix (PW-3) had given contradictory statements regarding the respondent-accused sexually assaulting her. In her complaint, the prosecutrix (PW-3) had stated that the respondent-accused established physical relations with her forcibly on the pretext of marriage. The prosecutrix (PW-3) had also supported the allegations made in her complaint in her testimony recorded before the Trial Court.

8. However, in her statement to the Metropolitan Magistrate recorded under Section 164 Cr.P.C., the prosecutrix (PW-3) had given a different account of the events and did not support the allegations made in her complaint. In fact, to the contrary, she stated that the respondent-accused

did not have any sexual relations with her and completely absolved the respondent-accused of the offence that he had been charged with. She had also stated in her Section 164 Cr.P.C. statement that on 3rd June 2015 she went to the Police Station with her mother because her exams were to be held in July and the respondent-accused who used to help her in her studies was not coming for tuitions for the past one month and she wanted the police to admonish him.

9. Further, the prosecutrix (PW-3) had refused internal medical examination twice and at the time of both her medical examinations she stated that she had established physical relations with the respondent-accused willingly. The FIR was lodged on 3rd June 2015, the medical examination of the prosecutrix (PW-3) was conducted on 4th June 2015 and the statement under Section 164 Cr.P.C. was recorded on 6th June 2015. Thus, the medical examination of the prosecutrix (PW-3) was conducted in the intervening period between registration of the FIR and the recording of the statement under Section 164 Cr.P.C.

10. Subsequently, the prosecutrix (PW-3) in her testimony before the Trial Court stated that she did not give the correct statement under Section 164 Cr.P.C. as the parents of the respondent-accused had assured her that they would get her married with the respondent-accused. It is pertinent to mention that the prosecutrix (PW-3) had deposed in her testimony that she did not tell the doctor that she had been raped as a family member of the respondent-accused had told her that the respondent-accused would be sent to jail if she were to state that he had established physical relations with her forcibly. However, the prosecutrix (PW-3) had also stated in her testimony that she did not meet the respondent-accused or his parents in the

intervening period between registration of the FIR and the recording of the statement under Section 164 Cr.P.C. and only stated that her earlier advocate had asked her to give a wrong statement. Consequently, the statements of the prosecutrix (PW-3) at different stages of the trial have not been consistent.

11. In fact, in both her MLCs Ex.PW8/A and Ex.PW15/A, there is no mention of the condition of the hymen. Consequently, there is no medical evidence available on record to corroborate the testimony of the prosecutrix (PW-3).

12. Though this Court finds merit in the submission of learned APP for State that the prosecutrix (PW-3) was a minor on the date of the incident and the presumption under Section 29 and 30 of the POCSO Act is attracted, yet the contradictory versions of the prosecutrix on material points at various stages of the proceedings create a serious doubt about the truthfulness of the prosecutrix. This Court is further in agreement with the finding of the Trial Court that the discrepancies and inconsistencies in the statements of the prosecutrix (PW-3) at different stages are not minor in nature but go to the root of the matter. Consequently, this Court is of the view that testimony of the prosecutrix (PW-3) does not inspire confidence and no conviction can be based on her sole testimony.

13. It is also settled law that any acquittal order cannot be lightly interfered with by the Appellate Court, though it has wide powers to review the evidence and to come to its own conclusion. The power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of an accused. In similar circumstances, in *State v. Kaishar Ali, 2019 SCC Online Del 9875*, we had

held as under:-

“13. The Apex Court in Ghurey Lal vs. State of Uttar Pradesh, (2008) 10 SCC 450 has held as under:-

“69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed 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.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. 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.

A number of instances arise in which the appellate court would have “very substantial and compelling reasons” to discard the trial court's decision. “Very substantial and compelling reasons” exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) *The trial court's decision was based on an erroneous view of law;*

(iii) *The trial court's judgment is likely to result in “grave miscarriage of justice”;*

(iv) *The entire approach of the trial court in dealing with the evidence was patently illegal;*

(v) *The trial court's judgment was manifestly unjust and unreasonable;*

(vi) *The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.*

(vii) *This list is intended to be illustrative, not exhaustive.*

2. *The appellate court must always give proper weight and consideration to the findings of the trial court.*

3. *If two reasonable 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.*

71. *Had the well-settled principles been followed by the High Court, the accused would have been set free long ago. **Though the appellate court's power is wide and extensive, it must be used with great care and caution.***”

(emphasis supplied)

14. *One of us, (Manmohan, J) in **Niraj vs. Ramesh Pratap Singh**, 2012 SCC OnLine Del 3813 has held as under:-*

“6. It is also well settled that the Appellate court should reverse an acquittal only for very substantial and compelling reasons. In the event, two views are possible on the evidence adduced before the trial Court and the view taken by the trial Court is a plausible view, the Appellate Court should not interfere and substitute its own view against the plausible view

taken by the trial Court. In fact, the Supreme Court in Chandrappa & Ors. Vs. State of Karnataka, (2007) 4 SCC 415 while referring to previous cases laid down the following general principles regarding the powers of appellate court while dealing an appeal against an order of acquittal:-

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

(1) An appellate Court has full power to review, reappraise 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 and 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 emphasize 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 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.”

7. The Supreme Court in a subsequent judgment in ***Arulvelu & Anr. Vs. State Represented by the Public Prosecutor & Anr., (2009) 10 SCC 206*** has held as under:-

“40. Unquestionably, the Appellate Court has power to review and re-appreciate the entire evidence on record. The appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial court is found to be perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallized by aforementioned judgments of this Court. 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. This fundamental principle must be kept in view while dealing with the judgments of acquittal passed by the trial court.”

(emphasis supplied)

14. Consequently, for the foregoing reasons, this Court does not find any reason to interfere with the impugned judgment.

15. Accordingly, the present leave petition, being bereft of merit, is dismissed.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

OCTOBER 22, 2019

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