

\$~2

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

+ CRL.L.P. 217/2019

STATE

..... Petitioner
Through Mr.Rajat Katyal, APP for the State
with Insp. Mandeep, PS Karawal
Nagar.

versus

MOHIT KUMAR & ORS.

..... Respondents
Through Mr.D.B.Yadav, Advocate for R-1.
Mr.Anuj Kumar Ranjan, Advocate for
R-2 & 3.

%

Date of Decision: 06th September, 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)

1. Present criminal leave petition has been filed on behalf of the State challenging the judgment/order of acquittal dated 17th November, 2018 passed by Judge Special Court (POCSO Act), ASJ-01 (North East Distt.), Karkardooma, Delhi in FIR No. 192/2012 under Sections 376/323/342/506 IPC registered with Police Station Karawal Nagar.

2. The Trial Court in the impugned judgment while acquitting respondent-accused has held as under:-

“ 82. I find that in the initial complaint Ex.PW1/A, victim had stated that one day, when she had gone to the house of accused Mohit to get milk, he raped her and thereafter, in a room of his house on the first floor and thereafter, he repeatedly raped her. A similar stand was taken by her when her first statement u/s 164 Cr.P.C. (ExPW1/B) was recorded. However, three months later, she changed her stand with regard to accused Mohit when her statement u/s 161 Cr.P.C. (Ex.PW17/DA) was recorded on the directions of CWC, the legality of which I am not inclined to take up at this stage. In that statement, she stated that she was in love with accused Mohit. They used to meet regularly and used to go for outings. However, one day accused Jagmohan raped her. After she had been raped by accused Jagmohan, with her own consent, accused Mohit established physical relations with her but when she was found pregnant, at the instance of accused Kiran, she falsely implicated accused Mohit.

83. When her second statement u/s 164 Cr.P.C. (Ex.PW1/C) was recorded, she stated that she loved Mohit. She further stated that mother and father of accused Jagmohan gave her bhabhuti and at their instance, she levelled false allegations against accused Mohit stating that he had raped her.

84. When she appeared as PW1, when only accused Mohit was facing trial, she only stated in her examination in chief about she being raped by accused Jagmohan. She stated that it was at the instance of accused Kiran that she had stated to the police that she was in love with accused Mohit and that accused Mohit had raped her. She did not state anything about accused Mohit raping her and then she was cross examined by ld. Addl. PP.

85. During her cross examination by learned Addl. PP, she denied that she used to talk to accused Mohit. She denied that she was concealing material facts regarding the incident by accused Mohit and then she stated that first accused Jagmohan had raped her and then accused Mohit also used to rape her. Then she went on to state that when her second statement u/s 164 Cr.P.C. was recorded, she could not tell that Mohit had also

raped her because she was not questioned about accused Mohit.

86. *A careful consideration of the material on record would reveal that victim has been changing her stand with regard to accused Mohit. Initially, she had stated that one day, when she had gone to get milk from the dairy of accused Mohit, he had taken her to a room on the first floor of his house and raped her and thereafter, under threats, he had repeatedly raped her. However, 03 months later, she changed her stand and stated that she was in love with accused Mohit and after she had been raped by accused Jagmohan, accused Mohit had established consensual physical relations with her. This statement of the witness cannot be said to be given under the influence of accused Mohit or accused Jagmohan and Kiran because she had stated during her examination in chief dated 28.04.2018, that when this statement was recorded by the IO, her brother in law was sitting outside the room. Therefore, the reason for this child being under fear had been removed by then. When her second statement u/s 164 Cr.P.C. (Ex.PW1/C) was recorded, she remained completely silent about she being raped by accused Mohit and she tried to explain it by saying that she could tell about it in her statement u/s 164 Cr.P.C. because she was not questioned about accused Mohit.*

87. *However, it is noticeable that in that statement also, she had categorically stated she was in love with accused Mohit.*

88. *It is also to be noticed that when her statement was initially recorded as PW1 in the court, she did not state anything against accused Mohit but she remained silent amount how, where and when. However, during her cross examination on behalf of accused Mohit, she stated that accused Mohit had sexual intercourse with her at the house of accused Kiran and then she went to state that it was done in collusion with accused Jagmohan when accused Jagmohan was present in the house. Therefore, the victim has been changing her state with regard to accused Mohit. Once she stated that she was raped by accused Mohit at his house but she denied this fact later on and stated*

that she was raped by accused Mohit at the house of accused Kiran.

89. *Her rape by accused Mohit at his house seems improbable from her testimony where she stated that she only used to go to the house accused Mohit only for the purpose of taking milk and except for taking milk, she never visited the house of accused Mohit and at that time, milk was always given by father of accused Mohit. She also stated that she stayed in the house of accused Mohit only for the time which was taken in getting the milk and never stayed beyond that. Therefore, it seems improbable that accused Mohit in presence of his father would take her inside his room and then rape her.*

90. *Therefore, the victim has been changing her stand repeatedly with regard to accused Mohit as to how, where and when he raped her and whether it was with her consent or without her consent.*

91. *In view of my above discussion, I find that victim has been repeatedly changing her stand with regard to accused Mohit, Jagmohan and Kiran. She had been contradicting herself and improving upon her statements and therefore, it will be highly unsafe to rely upon her sole testimony to pronounce a guilty verdict against accused Kiran and Jagmohan.*

92. *As regards accused Mohit, I find that in view of the previous statements of victim, which she denied making but she did not put forward any explanation except stating that it was made under the influence of Kiran, the probability of victim being a consenting party cannot be completely ruled out."*

3. Mr. Rajat Katyal, learned APP for State contends that the Trial Court failed to appreciate the medical evidence on record i.e. DNA report which proves that Respondent No. 1 was the father of the children of prosecutrix thereby, proving the case of the prosecution.

4. He further contends that the prosecutrix had initially kept silent about the fact that she was raped by Respondent No. 3 because she had been threatened by Respondent 2 i.e. mother of Respondent No. 3.
5. Having heard the learned APP for State, this Court is of the view that it is essential to outline the relevant facts of the present case.
6. In the present case, on 9th June 2012, the prosecutrix, in the presence of Respondent No. 2, had alleged that Respondent No. 1 had repeatedly raped her over the course of last few months and consequently medical examination of the prosecutrix was conducted and it was found that she was pregnant. Statement of the prosecutrix was recorded under Section 164 Cr.P.C. and Respondent No. 1 was arrested. During trial, a supplementary final report was filed and it revealed that on 26th September 2012, when the prosecutrix was produced before Child Welfare Committee at Nirmal Chhaya, she had alleged that Respondent No. 3 had raped her while she was working in the house of Respondent No. 2. Second statement of the prosecutrix under Section 164 Cr.P.C. was recorded and in that she stated that she was in love with Respondent No. 1 and Respondent No. 2 had forced her to make false allegations against him.
7. Perusal of the impugned judgment reveals that age of the prosecutrix was proved by prosecution through an ossification test and according to the said report the age of the prosecutrix was about 15-17 years. Accordingly, the age of the prosecutrix could be 16 years or more on the date of the incident and at that time, the age of consent as per clause sixth of Section 375 IPC was 16 years.
8. The relevant portion of testimony of the prosecutrix recorded over a period of time in Court as PW-1 is reproduced hereinbelow:-

“

xxx

xxx

xxx

One Jagmohan had committed wrong act with me in the aforesaid Kothi in the last summers. He had committed rape (Ganda Kaam) with me when his parents had gone to Haridawar. He had committed rape with me for three days. I had not disclosed about this incident to anybody due to fear. Owner of the Kothi i.e. Kiran Bhagatani had put me under fear. She had asked me if I disclosed the fact of incident she would throw me out from the Kothi. She also used to beat me and used to use filthy language. I had not made any statement to police in the present case.

I had told to police about accused Mohit in the present case that I was called by the police to make the statement at the instance of Kiran Bhagatani to depose against accused Mohit. I had told to police at the instance of Kiran Bhagatani that I was in love with accused Mohit. Again said, I had told the police that accused Mohit had committed wrong act with me and I had told this fact at the instance of Kiran Bhagatani. I had told to the place of incident i.e. house of accused Mohit.

xxx

xxx

xxx

Firstly accused Jagmohan used to commit rape on me and thereafter accused Mohit also used to commit rape with me.

Accused Jagmohan had committed rape with me twice while accused Mohit committed rape once.

xxx

xxx

xxx

When my second statement was recorded under Section 164 CrPC was recorded, I was not enquired about accused Mohit and for this reason I could not tell that accused Mohit had also committed rape with me.

xxx

xxx

xxx

Accused Mohit had committed sexual intercourse with me in the house of accused Kiran @ Bhagatni where I used to reside and at that time accused Jagmohan was present in the house. I do not recollect the time when accused Mohit had committed sexual intercourse with me. When the accused Mohit entered into the house the gate was opened and the accused Mohit remained for about half an hour.

xxx

xxx

xxx

*One day, after some months, there was no one at home except I and Jagmohan. Jagmohan then raped me. Next day, when Kiran came, I told her what Jagmohan had done but she did not believe me and beat me. There was a house near the house of Kiran. Kiran would send me to bring milk from that house. **The son of the owner of that house was named Mohit and one day Mohit raped me at his house.** I informed Kiran but she did not give any heed.*

xxx

xxx

xxx

Q. Did you state to the magistrate that you loved Mohit and Jagmohan and his mother wanted you to separate from Mohit and that is why they made you level a false allegation against Mohit?

Ans. Yes I had made this statement. I had stated this fact so that Mohit could be released from jail.

I was told by Kiran to say that I loved Mohit and Kiran wanted to separate us.

I do not remember who had told me to state the aforesaid fact in my statement Ex.PW1/C."

(emphasis supplied)

9. A perusal of the aforesaid testimony shows that the prosecutrix has changed her statement with regards to where and how the incident had happened. She has also mentioned that she wanted Respondent No.1 to be released from jail.

10. This Court is in agreement with the finding of the Trial Court that there are discrepancies and inconsistencies in the statement of the prosecutrix which go to the root of the matter. Consequently, this Court is of the view that testimony of the prosecutrix does not inspire confidence and cannot be said to be reliable.

11. Even though the medical evidence proves that Respondent No. 1 was the biological father of the children of the prosecutrix, the same does not establish that the sexual intercourse between them was without consent or against the will of the prosecutrix or on the basis of some threat or force.

12. 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.

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, 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 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)

15. In view of the above, the present leave petition, being bereft of merit, is dismissed.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

SEPTEMBER 06, 2019

rn

न्यायमेव जयते