

#4 & 5

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Delivered on : 20.09.2019

CRL.L.P. 353/2019

STATE (GOVT. OF NCT OF DELHI) Petitioner

versus

SANDEEP MADAAN Respondent

&

CRL.L.P. 418/2019

STATE (GOVT. OF NCT OF DELHI) Petitioner

versus

PUSHPA MADAAN Respondent

Advocates who appeared in these cases:

For the Petitioners :Mr. Ravi Nayak, APP for State with Insp. Usha Sharma and WSI/IO Sona, PS-Rohini North.

For the Respondents :Mr. Shubham Asri, Mr.Vijay Khatri and Mr. Abhijeet Rai, Advocates.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

SIDDHARTH MRIDUL, J (OPEN COURT).

CRL.M.A. 31801/2019 (for delay in filing) in CRL.L.P. 418/2019

1. The present application under Section 5 of the Limitation Act, 1963, filed on behalf of the petitioner, seeks condonation of delay of 63 days in filing the leave petition.
2. Issue notice.
3. Mr. Shubham Asri, learned counsel accepts notice on behalf of the non-applicant/respondent and fairly does not oppose the application.
4. For the reasons stated in the application, which are duly supported by an affidavit, the application is allowed. The delay of 63 days in filing the leave petition is condoned.
5. The application is disposed of accordingly.

CRL.L.P. 353/2019 & CRL.L.P. 418/2019

6. The above petitions seek leave to appeal against the judgment and order dated 19th February, 2019, whereby, the learned trial Court acquitted Sandeep Madaan and Pushpa Madaan, the respondents of charges framed against them, for commission of offences punishable under Section 6 POCSO Act read with Section 5 (m) and (p) of the said Act against the former, and for offences under Section 21 POCSO

Act read with Section 506 Indian Penal Code against the latter. In a nutshell, the facts of the case as elaborated by the learned trial Court are as follows:-

“Brief facts of the prosecution case are that on 21.12.2015, the complainant C who is the mother of the victim A came to PS and gave her statement to the effect that her daughter A aged about 3 years is a student of class Nursery. On 26.10.2015 when she was changing her lower garment (pajami), the victim told her that she is having pain and on inquiry told that her father inserted his finger in her shu shu. She immediately went down stairs and informed her mother in law who ignored it. On 27.10.2015, victim went to school and informed her class teacher about the incident. The class teacher of victim recorded the version of the victim on her mobile narrating the incident and also sent that video recording to the mobile of the complainant through whatsapp. The memory card of said mobile was handed over to the police. She informed about this incident to her parents in law. Her mother in law threatened her to not to tell it to anyone or else she will be killed. She did not tell it to anyone out of fear. On 19.12.2015, she visited her parental home and informed her sister in law (bhabhi) who advised to lodge police complaint and hence this complaint. On her statement, present FIR was registered. Victim was taken to hospital for medical where her complainant mother refused internal examination. Accused was arrested from his house. Statement of the victim u/s 164 Cr. P.C. was got recorded where she supported the version of her mother. After completion of investigation, chargesheet was filed against father and grandmother (dadi) of the victim. Copy supplied.”

7. In order to establish its case against the respondents, above named, the prosecution examined six witnesses. The statement under Section 313 of the respondents was thereafter recorded wherein they

asseverated false implication and examined two witnesses in support of their defence.

8. Mr. Ravi Nayak, learned APP appearing on behalf of the State, while reiterating the grounds taken in the present Leave petition, invited our attention to the testimony of the child victim (PW-3) and asserted that her testimony was trustworthy and reliable, and that the judgment of acquittal rendered by the trial court was liable to be set aside, on that ground alone.

9. It was the case of the respondents, accused before the trial Court, that there was a matrimonial discord between Mr. Sandeep Madaan and his complainant wife Ms. Chandni Madaan (PW-1), allegedly on account of the latter's illicit relationship with one Mr. Manoj Pant, and consequent thereto, as part of a pre-meditated and planned conspiracy, Chandni Madaan along with her accomplices Ms. Kanika (PW-2) and the said Mr. Manoj Pant, orchestrated the institution of the complaint on behalf of the minor child of the estranged couple. In order to buttress their defence, call detail records of Ms. Chandni Madaan (PW-1), Ms. Kanika (PW-2) and the said Mr. Manoj Pant were proved and exhibited before the trial Court, with a

view to clearly and unequivocally establish that the three of them were in touch with each other on their registered mobile telephone numbers both bilaterally as well as on conference calls, during odd hours, at all the relevant times. The learned trial Court returned the following findings in this behalf:-

“9. Coming to the main incident, admittedly there is delay of almost two months in reporting the matter to the police. Neither the mother of the victim nor the school authorities reported the matter to the police and technically are liable for prosecution u/s 21 of POCSO Act. This delay has not been explained by the prosecution. Though the mother of the victim claimed that she was under threat from her in laws from reporting the matter to the police but there appear to be no threat to school authority or the teacher.

10. Coming to the testimonies of the material witnesses. The mother of the victim claimed that the said video recording of victim was transferred to her mobile after 2-3 days of 27.10.2015 whereas the teacher Kanika states that she transferred the recording to the phone of the complainant immediately on 27.10.2015 and deleted it from her phone there and then. She specifically stated that she did not transfer it to any other person. Contrary to it, the complainant states that school Incharge Ms.Gunjan came to their house 2-3 days after 27.10.2015 as victim did not go to her school after 27.10.2015 and showed the video to her father in law. How Ms.Gunjan got this video in her phone remained unexplained. Further as per complainant, the brother in law (dever) of the complainant got this video deleted from the phone of Gunjan and a second video was again prepared by the said teacher and sent to her phone. When and by whom this second video was prepared remains unexplained and introduced a new story of fresh video recording. As per school authorities/teacher no fresh video clip was prepared. Further, complainant admitted her long phone calls at odd hours with Manoj Pant and Kanika which was denied by Kanika who showed her ignorance about knowing

Manoj Pant. The call details produced by defence witnesses of phone of complainant, Kanika and Manoj Pant showed that they were regularly and constantly were in touch with each other and more so around 25/26/27, October, 2015 and 20/21/22, December, 2015 i.e. the period when the alleged sexual assault happened with the victim and when this case was registered.

11. Coming to the testimony of the victim, her cross examination shows that victim because of her tender age is prone to tutoring. She admitted in the cross examination that she does whatever her maternal grand father and uncle and aunt (nana, mama, mami) says and she behaves in the manner what they say. She also spoke to her madam Kanika outside the court who informed her that for what purpose the victim is called to the court today and most importantly her mother, mama and naana told her in the car on the way to the court as to what statement is to be given in the court. All these facts coming in the cross examination of the victim shows that victim is more inclined towards tutoring and because of her small age of 4 years is more prone to be tutored. Further, there is no corroborating evidence to the testimony of the victim. Her internal medical examination was refused by her mother and there is no medical or scientific evidence to corroborate the version of victim. Further the sister in law of the complainant PW-4 stated to the police that complainant used to share all her talks with her but in the court made improvements by saying that she shared only limited things just to overcome the fact that why complainant did not tell about this alleged incident to her sister in law immediately after 26.10.2015. Further, PW-4 stated that she came to know about the incident only on 19.12.2015 when the complainant came to her parental home with victim which is contrary to the statement of the complainant who stated that she communicated about the sexual assault to PW-4 on phone after the marriage of her deaver on 12.12.2015 and PW-4 advised to take legal action against the accused persons. Why the said legal action was not taken immediately also remains unexplained. Further, the class teacher of victim PW-2 denied knowing any person namely Manoj Pant but her call details shows that she was in regular touch with said Manoj Pant on mobile phone before and after this case. PW-2 deliberately tried to conceal this fact from the court and the reasons are obvious i.e. to conceal the proximity between the complainant, Manoj Pant and Kanika. It was for

the prosecution to explain as to what conversation were going on between these three that too at odd hours at lengths which the prosecution could not explain. Normally, no person will call his business associates or client at late hours in the midnight or so early at 5.00 a.m. in the morning. PW-2 deliberately tried to mislead the court by showing the ignorance about Manoj Pant. Further, the complaint herself admitted in the cross examination that she was in touch with said Manoj Pant and spoke to him for duration extended to even an hour at 12.30 a.m. The call details record of these three shows that they spoke even on conferences in late night. Further, PW-1 claimed that the said video recording was transferred to her phone immediately after 27.10.2015 but the data generated by FSL shows that this video was transferred to her phone on 21.12.2015 which means that this file was created in the memory card handed over to the police on 21.12.2015 itself and not around 27.10.2015 as alleged. Considering all these facts and aspects, the prosecution has failed to prove commission of offence against the accused persons. Accordingly, they are acquitted.”

10. An examination of the above findings, in the backdrop of the evidence on record, leads to the following inescapable conclusions:-

A. That admittedly there was a delay of almost two months in reporting the matter to the police; which inexplicable delay belies the case of the prosecution *in toto*, inasmuch as, no reason whatsoever was put forward, to explain the circumstance that neither Chandani Madan (PW-1) – the mother of the minor nor Ms. Kanika (PW-2) – who teaches in the play school attended by the minor prosecutrix – take any steps for the prosecution of the

alleged accused, upon acquiring the immediate knowledge of the commission of the offence, despite admittedly being aware of the commission of the offence upon the person of the minor child.

B. Although, Ms. Chandni Madaan (PW-1) testified that the video recording of the minor child was transferred to her mobile number within two-three days of the commission of the offence on 27th October, 2015; on the electronic evidence contrary to this assertion as proved by PW-6, unequivocally establishes that the said recording was created only on 21st December, 2015 at 1:19 AM; conveniently, just prior to the registration of the subject FIR, later on the same day.

C. The explanation put forth by Ms. Chandni Madaan (PW-1) to explain her long telephonic conversations with Ms. Kanika (PW-2) and Mr. Manoj Pant – her alleged co-conspirators – does not inspire any confidence either, inasmuch as, they were not only unduly long, but at all odd hours as well. The explanation offered for the

admitted bilateral conversations and conference calls by asserting that the same were for business and formal purposes, is to say the least strange, incredible and contrary to the ordinary course of human relations.

- D. In so far as the testimony of the child victim is concerned, a perusal of her cross-examination clearly indicates that her testimony could not be said to be absolutely free from tutoring on the part of her mother, Nana and Mama as well as Ms. Kanika, who admittedly accompanied her on every occasion that she was called upon to depose and testify and as axiomatic from her cross examination.
- E. Lastly, there is neither any shred of medical or scientific evidence to corroborate the testimony of the child victim, inasmuch as, Ms. Chandni Madaan (PW-1), her mother pointedly refused the former's internal examination, as recorded in the subject MLC (PW-1/B).

11. The law, so far as the scope of interference against an order of the acquittal is concerned is well defined. Reference in this regard is

made to the decision of the Supreme Court in *Ghurey Lal V. State of*

U.P., reported as (2008) 10 SCC 450, wherein it was held:-

"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."

12. In view of the foregoing, we are of the considered view that the impugned judgment and order dated 19th February, 2019 does not suffer from any infirmity or perversity, so as to warrant any interference by this Court in the present proceeding. The leave to appeal petitions being devoid of merit are accordingly dismissed.

**SIDDHARTH MRIDUL
(JUDGE)**

**I.S. MEHTA
(JUDGE)**

SEPTEMBER 20, 2019
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