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

+ CRL.L.P. 486/2019

STATE

..... Petitioner

Through Ms. Aasha Tiwari, APP

versus

TRILOK AGGARWAL @ Raj & ANR.

..... Respondents

Through

None

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Date of Decision: 29th August, 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 31st May, 2019 passed by Additional Sessions Judge-07 (POCSO), West District, Tis Hazari Courts, Delhi in FIR No. 69/2011 under Sections 376(2)(g)/506 IPC registered with Police Station Khyala.

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

“42. Thus, in testimonies dated 13.12.2011 and 18.04.2018, the victim deposed that accused Deepanshu accompanied accused Trilok Aggarwal to her house but in her testimony dated 12.02.2018, she has specifically denied presence of accused Deepanshu at the spot on 13.04.2011. Even in her complaint to the police (Exh PW 1/A), presence of accused Deepanshu alongwith Trilok Aggarwal on 13.04.2011 has not been alleged. These two contradictory stands create a doubt in the mind of the Court regarding presence of accused Deepanshu at the spot on 13.04.2011. His presence at the spot on 13.04.2011 and charge of offence punishable u/s 376 (2)(g) IPC against him, therefore, could not be proved beyond any shadow of doubt.

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46. Ms. Upasana is a material witness but she did not support the case of prosecution. She was examined as PW 4 on 10.02.2012 and as PW 8 on 11.12.2018. She denied her statement u/s 161 Cr. P.C. dated 21.04.2011 (Exh PW4/A; Exh PW 8/PX-1). She, however, admitted that she had informed the mother of the victim that the victim did not pick up the phone as she was asleep. Contrary to the case of prosecution, she deposed that on 15.04.2011, she received a phone call of Ms. 'U', mother of the victim and she requested her to go to her home as none was picking her phone. She reached house of victim at about 2:30 pm to 3:00 pm. At that time, victim and her sister were present at their residence. She denied reaching house of victim at about 10:45 am. I have also carefully perused the statement u/s 161 CrPC of this witness. Even in this statement upon which the prosecution had sought to rely before she turned hostile, this witness has denied seeing accused Deepanshu at the house or outside the house of the victim of 15.04.2011.

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60. The entire edifice of the allegations of the victim against accused Trilok Aggarwal is based on element of threat and fear. From the initial stage of lodging of FIR till conclusion of trial, the case of the victim has been that she was forced into friendship by accused Trilok Aggarwal who continuously threatened her. She also allowed him entry into her house on 13.04.2011 as well as 15.04.2011 out of fear. When Ms. Upasana spotted accused Trilok

Aggarwal leaving the house, the victim did not disclose anything to her out of fear. She admitted that there was exchange of letters between her and the accused but claimed to have written such letters under his compulsion and threat. The contents of the three paged letter (Ex. PW 1/DA) admittedly written by the victim to the accused Trilok Aggarwal as also the testimony of PW Ms. Upasana recorded on 10.02.2012, 18.04.2012 and 18.12.2018 negate the argument that the victim was under pressure and fear of accused. There is also no cogent explanation as to how did the accused come to know that the victim had not gone to school on these two days and was at home alone.

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65. *It would be worthwhile to note the testimony of Ms Upasana in brief. She deposed that on 13.04.2011, victim had come to her residence in school dress alongwith Trilok Aggarwal. On 15.04.2011 when she reached the residence of victim at about 2:30 pm to 3:00 pm, she only found the victim with her sister. In the evening on that day, mother of the victim called her up and talked to her about friendship of victim with accused Trilok Aggarwal. Thereafter, mother of the victim approached parents of accused Trilok Aggarwal for marriage of victim with him. Upon their refusal, mother of the victim got the present case lodged against the accused. This witness has not supported the case of the prosecution.*

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69. *To establish the offence u/s 376 IPC against the accused Trilok Aggarwal, it was required to be proved beyond any shadow of doubt that accused established sexual intercourse with the victim who was 16 years 03 months old at the time of incident without her consent or against her will or under any threat of force. The evidence/record rather establishes that victim and the accused Trilok Aggarwal were in love with each other and had known each other for about one year. The element of threat or force could not be proved conclusively. The testimony of the victim has been contradicted by evidence such as letter Ex. PW1/DA, testimony of Ms. Upasana and evidence collected by the IO in respect of accused Deepanshu Sobti. In these circumstances, the present case is not the one where sole testimony of the prosecutrix is sufficient to establish*

the charge against the accused Trilok Aggarwal.

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72. *The testimony of the victim that on 13.04.2011 and 15.04.2011 at about 9:30 a.m. when she was alone in her house, accused Trilok Aggarwal came with accused Deepanshu Sobti and raped her while accused Deepanshu Sobti stood watch outside has come under a veil of doubt. It could not be proved beyond any shadow of doubt that if at all sexual intercourse between the victim and accused Trilok Aggarwal was established, it was established without the consent or against the will of the victim or on the basis of some threat or force. Elements of threat, force or pressure could not be proved. Such circumstances call for grant of benefit of doubt to the accused Trilok Aggarwal.*

73. *In view of above discussion, benefit of doubt is granted to accused Trilok Aggarwal as well as accused Deepanshu Sobti. They both are acquitted of all the charges against them. Bail bond of accused Deepanshu Sobti accepted on 10.12.2012 and bail bond of accused Trilok Aggarwal accepted on 06.12.2012 stand cancelled. The sureties as well as the superdar of the case property, if any, are discharged. Endorsements, if any, be cancelled.”*

3. It is averred in the present petition that the Trial Court failed to appreciate that the prosecutrix was a minor and her statement recounting the incident had been corroborated with the medical evidence which proves that Respondent No. 1 had committed rape upon her.
4. It is further stated in the petition that the prosecutrix was a minor and her consent, if any, to have physical relations with Respondent No. 1 was of no consequence.
5. This Court is of the view that it is essential to outline the relevant facts of the present case.
6. In the present case, the prosecutrix/PW1 has alleged that on 13th and 15th April 2011, when she was alone at her home, Respondent Nos. 1 & 2

had come to her house and Respondent No. 1 had raped her while Respondent No. 2 stood guard. The prosecutrix has also alleged that Respondent No. 1 had criminally intimidated her from 13th to 15th April 2011.

7. Investigation had been conducted and a charge sheet was filed against Respondent No. 1 on 18th August 2011. During trial, vide order dated 4th October 2012, Respondent No. 2 was also summoned as co-accused under Section 319 Cr.P.C.

8. Perusal of the impugned judgment reveals that PW13 (Record Keeper, SDMC) had produced the original birth register and proved the birth date of the victim as 26th January 1995. Accordingly, the age of the prosecutrix was more than 16 years 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.

9. The relevant portion of testimony of the prosecutrix/PW1 recorded on 13th December 2011 is reproduced hereinbelow:-

“I did have telephonic talk with Trilok as he used to call at my house. He used to call on the mobile kept at my home. I had been having talks with him on mobile for about three months prior to 13.04.2011. He even used to call at my mobile even earlier to the said period. I had not told my mother or Upasna Aunty about the telephone calls earlier and had told my mother only after 15.04.2011. I had mentioned mobile number of the accused when I made complaint to the police. I had mentioned his two mobile numbers which I do not remember today.

There had been exchange of letters between us. (Voltd. Accused had written letters to me and had threatened me to reply to the same. It was under threat that I wrote replies to his letters). I had never disclosed about those letters to my mother or to the police. I had never handed over any copy of the letter to the police. (Voltd. Accused used to forcibly make me write replies to his letters and

*then used to take away his letters and my replies to the same). It is incorrect to suggest that I am deposing falsely in this regard. The replies written by me were of about 2-4 pages. Accused had been writing letters to me and making me reply to the same since about 3-4 months prior to 13.4.2011. **Letter Ex. PW-1/DA is in my handwriting.***

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*Door of my house is of “jaali” and I could see from inside that it was the accused who was knocking at the door. **I did not raise any noise nor called out to anyone while the accused was knocking at the door of my house and asking to be let in.** (Vol – It was so as accused claimed that he only wanted to talk to me.)”*

(emphasis supplied)

10. A perusal of the aforesaid testimony shows that the prosecutrix had not raised any alarm when the Respondent No. 1 went to her house, instead she opened the door to let him in. Further, she had been in regular contact with Respondent No. 1 and had even written several letters to him. It is also highly improbable that the prosecutrix was forced to write those letters as stated in her testimony. In fact, the exchange of letters as suggested by the trial court shows a romantic relationship and the possibility of the prosecutrix being a consenting party cannot be ruled out.

11. The Trial Court has also noted discrepancies and inconsistencies emerging in the statement of the prosecutrix. In her testimony dated 13th December 2011 before the Trial Court, prosecutrix had stated that Respondent No. 2 had accompanied Respondent No. 1 to her house on the date of the incident. However, contrary to aforesaid, the prosecutrix had specifically denied presence of Respondent No. 2 in her testimony dated 12th

February 2018. In fact, presence of Respondent No. 2 was not even mentioned in the police complaint made by the prosecutrix. Consequently, this Court is of the view that testimony of the prosecutrix does not inspire confidence and cannot be said to be reliable.

12. Upasana / PW8 who is a material witness in the present case, has not supported the case of the prosecution and has turned hostile.

13. Further, forensic and medical evidence does not support the contention of the prosecutrix that there was sexual intercourse between her and Respondent No. 1 or that it was established without consent or against the will of the prosecutrix or on the basis of some threat or force.

14. 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.

15. 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)

16. 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)

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

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

AUGUST 29, 2019

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