

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

CRL.REV.P. 727/2016&CRL.M.A. 14401/2017 (stay)

Judgment Reserved :25.09.2019

Date of Decision : 10.10.2019

IN THE MATTER OF

PAWAN KUMAR

..... Petitioner

Through: Mr. Amit Sharma, Advocate with
Mr. Vaibhav Tomar, Mr. Siddharth Mittal,
Mr. Aditya Bhardwaj & Mr. Ziad Ahmed,
Advocates

Versus

STATE & ANR

....Respondents

Through: Ms. Radhika Kolluru, APP for State
with SI Sanjay Singh, P.S. Greater Kailash

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The petitioner was convicted vide judgment dated 21.01.2016 passed by the Metropolitan Magistrate, Mahila Court (South East), Saket Courts, New Delhi in FIR No.50/2013 registered under Section 354A IPC at P.S. GK-I. The petitioner was sentenced to SI for 6 months for the offence under Section 354A IPC along with a fine of Rs.5000/-, in default of which the petitioner was further directed to undergo SI for two days.
2. The appeal filed by the petitioner came to be dismissed vide judgment dated 21.10.2016 passed by the Additional Sessions Judge-04 & Special Judge South East, Saket Courts, New Delhi.

3. Briefly, the facts as noted by the trial court are reproduced as under:-

“.... on 17.04.2013 inside school Kotilya Sarkari Sarvodaya Bal Vidyalaya, Chirag Enclave, inside the examination hall, between 2.30 pm to 5.30 pm, the accused made unwelcome physical contact involving explicit sexual overtures against the minor victim Ms. X. Further, the accused met the victim nearby bus stand and uttered certain words towards her intending to insult her modesty and intrude upon her privacy.

2. As per the complaint of the complainant, on 17.04.2013 she had her examination of History subject at Kotilya Sarkari Sarvodaya Bal Vidyalaya, Chirag Enclave. The examination commenced at about 2.30 pm. There were two invigilators one of whom was of about 45 years of age with a strong built (accused). The other was about 30 years of age and was of thin built. The accused came to her and said that the time was about to get over and asked her to tie the map. When she started tying the map, he said that the method of tying the map is not correct and himself started tying the map. He sat beside the victim on the desk, on her left side and touched her breast with his right elbow intentionally. He told her that he could get her clear the examination. When she started moving away, he held her hand. She let her hand free from him. Then he gave his number 8826541465 to the victim and asked her to call him later. At the time of the incident, the other invigilator was far away. She was sitting on the last bench of the last row. In the end, the accused collected her copy and asked her to call him if she desired. Thereafter she came out of the class and reached the bus stand of Pampose Enclave. After sometime, the accused reached there also and started talking about the examination. He offered her lift to Khanpur but she declined. She said that her sister was waiting for her at Khanpur red light and that she would go by herself. The accused then forced her to go along with him and got an auto stopped. She declined and boarded a bus and reached Khanpur. The victim again saw the accused at Khan Pur BRT bus stop but by the time she met her sister, accused left. She told the entire incident to her sister and then to her father who called the PCR. Police reached there and recorded the statement of

victim.”

4. During the trial, the prosecution examined total of 3 witnesses. The material witnesses examined by the prosecution were the complainant (PW-1) and Dr. Sanjay Chaturvedi, the Principal of K.G.S.B. Vidhalaya Chirag Enclave, New Delhi (PW-2). SI Manisha, the Investigating Officer was examined as PW-3.

5. Learned counsel for the petitioner submitted that the present case relate to an alleged incident dated 17.04.2013 which occurred when the complainant was writing her exam. He has assailed the impugned judgment on the ground that it was passed on the premise that the complainant was a “minor”. He pointed out various paragraphs in the impugned judgment where it was repeatedly mentioned that the complainant was a “minor victim”. He submitted that the complainant was in fact, a “major” being 20 years of age on the date of the incident. He also pointed out the testimony of the complainant where it was stated that at the relevant point of time, she was working in an office at Bhikaji Cama Place.

6. Learned counsel for the petitioner submitted that although the charges were framed against the petitioner under Sections 354(A) and 509 IPC but he was convicted only under Section 354(A) IPC as the trial court disbelieved the testimony of the complainant in so far as charge under Section 509 IPC was concerned.

7. It was next contended that the entire prosecution case was based on a map, a question paper and the admit card, however neither of it was proved on the record. He next contended that the entire inculpatory material was not put to the petitioner when his statement was recorded under Section 313 CrPC. To buttress his submission, he placed reliance

on the decision rendered in Koli Trikam Jivraj and Anr. v. The State of Gujarat reported as **AIR 1969 Guj 69**.

8. It was further contended that the FIR against the petitioner was motivated as the petitioner had reprimanded the complainant for not bringing the original admit card at the time of the examination and also because she attempted to cheat and carried her mobile while writing her exam, which was objected to by the petitioner.

9. Learned counsel for the petitioner, while referring to various contradictions and improvements in the testimony of the complainant, contended that her testimony is neither creditworthy nor reliable. It was submitted that in her deposition, the complainant did not mention about her hand being held by the petitioner which was stated in her previous statement. In her examination-in-chief, the complainant deposed that after reaching the house, she disclosed the incident to her father who gave a call to the petitioner as the mobile number was written on the question paper however, during her cross-examination, she stated that the police called the petitioner. It was also submitted that the complainant during her cross-examination admitted that she did not accompany the police when the police went to the house of the petitioner to apprehend him however, SI Manisha, the Investigating Officer deposed that the petitioner was arrested on the identification of the complainant. There was also some variation about the spot where the complainant got down after boarding the bus. Whereas in her statement given to the police, she stated that she boarded the bus and got down at Khanpur, however, in her deposition, she deposed that after boarding the bus, she reached the Ambedkar Nagar bus stand.

10. *Per contra*, learned APP for the State supported the impugned

judgment. She submitted that since the incident occurred inside the examination hall therefore, no eyewitness could be examined. She submitted that the mobile number of the petitioner was mentioned in the FIR itself. It was also submitted that the identity of the petitioner and his presence at the spot was not disputed during the trial.

11. I have heard learned counsel for the petitioner as well as learned APP for the State and have also gone through the case records.

12. It is no longer *res integra* that the sole testimony of a complainant can be relied upon to convict an accused provided the same is reliable and creditworthy. In Lallu Manjhi and Anr. v. State of Jharkhand, reported as (2003) 2 SCC 401, Supreme Court had classified the oral testimony of the witnesses into three categories:

- “a. Wholly reliable;*
- b. Wholly unreliable; and*
- c. Neither wholly reliable nor wholly unreliable.”*

13. In Kanhaiya and Ors. v. State and Ors. reported as **2015 SCC OnLine Del 7840**, while referring to above decision, the court held as under:-

“12. In the third category of witnesses, the Court has to be cautious and see if the statement of such witness is corroborated, either by the other witnesses or by other documentary or expert evidence. Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eye-witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the

occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty. Reference in this regard can be made to the cases of Joseph v. State of Kerala (2003) 1 SCC 465; Tika Ram v. State of Madhya Pradesh (2007) 15 SCC 760 and Govindaraju @ Govinda v. State (2012) 4 SCC 722.”

14. In the present case, besides examining the complainant, the prosecution did not examine any independent witness despite the fact that not only the second invigilator but other examinees were also present in the examination hall where the incident occurred.

15. The defence setup by the petitioner was that he was falsely implicated as he had objected to the complainant for carrying her mobile phone to her seat, for not bringing the original admit card as well as for cheating in the exam. In view of the above, the testimony of the complainant has to be scrutinised closely and carefully in light of the inconsistencies and the improvements pointed out by the learned counsel for the petitioner.

16. The FIR in the present case was registered on the statement of the complainant. In the statement recorded by the police, the complainant stated that there were two invigilators in the examination hall. It was also stated that when the complainant was tying the “map”, the petitioner sat on her bench and intentionally touched her breast with his right elbow and started filing the map. The petitioner held her hand and even wrote his mobile number on the question paper. Thereafter, when the complainant after coming out of the examination hall went towards the bus stand, the petitioner followed and offered to drop her at Khanpur.

The complainant replied that her sister was waiting at Red Light of Khanpur and she could go by herself. However, the petitioner insisted and stopped one auto but the complainant declined and boarded the bus and reached Khanpur.

17. In her testimony before the Court, the complainant improved upon her previous statement and deposed that the petitioner, after sitting next to her in the examination hall, started telling her the answers to be filled in the map. She also deposed that the petitioner in fact, started writing the answers on the map himself. While doing so, the petitioner touched her breast with his elbow. When the complainant asked as to what he was doing, the petitioner also touched on her thighs.

18. During cross-examination, the complainant admitted that she did not complain to the second invigilator who was present in the examination hall. SI Manisha, the Investigating Officer, during her cross-examination, stated that she had done enquiries from the other invigilator i.e., one Devender who did not state anything about the alleged incident. She deposed that she did not record his statement.

19. Besides the statement of the complainant, the other material to corroborate could have been either the map that was stated to be partly filled by the petitioner or the question paper on which the petitioner had written his mobile number. It is relevant to note that neither the map nor the original question paper was produced or exhibited during the trial. It was urged by learned APP for the State that the petitioner did not deny that the mobile number belonged to him. There is no gainsaying the fact that the prosecution has to stand on its own legs and is under a bounden duty to prove its case against the accused. The prosecution did not even prove that the said mobile number belonged to the petitioner. A look at

the statement of the petitioner recorded under Section 313 Cr.P.C would reveal that it was not even put to the petitioner that the said mobile number belonged to him. Further, neither the factum of filling up of the map nor the writing of mobile number on the question paper was put to the petitioner.

20. The relevance of putting all the inculpatory material to the accused was emphasized by the Supreme court in Ranvir Yadav Vs. State of Bihar reported as (2009) 6 SCC 595, where it was held as under:-

“9. “12. The purpose of Section 313 of the Code is set out in its opening words- ‘for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him.’ In Hate Singh, Bhagat Singh v. State of Madhya Pradesh it has been laid down by Bose, J that the statements of the accused persons recorded under Section 313 of the Code ‘are among the most important matters to be considered at the trial’. It was pointed out that:

‘8.....The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box and that they have to be received in evidence and treated as evidence and be duly considered at the trial.’

This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

13. The object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

14. The word ‘generally’ in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the

question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.

15. The importance of observing faithfully and fairly the provisions of Section 313 of the Code cannot be too strongly stressed:

'30...It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. ...The questioning must therefore be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. ... Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.

xxx

11. Above being the position the appeal deserves to be allowed. It is a matter of regret and concern that the trial court did not indicate the incriminating material

to the accused. Section 313 of the Code is not an empty formality. There is a purpose behind examination under Section 313 of the Code. Unfortunately, that has not been done. Because of the serious lapse on the part of the trial court the conviction as recorded has to be interfered with. Conviction recorded by the High Court is set aside. Bail bonds executed to give effect to the order of bail dated 8.1.2002 shall stand cancelled because of the acquittal. The appeal is allowed to the aforesaid extent.”

21. Similarly, in Sujit Biswas Vs. State of Assam reported as **(2013) 12 SCC 406**, it was held as under:-

“20. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 CrPC, is to meet the requirement of the principles of natural justice i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 CrPC, cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.”

22. Recently, in Samsul Haque Vs. State of Assam reported as **2019 SCC OnLine SC 1093**, the Supreme Court reaffirmed the above views.

23. The trial court as well the appellate court relied upon the suggestion given on behalf of the petitioner to the complainant that she

had already obtained the phone number of the petitioner after leaving the examination hall and that is how she knew the same. The appellate court observed that the suggestion essentially goes to show that the petitioner himself had admitted the possession of his phone number with the complainant.

24. The question whether a suggestion given by the counsel on behalf of the accused can be considered as an admission and bind the accused under Section 18 of Indian Evidence Act came before the Supreme Court in Koli Trikam Jivraj (supra), where it was held as under:-

“18. Therefore, the accused is entitled to the benefit of the plea set up by the lawyer but it cannot be said that the plea or defence which his lawyer puts forward must bind the accused. The reason is that in a criminal case a lawyer appears to defend the accused and has no implied authority to make admissions against his client during the progress of the litigation either for the purpose of dispensing with proof at the trial or incidentally as to any facts of the case. See Phipson's Manual of Evidence, Eighth Edition Page 134. It is, therefore, evident that the role that a defence lawyer plays in a criminal trial is that of assisting the accused in defending his case. The lawyer has no implied authority to admit the guilt or facts incriminating the accused. The argument of Mr. Nanavati that suggestion put by the lawyer of the accused in the cross-examinations of the prosecution witnesses amounts to an admission under Section 18 of the Indian Evidence Act cannot be accepted.”

25. The prosecution has examined Dr. Sanjay Chaturvedi, the then Principal of the concerned school, who did not state anything about the incident and rather deposed that he did not receive any complaint either from the complainant or her family members about any incident. He also deposed that during his tenure as a Principal of the school, he did not receive complaint of any type against the petitioner.

26. The trial court disbelieved a part of the statement of the complainant where it was stated that the petitioner had followed the complainant up to the bus stand where he allegedly held her hand and insisted to drop the complainant at her home. As per the complainant's deposition, the incident in the examination hall happened towards the end of the exam where after, she left the examination hall and walked towards the bus stand. It was narrated as one continuous incident. However, as stated above, the latter part of the incident has been disbelieved.

27. In so far as the first part of the incident is concerned, the prosecution failed to bring on record any corroborating evidence in the form of the map that was partly filled by the petitioner, the question paper on which the petitioner allegedly wrote his mobile number or even by proving that the mobile number belonged to the petitioner.

28. In Radhu v. State of M.P., reported as **(2007) 12 SCC 57**, it was observed as under:

“16. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place....”

29. In Gautam Khanna v. The State (NCT of Delhi) reported as **2015 SCC OnLine Del 11292**, it was observed as under:

“21. In the instant case, considering the vital discrepancies, contradictions and infirmities in the statements of the prosecution witnesses, it is not safe to convict the appellant on the sole uncorroborated testimony of the prosecutrix. The appellant deserves benefit of doubt. The appeal is allowed. Conviction and sentence awarded by the Trial Court are set aside. Bail bond and surety bond of the appellant stand

discharged.”

30. In light of the inconsistencies and the improvements made by the complainant during her deposition and in absence of any corroborating evidence to support her statement, this court is of the opinion that the testimony of the complainant does not inspire confidence. The prosecution has failed to prove its case against the petitioner. The finding of guilt recorded by the trial court and the appellate court is manifestly illegal and perverse. Resultantly, the revision petition is allowed. The petitioner's conviction is set aside. The bail bonds furnished by the petitioner are discharged.

31. Copy of this judgment be sent to the trial court along with the LCR.

(MANOJ KUMAR OHRI)
JUDGE

OCTOBER 10th, 2019

na