

\$~

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

Date of decision : 05th February, 2019

+ **CRL. L.P. 783/2018**

STATE

....Petitioner

Through : Mr. Ravi Nayak,, APP for state with
SI P.L. Meena.

Versus

MOHD. SHAKIR

....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

JUDGMENT:

SANGITA DHINGRA SEHGAL, J.

1. Present leave to appeal has been filed by the State under Section 378 (1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as '**Cr.P.C.**') assailing the judgment dated 05.09.2018 passed by learned Additional Sessions Judge, Rohini District Court, New Delhi in Sessions Case No. 3/2016 arising out of case FIR No. 1239/2015 registered at Police Station – Aman Vihar whereby the accused was acquitted of the charge under Section 354 A/307 of Indian Penal Code (hereinafter referred to as '**IPC**'), Section 25 & 27 of Arms Act, 1959 and Section 12 of POCSO Act.

2. The brief facts of the case, as noticed by the learned Trial Court, which reads as under:

“On 05.10.2015 on receipt of DD no. 9PP a case was recorded on PCR regarding assault on a girl by a man with a knife. The said DD was handed over to the IO who reached House No. B 3/427, Agar Nagar, Prem Nagar-III, Delhi where on inquiry, it was revealed that the victim girl has been taken to SGM Hospital by the neighbours. IO reached the hospital where the victim was medically examined. IO collected the MLC with history of physical assault by her paternal uncle (chacha) and the injuries were under observation. IO also collected the blood stained clothes of the victim and her blood sample gauge seized by the doctor. The victim could not give her statement at the hospital as she was in pain. Thereafter, the IO reached the place where the victim got counseled and have her statement that she is living on rent with her siblings and the accused (step father) is living on rent in the back lane. Earlier he was residing with his kids in Inderlok and had asked the victim to sleep with him. She refused the same and about 4-5 days before, he again asked her to sleep with him and she complained about this to her maternal uncle (mama) Safdar who warned the accused to not go to her room. Accused got annoyed and threatened the victim. On the day of the incident, the accused knocked at their door at 7.30 am and said that maternal uncle has come. Her brother A opened the door and the accused was holding a knife in his hand and ran towards her and attacked her on her face and stomach, when the siblings raised an alarm, he ran away.

On her statement, the present FIR was registered and investigation was conducted. A knife was also recovered from the accused which was seized.”

3. After completing the investigation, a charge sheet was filed and the accused was charged with offence under Section 12 of POCSO Act or in the alternate under Section 354A/354B read with 307 of IPC and Section 25 and 27 of Arms Act, 1959 to which he pleaded not guilty and claimed to be tried.
4. The prosecution in order to bring home the guilt of the accused, examined as many as of 13 witnesses including an eye witness PW-5, Mohd. Altaf (brother to victim).
5. Statement of the accused was recorded under Section 313 Cr.PC wherein he reiterated his innocence and claimed to be falsely implicated in the instant case by the maternal uncle (Mama) as no such incident took place.
6. After hearing both the sides and evaluating the prosecution witnesses and documentary evidence, the learned Trial Court recorded the acquittal of the accused for the offence punishable under Section 354A/307 of the IPC, Section 12 of POCSO Act and Section 25 & 27 of Arms Act and convicted him only for the offence punishable under Section 326 of IPC.
7. Assailing the impugned judgment, learned counsel appearing for the State contended that the impugned judgment passed by the learned Trial Court is perfunctory in nature, full of conjectures and surmises; that the impugned judgment is a glaring case of legal defects resulting in grave failure of justice;

that the Trial Court has erred in laying a lot of emphasis on minor variations and discrepancies in the testimonies of the witnesses led by the prosecution, however, there are no material contradictions or improvements in the testimonies of the victim (PW-2), the brother of the victim who is also an eye witness of the incident, Mohd. Altaf @ Gufran (PW-5), the neighbour (PW- 7), the maternal uncle (Mama) (PW-4); that PW-7 had caught the respondent red handed on the spot with a knife and the injuries of the victim have also been proved; that minor contradictions or embellishments of trival nature, which do not affect the core of the prosecution case, should not be taken to be the ground to reject the evidence in its entirety; that the Trial Court failed to appreciate the intention of the respondent to kill the victim and that he had prepared for the incident a day prior by procuring the knife and then falsely got the door of the house opened early morning and stabbed her thrice on her vital parts of the body i.e. neck, spine and near abdomen; that the Trial Court has also discarded the testimony of PW-3 who deposed that the respondent had asked for a knife and he also identified the respondent and the knife (the weapon used); that the nature of the injuries is grievous and hence a case under Section 307 of IPC is clearly made out against the respondent.

8. Before concluding his arguments, learned counsel for the State submitted that the defective investigation should not be of any advantage to the accused and that the prosecution has been able to prove the entire chain of events, proving the guilt of the

accused beyond reasonable doubt, thus urging the Honb'le Court to set aside the impugned judgment.

9. To substantiate his arguments, learned counsel for the State has placed reliance on *State of Maharashtra v. Balram Bama Patil*, reported in *AIR (1983) SC 305* and *State of Punjab v. Gurmit Singh & Ors.* reported in *AIR 1996 SC 1393*.
10. We have given our anxious consideration to the submissions advanced on behalf of counsel for the State and also perused the material available on record.

Age of the victim

11. In the present case, the prosecution has failed to prove the age of the victim at the time of the incident. The ossification test was conducted on the victim on 05.01.2016, the report of which has proved that the victim was between 16 to 18 years at the time of the test. It is a settled principle of law that the benefit of doubt at all stages, other things being equal, goes in favour of the accused. It is also an established principle of law that if in a case the benefit of doubt has to go to the accused then the upper limit of the age bracket is assumed as held by the Apex Court in *Ram Suresh Singh v. Prabhat Singh* reported in *(2009) 6 SCC 681* and *Jyoti Prakash Rai v. State of Bihar* reported in *(2008) 15 SCC 223*.
12. Applying the aforesaid principle laid down by the Apex Court, to the present case, the age of the victim has to be read as 18 years and hence, at the time of the incident the victim was not a

minor and the provisions of POCSO Act cannot be applicable to the present case.

Testimony of the prosecutrix

13. In ***State of Haryana Vs. Basti Ram*** reported at (2013) 4 SCC 200, the Apex Court has held as follows:-

"25. The law on the issue whether a conviction can be based entirely on the statement of a rape victim has been settled by this Court in several decisions. A detailed discussion on this subject is to be found in Vijay v. State of M.P. reported in (2010) 8 SCC 191. After discussing the entire case law, this Court concluded in para 14 of the Report as follows:

"14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

14. In the instant case, the respondent is charged for offences under Section 354A and 354D of IPC. As per the case of the prosecution, the victim was sexually assaulted by the respondent when they were living together at Inderlok. However, no such complaint has been ever been made before any authority either by the victim or her maternal uncle.
15. The prosecution examined the victim as PW-2, who has testified as under:

"....She deposed that accused wanted to do wrongful act with her and accused used to come and sleep on her side and use to molest her. He used to touch her chest and near her thighs. At that

time accused use to live with them at a rented accommodation at Inderlok. ...”

16. However, in her statement recorded under Section 164 Cr.P.C., Ex. PW-2/B, she never stated that the accused committed any wrongful act with her, on the contrary she stated that he intended to commit wrongful act with her but she always managed to save herself.
17. Further, the victim (PW-2) in her testimony did not state any incident of sexual assault after they shifted from Inderlok to Prem Nagar. However, the brother of the victim and also an eyewitness of the incident (PW-5) gave a different version in his testimony and deposed as under:

“...One morning prosecutrix had informed him that the accused had misbehaved with her and then they informed their mama Safdar who then took separate accommodations for accused and for prosecutrix and her brothers and sisters. He stated that after one week of their shifting the accused managed to enter their room on the pretext of fever and the committed ched chad with his sister. In the early morning they had informed this to their Mama (maternal uncle) who came and instructed the accused not to enter in their room again. On next day i.e. on 05.10.2015 at about 7 or 7.30 a.m early morning all of them were sleeping when accused had knocked the door of their room and asked them to open on pretext that their maternal uncle has come. After hearing this he opened the door and he saw accused standing with knife. He

entered the room and started giving knife blows to his sister.....”

18. Interestingly, in his cross-examination, PW-5 has made a contradictory statement and stated that:

“that accused used to look after them very well and remained with them when their mother left. His sister never complained against accused earlier nor she told to the maternal uncle or aunt about the acts of the accused. ”

19. However, in view of the material contradictions and considerable improvements made by the victim (PW-2) and PW-5 in their testimonies qua the sexual assault committed by the respondent makes it difficult for us to accept the version of the prosecutrix on its face value. Moreover, there is nothing on record to suggest that we can lend assurance to the testimony of the prosecutrix.

Recovery of knife and injuries sustained by the victim

20. Coming to the next limb of the case of the prosecution that the victim was attacked with a knife and has suffered injuries. The prosecution has been able to bring on record that these injuries have been inflicted by a knife and examined Dr. Abhinav Rathi as PW-13 who opined that according to the MLC Report the victim had suffered three wounds on her cheek, iliac spine and umbilicus. The injuries inflicted upon the victim are as follows:
- i. 1 x 0.5 x 0.5 cm stab wound present on left cheek at the level of tempora-mandibular joint.

- ii. 5 x 2 x 2 cm stab wound present in left anterior- superior lilac spine.
 - iii. 0.5 x 0.5 cm stab wound present on the left side of umbilicus.
21. Undisputedly, the victim sustained injuries on the date and time of the alleged incident. However, the prosecution has been unsuccessful in proving the evidence on the recovery of the weapon allegedly used to inflict these injuries. According to PW-7, PW-8 (neighbourers) and PW-5, the brother of the victim, the respondent was apprehended red handed on the spot by them and when the police came they handed the respondent over to the police. PW-7 and PW-8 are also two independent witnesses who have identified the weapon and the respondent as well.
22. The relevant part from the testimony of the independent witness PW-7 is stated as under:
- “On hearing noise she came and saw prosecutrix was crying and blood was oozing from her cheek and waist and accused Shakir was present there with a knife in his hand. He was trying to inflict further injury upon the prosecutrix however he was apprehended by brother of the prosecutrix and other persons of locality.”*
23. Another independent witness PW-8 deposed in his testimony that:

“...He rushed to the spot and found prosecutrix in injured condition (khoon se lath-path) in the lap of one or two ladies of the gali including my wife.

He was informed by the people that accused Shakir, stabbed the prosecutrix. Siblings of prosecutrix were weeping and he saw a stabbed injury on the cheek of the prosecutrix and came to know that she had injury around her waist through his wife. Someone had called 100 no. and seeing condition of prosecutrix he called an auto rikshaw and sent prosecutrix with her brother and his wife and one more lady Noor to Hospital. He along with other persons were at the spot and when police came they handed over accused to the Police. ”

24. Interestingly, there is a contrary statement of the Investigating Officer (PW-11) who stated that he eventually recovered the knife from a plot at the instance of the respondent vide memo Ex. PW11/H.
25. Owing to this contradiction in the testimonies of the prosecution witnesses i.e. the Investigating Officer and the public witnesses PW-5, PW-7 and PW-8 and the failure of the prosecutions to prove the recovery of the knife, the respondent is entitled to a benefit of doubt on the grounds of parity.

Motive

26. Now we advert to the motive behind commission of crime. It is settled law that motive is not a necessary element in deciding culpability but it is equally an important missing link which can be used to corroborate the evidence where conviction is based on circumstantial evidence. The Apex Court on several occasions has considered the law regarding basing of conviction by the Court on circumstantial evidence. It is useful to refer to

the judgment of the Apex Court in ***Gambhir v. State of Maharashtra 1982 (2) SCC 351***, wherein the apex Court laid down that circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Referring to the above judgment of ***Gambhir v. State of Maharashtra (supra)***, principles were again reiterated by the Supreme Court in ***K.V. Chacko v. State of Kerala 2001 (9) SCC 277***, wherein following was laid down in paragraph 5:

5. The law regarding basing a conviction by the courts on circumstantial evidence is well settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

27. On evaluating the material available on record, we are of the considered view that the no fault can be attributed to the findings rendered by the Trial Court that that there was no

motive on the part of the respondent to kill his step-daughter (victim). The respondent was simply infuriated with the victim, as she had complained about the respondent to her maternal uncle (Mama) who had come forward and warned him to stay away. The act of the respondent was only because of his anger and all he intended to do was threaten his daughter and not to kill her.

28. Learned counsel for the State has strongly urged that from the facts and evidence adduced by the prosecution, a case under Section 307 IPC is clearly established against the respondent and laid emphasis on ***Balram Bama Patil (Supra)***, wherein it has been held that :

“A bare perusal of Section 307 IPC would show that the reasons given by the High Court for acquitting the accused of the offence under Section 307 were not tenable. Section 307 IPC reads:

Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as

to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.

10. The High Court, in our opinion, was not correct in acquitting the accused of the charge under Section 307 IPC merely because the injuries inflicted on the victims were in the nature of a simple hurt. Therefore, that part of the judgment of the High Court acquitting the accused Nos. 1, 2 and 11 of the offence under Section 307 IPC cannot be sustained and must be set aside. They have, however, already served out sentence of imprisonment for two years for the offence under Section 147 and 148 IPC in pursuance of the order of the High Court. When the State filed an appeal against them they were arrested again and had to remain in jail for three months before they could be released on bail. Thus, they have already served a sentence of two years, three months. In the circumstances the ends of justice should be met if

the sentence is limited to the period already undergone.”

29. In the instant case, though the prosecution has been able to prove that the injuries caused to the victim were grave and the same were inflicted with a knife, but from the nature of the injuries i.e. the depth of the injuries, it is unsafe to deduce that the respondent had any intention to kill the victim. Moreover, the recovery of the weapon i.e. knife allegedly used in the commission of the offence is under suspicion. In these circumstances, the conviction of the respondent under Section 307 IPC cannot be sustained, however, there is sufficient material on record to convict him for the offence punishable under Section 326 IPC.

Possession of Prohibited Arm

30. Now considering the charges on the accused for the offence punishable under Section 25 and 27 of Arms Act, 1959. The blade of the knife alleged to be recovered from the accused is 11 c.m. i.e. 4.33 inch and width is 4 c.m. i.e. 1.57 inch. As mentioned earlier, there exist contradictory statements regarding the recovery of the knife by the three public witnesses being PW-5, PW-7, PW-8 and the Investigating Officer. The two contrary evidences have raised a doubt regarding the recovery of knife and the prosecution failure to prove its case beyond reasonable doubt has led this Court to give the benefit to the accused and he is acquitted of the charges under Section 25 and 27 of Arms Act, 1959.

Conclusion

31. The Apex Court in the case of ***Ghurey Lal v. State of U.P.*** reported in **2008 (10) SCC 450** has laid down the following principles before granting leave to appeal against an order of 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 enormous 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 is 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 declaration/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 much rule in favour of the accused.”*

32. Having regard to the principles laid down by the Apex Court in the case of **Ghurey Lal** (supra) and the prosecutions failure to establish the guilt of the accused beyond reasonable doubt, we do not find that there is any illegality or perversity in the reasoning given in the impugned judgment. Accordingly, no compelling reasons exist to deviate from the same, hence, the present appeal stands dismissed.

SANGITA DHINGRA SEHGAL, J.

SIDDHARTH MRIDUL, J.

FEBRUARY 05, 2019

gr//