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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Delivered On: 23.11.2021

+ **CRL. L.P. 163/2021**

STATE

..... Petitioner

versus

AKRAM

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Ashish Dutta, APP for the State with S.I.
Athine, P.S.: Jafrabad.

For the Respondent : None

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

SIDDHARTH MRIDUL, J. (OPEN COURT)

Crl. M.A. No.18503/2021 (exemption)

Exemption allowed, subject to just exceptions.

The application stands disposed of.

Crl. L.P. 163/2021

1. The present leave to appeal under section 378(3) of Code of Criminal Procedure, 1973 has been instituted on behalf of the State of NCT of Delhi assailing the correctness of judgment dated 10.12.2020 rendered by the learned Additional Sessions Judge (Special Fast Track Court), East, North East & Shahdara Districts, Karkardooma

Courts, Delhi in SC No.1470/2016 arising from case FIR No.341/2013 registered under sections 376/376(2)(n)/377/323/506 of the Indian Penal Code, 1860 ('IPC'), whereby it was held that the prosecution had failed to prove its case against accused Akram, which was to the effect that he had committed sexual intercourse with the prosecutrix against her will and consent and had beaten her and criminally intimidated her; and resultantly acquitted the former of all offences he was charged with.

2. The facts as are necessary for adjudication of the present leave to appeal petition, which has been instituted belatedly, are that on 16.09.2013, the prosecutrix, whose particulars are withheld and are not being disclosed in compliance of the guidelines of the Hon'ble Supreme Court in relation to minors who are victim of sexual offences, came to the police station with a complaint against the respondent of having committed rape upon her.
3. In this behalf, it would be relevant to extract the entire examination-in-chief and cross-examination of the prosecutrix/PW-1 commencing from 05.02.2015, as recorded by the learned Trial Court:

*"Earlier I was residing at house no. 53/13A, Gali no.6, Chauhan Bagad, Delhi-53 with my parental family. After the death of my father, my family shifted to Akhadewali Gali, Hasnain Karina Madarasa after selling house no. 53/13A, Gali no.6, Chauhan Bagad, Delhi-53. In Akhadewali gali the house of accused was opposite to my house. I came in contact with accused Akram as he used to come to my house and used to demand money from my mother. **I developed friendship with accused and accused performed marriage with me.** It was my second marriage as earlier I was married to Gulfam Ali. My husband was a habitual drinker and a gambler. So my divorce with him took place in Panchayat.*

After that I alongwith accused started living in a rented premises at Shiv Mandir wali Gali where accused repeatedly used to perform sexual intercourse with me and he also used to insert his penis in my mouth and he also used to do anal intercourse from my back forcibly. He used to make me lie on the floor and after removing my clothes used to commit sexual intercourse and unnatural sex i.e. anal intercourse with me. Whenever I objected unnatural sex by accused, he used to beat me. **After that accused performed nikaha with some other lady. After leaving me at the house at Shiv mandirgali, he started living with that lady.** Accused also used to demand money from me. I had also filed a complaint at CAW cell Nand Nagri. After 15 days prior to my filing the complaint, accused got remarried with another lady. **Even after second marriage, he continued to perform sexual intercourse and anal intercourse with me.** After that he divorced me in my presence, in the presence of my brother and relatives of the accused and I started living separately from the accused in a Ashram.

On 08.09.2013 I had gone to the house of accused to take some documents i.e. acknowledgment of Aadhaar card and electricity bill and at that time also accused by force committed anal intercourse with me. When I objected he beat me. I had suffered injuries and I was having bleeding from my back.

Now, witness has started weeping.

On 16.09.2013, I had gone to police station Jafrabad where I got recorded my complaint to the police but police did not write my complaint properly. I am illiterate. I can read Quran Sharif in Urdu. I can sign in Hindi. I can identify my complaint if shown to me.

After that I was got medically examined at GTB hospital. I had also signed my MLC. On the next day i.e. 17.09.2013 I was produced before the Ld. MM where my statement was got recorded by the Ld. MM.

Today I have seen my complaint Ex.PW1/A which bears my signatures at point. I have also seen my MLC Ex.PW1/B which bears my signatures at point A.

At this stage sealed envelope duly sealed with the seal of AS is opened. Proceedings u/s 164 Cr.P.C. are taken out and shown to the witness. On which witness identifies her signatures at point A on all the pages. Statement is exhibited as EX.PW1/C.

On 31.01.2014, IO SI Kusumlata had made inquiries from me and recorded my statement.

Remaining testimony is deferred for want of case property and the complaints lodged by the witness."

(examination-in-chief dtd 05.02.2015)

"At this stage, accused is shown to the witness after bringing him out of the room which is meant for the accused. The witness has correctly identified accused Akram.

On 29.07.2013 I made a complaint to ACP, CAW Cell, Nand Nagri. Copy of the same is marked as PW1 mark A bears my signature at point A. During investigation, the investigating officer recorded my statements."

(examination-in-chief dtd 05.02.2015)

"Earlier I got married to one Gulfam Khan when my mother was alive. Gulfam Khan habitually used to consume liquor. He divorced me after two years of our marriage. Thereafter, I got married to accused Akram. I do not remember the date of my marriage with Gulfam. I have no document pertaining to divorce between me and Gulfam Khan. I can not produce the, talaknama. I alongwith Gulfam Khan was residing at Kachchi Khajuri Delhi. However, I do not know the house number. I do not remember in which year Gulfam Khan divorced me. Before marriage with Gulfam Khan, I alongwith my father and mother was residing at house no. C-53/13A, Gali no.6, Chauhan Bagar, Delhi-53. I do not remember the year in which my father had expired. After death of my father, I alongwith my mother and. three brothers shifted to a house at Akhadewali, Hasnain Karnail Madarasa which was situated in front of the house of accused Akram. The said house was purchased by my mother and brothers. I do not remember in which year the said house was purchased by my mother and brothers. I never got married with Fazil.

My nikaha (marriage) with accused Akram was performed in the year 2000 at Salim Masjid, Seema Puri. I am illiterate. Again said my marriage was performed with the accused five years ago. At the time of my marriage with accused Akram, my cousin brother and three friends of accused were also present there but I do not know

their names. Again said my cousin brother was not present in my marriage.

Today I have brought the nikahanama and talaknama. Same are marked as mark X, mark Y and mark Z.

Further cross examination is deferred as it is lunch time. Be continued after lunch.

(cross-examination dtd 05.12.2015)

'Now I can sign in Hindi. Early I used to put my thumb impression on the documents. I have been residing in Ashram for the last six and a half months. Prior to that I was residing at my house at Akharewali Gali. The fatwa mark Y was got written at Fatehpuri Road by one Haji Mukarram. Mark Z is Hindi translation of mark Y. Accused Akram divorced me in presence of my brother Anis and family members of the accused including his maternal uncle namely Munna. I am illiterate. I do not know the date when the accused divorced me. No written talaknama was prepared at the time of divorce.

I signed the complaint which I had filed at police station Jafrabad. I do not remember the date when I signed the complaint. I had stated to the police that on 08.09.2013 when I had gone to the factory (karkhana) of the accused to collect my documents, he raped me. (confronted with complaint Ex.PW1/A where it is not so recorded). I had stated to the police that the accused had performed unnatural sex with me. (confronted with complaint Ex.PW1/A where it is not so recorded).

On 08.09.2013 when I had gone to the factory of the accused, no other person was present there except the accused. The factory of the accused was at the ground floor in his house. On 08.09.2013 no worker of factory was present when accused raped me as it was a holiday.

I filed the complaint against the accused at police station Jafrabad immediately after commission of rape on me by the accused on 08.09.2013. It is correct that prior to the present complaint, I had filed a complaint against the accused at Crime against woman cell, Nand Nagri as the accused had beaten me. At that time my marriage with accused Akram was subsisting. It is correct that earlier accused Akram was residing opposite to my house. The accused used to visit my house. My brother and maternal uncle of the

accused were good friends. I never visited the house of the accused before marriage. The accused used to visit my house and used to borrow money from my mother. The accused took me to his house after our marriage and he kept me there for three days. After three days the accused beat me and demanded money from me. After our marriage, the accused wanted to marry with some other girl but I do not know the name of that girl.

It is wrong to suggest that the accused never got married with me. It is further wrong to suggest that the accused never made physical relations with me nor resided with me at any time. It is further wrong to suggest that I had made false complaints against the accused. It is further wrong to suggest that the accused never threatened me in any manner. It is further wrong to suggest that the accused never beat me. It is further wrong to suggest that the accused never performed unnatural sex with me. It is further wrong to suggest that the documents mark X, mark Y and mark Z are false and fabricated documents as no nikaha was performed by the accused with me.

It is correct that I had filed a complaint Ex.PW1/DA against the accused on 21.11.2014 for commission of rape on me near Karkardooma court. It is correct that FIR Ex.PW1/DB was registered on my complaint mark Z1. It is correct that I had also got registered FIR under sections 498A/406 IPC against the accused at police station Jafrabad. The FIR is Ex.PW1/DC.

It is wrong to suggest that I have deposed falsely. It is wrong to suggest that the accused had never done any wrong with me. It is wrong to suggest that all the complaints filed by me against the accused are false and fabricated.”

(cross-examination dtd 05.12.2015)

4. Having given due consideration to the above testimony of the prosecutrix read in conjunction with the MLC of the prosecutrix which is exhibited as Ex. PW-1/B and Ex. PW-1/C, the learned trial court recorded the following findings :

“13. From exception 2 of section 375 IPC it is evident that physical intercourse by a husband with her own wife with or without her consent is not a rape. Even though accused had denied of

marrying with prosecutrix but Ld. Counsel for accused had argued that since prosecutrix had deposed in her testimony that accused had performed marriage with her and only incident of 8.9.2013 i.e. after divorce therefore all the acts of sexual intercourse by accused with prosecutrix prior to 8.9.2013 would not be rape as at that she was the wife of accused.

“14. On the other hand Ld. Addl. PP for State submits that since accused had denied of having performing marriage with prosecutrix therefore all the acts of sexual intercourse prior to 08.09.2013 would also be amount to rape as prosecutrix had given her consent because accused had married with prosecutrix and she agreed to sexual intercourse with him treating her as her husband and when accused denied of performing marriage with her consent also goes.

“15. In my view since prosecutrix had deposed that accused had performed marriage with her and divorce her, in that situation even if accused had denied of performing marriage with her in his statement u/s 313 Cr.PC the prosecution cannot be allowed to go beyond the testimony of prosecutrix. Hence all the incident of physical intercourse by accused prior to alleged divorce with prosecutrix would not be rape being covered in exception 2 of section 375 IPC. Even otherwise from testimony of prosecutrix it is evident that prosecutrix had not deposed that except on 08.09.2013 accused made sexual relation forcibly or by threatening her or without her will or consent hence in my view same cannot be considered as rape.

“16. As far as contention of Ld. Addl. PP for State that accused had done anal sex and put his penis into her mouth which amount to unnatural carnal intercourse hence accuse is liable to be convicted for offence u/s 377 IPC. In my view accused making physical relation with her both natural and anal/unnatural with her will and consent whether without performing marriage or after performing marriage is not an offence.

“17. Further more, I am agreed with contention of Ld. Counsel for accused that since accused and prosecutrix are husband and wife therefore carnal intercourse by a husband with her own wife is not an offence. Prior to the amendment in Section 375 IPC the unnatural sexual intercourse was not covered u/s 375 IPC and it was only covered u/s 377 IPC. The pre amended section 375 IPC is reproduced as below:

* * * * *

“18. The amendment in Sections 375 & 377 IPC has been made which has come into force on 03.02.2013 and the amended Sections 375 & 377 IPC are reproduced as below:

* * * * *

“19. Thus, from perusal of the aforesaid definition of rape as prescribed in amended Section 375 IPC, the unnatural sex with a woman has been made as rape and as per exception II given in Section 375 IPC the sexual intercourse or sexual act by a man with his own wife not being under 15 years of age is not rape. It is deposed by prosecutrix that she and accused are husband and wife, hence if the accused had done carnal intercourse with the prosecutrix it would also be covered in definition of rape under Section 375 IPC.

* * * * *

“22. From aforesaid judgment it is evident that carnal intercourse by a husband with his wife is not a rape or even if they are not husband and wife but done with their mutual consent same is not rape. Hence even if I presume that accused has done carnal intercourse with prosecutrix, I held that said act of accused doing anal sex prior to 08.09.2013 is not an offence as being covered in exception 2 of section 375 IPC.

“23. As far as incident of 08.09.2013 is concerned since in her complaint Ex. PW1/A she has not stated that accused made physical relation with her on 8.9.2013 hence same is an improvement and afterthought, probably made under legal advice as probably she become aware that physical intercourse with wife or with her consent is not a rape. Even otherwise she has not given any explanation if she was raped forcibly on 08.09.2013 why she did not reported the matter to the police immediately as she lodged the complaint on 16.9.2013. Hence I do not find her testimony reliable that she was raped by accused on 08.09.2013 or beaten her and it would not be safe to convict the accused without corroboration from independent witness.

* * * * *

“27. As far as offence under Section 323 IPC is concerned though prosecutrix has deposed in her testimony that accused beaten her on 08.09.2013 but as stated above in my view incident of 08.09.2013 is concocted story and is not believable. There is nothing in her MLC which corroborate that she had injuries in her back as deposed by her. Therefore I held that prosecution has failed to prove that accused caused hurt to prosecutrix.

“28. As far as 506 IPC is concerned, even prosecutrix in her testimony has not deposed that accused threatened her to kill. Therefore prosecution has failed to prove that accused had criminally intimidated the prosecutrix.

*“29. In view of above discussion, I held that prosecution has miserably failed to prove its case that accused had committed sexual intercourse with prosecutrix against her will and consent and thus raped her or beaten her, or criminally intimidated her hence, **I acquit the accused from all the offences he was charged i.e. 376/376(2)(n)/377/323/506 IPC.**”*

(emphasis supplied)

5. We have heard Mr. Ashish Dutta, learned Additional Public Prosecutor appearing on behalf of the State and have carefully examined the impugned judgment as well as relevant material available on the record of the present leave to appeal petition.
6. A plain reading of the above extracted findings arrived at by the learned trial court clearly reflect that the prosecution has neither been able to establish that the respondent had committed rape on the prosecutrix nor that he had subjected her to any unnatural offence, since neither the testimony of the prosecutrix nor the MLC recorded contemporaneously inspires any confidence or can be considered creditworthy, so as to arrive at a conclusion or establishment of the respondent's guilt beyond reasonable doubt.
7. A plain reading of the MLC completely belies the allegations made by the prosecutrix in her afore-extracted testimony. It is further clear and unequivocal that nowhere in the testimony of the prosecutrix did she depose, even in passing, that the respondent had threatened to kill her at the time of having allegedly committed the offence that he was

charged with. Furthermore, there is clear-cut evidence that the sexual intercourse alleged against the respondent by the prosecutrix took place, as per the prosecutrix's own testimony, during the period they were legally married, save and except the allegation relating to commission of the offence on 08.09.2013; which allegation, as is axiomatic from the testimony of the prosecutrix read in conjunction with the MLC Ex. PW1/B, is neither believable nor credible.

8. It is a settled principle of law that conviction can be based on the sole testimony of the victim of sexual assault without corroboration from any other evidence, *if such testimony inspires confidence*.
9. However, in the present case, from a plain reading of the testimony of the prosecutrix, it is evident that it is not her allegation that the respondent made sexual relations with her forcibly or by threatening her or without her will or consent except on 08.09.2013, which last allegation, as afore-noted, is completely negated by the medical evidence contemporaneously recorded and exhibited as Ex.PW1/A dated 08.09.2013.
10. It is further observed that there was neither any complaint prior to 08.09.2013 of the respondent having committed any sexual offence against the prosecutrix nor any material of the prosecutrix having initiated a complaint in this behalf before the police or the Crime Against Women Cell.
11. Lastly, even the incident on 08.09.2013 is evidently an improvement and an afterthought, since the same was not narrated in her complaint exhibited as Ex.PW1/A. This inference is further supported by the circumstance that no explanation is forthcoming on behalf of the

prosecution as to why the complaint in this behalf was lodged only on 16.09.2013, whereas the incident is alleged to have occurred on 08.09.2013.

12. In this view of the matter, and having considered all the relevant evidence on record, we are of the opinion that there is no ground to interfere with the findings arrived at by the learned trial court to the effect that the testimony of the prosecutrix was unreliable; and in the absence of independent corroboration, could not form the basis of convicting the respondent.
13. It is settled law that the Appellate Court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so. [Ref: *Muralidhar v. State of Karnataka* reported at (2014) 5 SCC 730].
14. In *State (Govt. of NCT of Delhi) v. Kuldeep @ Kallu & Anr.* CrI. L.P. 478/2018 reported as 2019(1) JCC 298 (Del.), a Division Bench of this court has stated that:

“It is a settled law that while deciding a leave to appeal petition filed by the State, in case two views are possible, the High Court must not grant leave, if the trial court has taken one of the plausible views, in contrast thereto in an appeal filed against acquittal. Upon re-appraisal of evidence and relevant material placed on record, in case the High Court reaches a conclusion that another view can reasonably be taken, then the view, which favours the accused, should be adopted unless the High Court arrives at a definite conclusion that the findings recorded by the trial court are perverse, the High Court would not substitute its own views on a totally different perspective.”

(emphasis supplied)

15. For the foregoing reasons, we find ourselves unable to hold that there is any good ground to interfere with the findings arrived at by the learned trial court in concluding that the prosecutrix was not a reliable witness; and in the absence of independent corroboration, it would be wholly unsafe to base the conviction of the respondent on the prosecutrix's deposition.
16. The present petition seeking leave to appeal is accordingly dismissed.

Crl. M.A. No.18504/2021(condonation of delay)

Since the main criminal leave petition is dismissed, this application for condonation of delay also stands disposed of.

**SIDDHARTH MRIDUL
(JUDGE)**

**ANUP JAIRAM BHAMBHANI
(JUDGE)**

NOVEMBER 23, 2021
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