

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-A-2678-MA-2018

Date of Decision: 15.11.2022

POOJA

.....Appellant

Vs.

STATE OF HARYANA AND OTHERS

.....Respondents

CORAM: HON'BLE MR. JUSTICE G.S. SANDHAWALIA
HON'BLE MS. JUSTICE HARPREET KAUR JEEWAN

Present: Mr. Samar Ahluwalia, Advocate, for
Mr. A.K. Jindal, Advocate, for the appellant.

HARPREET KAUR JEEWAN J.

CRM-42940-2018

By this application, the applicant-appellant seeks condonation of delay of 17 days in filing the appeal.

For the reasons given in the application, which is duly supported by an affidavit of the appellant, the application is allowed and the delay of 17 days in filing the appeal is condoned.

CRM-A-2678-MA-2018

Challenge by the appellant (victim) in the present application filed under Section 378 (3) Cr.P.C. is for grant of leave against the judgment of acquittal dated 05.07.2018 passed by the Additional Sessions Judge, Gurugram.

Vide the impugned judgment, the trial Court acquitted the respondents-accused of the charge, which had been framed against them under Sections of 376D, 323, 509, 506, 34 of the Indian Penal Code (for short 'IPC') in FIR No. 296 of 2016 registered at Police Station Sector 5, Gurugram.

2. The brief facts which are necessary for adjudication of this appeal are that victim X (the name withheld) was residing in a village of District Gurugram. She is having two children who are living with her husband whereas she is living with her father and sister. She worked as a helper for about 02 years at the '*Dhaba*' of respondents Dinesh Kataria and Swaroop Kataria, but she was not paid her salary and therefore, she left the job. Thereafter, the victim X installed a kiosk for her livelihood. After about 02 months, on 13.05.2016, the respondents Dinesh Kataria, Swaroop Kataria, Ashok, Kapil, Shamsheer Kataria, Tony and Fogat came at the kiosk of the victim, gave her beatings and threatened to kill her. They stopped her from selling *Bidi*, and cigarettes at her kiosk and asked her to work with them. The victim refused to do the same and then on the same day about 07:30 p.m., the said persons came to her kiosk and turned her out of the '*Khokha*' and further threatened to kill her if she would not obey them. The victim has further alleged that respondents Dinesh Kataria and Sawroop Kataria had been committing rape upon her and they used to force her to have physical relationships with the customers and also used to take her with them for such purpose. The said respondents used to promise to give her a plot of 100 square yards and huge amount of money.

3. On 13.05.2016, when the victim was turned out of her kiosk, she immediately made a phone call at telephone No. 100 and then ASI Sanjay along with the other police officials reached at the spot but in the meantime, the respondents managed to escape. The victim gave a written complaint to the police and on the basis of the same, FIR was registered and the investigation was conducted by lady Sub-Inspector Rajesh Kumar.

Medical examination of the victim was got conducted from the General

Hospital, Gurugram. Rough sketch of the site of offence was prepared. Statement of the victim under Section 164 of the Cr.P.C. was recorded. The respondent Dinesh Kataria was arrested on 18.05.2016. His disclosure statement was recorded and his medical examination was also got conducted. The samples collected from the doctor were sent for FSL examination. Accused Swaroop Kataria was joined in the investigation and was released on bail on the basis of the pre-arrest order passed by the Court. His medical examination was also got conducted. Accused Shamsher Kataria was arrested on 06.08.2016 and the offence under Section 506 of the IPC was added. The remaining investigation was conducted by ASI Jitender who arrested the accused Ajit @ Ashok on 10.09.2016 and further investigation was again conducted by lady Assistant Sub Inspector Rajesh and accused Ashwani @ Tony was arrested on 20.09.2016. The identity of the person namely Fogat could not be established during the investigation and therefore the arrest could not be made. After completion of the investigation, '*challan*' against the accused Dinesh Kataria, Swaroop Kataria, Shamsher Kataria, Ajit @ Ashok, Ashwani @ Tony and Kapil was submitted before the Area Magistrate. Accused Shamsher Kataria, Ajit @ Ashok, Ashwani @ Tony and Kapil were not found to have committed the offence under Section 376 of the IPC.

The case was committed to the Court of Sessions after completing the formalities of supply of the documents to the respondents. Charge under Section 376-D of the IPC was framed only against respondents Dinesh Kataria and Sawroop Kataria, whereas charges under Sections 323/506/509 of the IPC read with Section 34 of the IPC were framed against all the respondents. The respondents pleaded not guilty and claimed trial.

4. The prosecution examined total 12 witnesses. The victim appeared as **PW-6** as she had stated as per the prosecution case. MLR of the victim was brought on record as Ex. P-26 in the statement of the Public Prosecutor.

PW-8 Lady Assistant Sub Inspector Rajesh and **PW-12 Assistant Sub Inspector Jitender Singh** were the investigating officers. They have stated about the investigation conducted by them and proved all the documents prepared during the investigation.

PW-1 Girish Kumar, draftman from the office of the Commissioner of Police, Gurugram, proved the site plan of the place of occurrence.

PW-3 Constable Sandeep Kumar prepared the rough site plan of the place of the occurrence as Ex. P-2.

PW-2 Constable Vijay and **PW-4 Constable Rakesh** are the formal witnesses to prove the link evidence regarding taking the samples to the FSL, Madhuban.

PW-5 Constable Narender Singh, **PW-7 EHC Karambir** and **PW-11 Head Constable Jasbeer Singh** have stated that they were present during investigation and attested various documents prepared during investigation.

PW-9 Dr. Irfan, proved the medico legal examination report (Ex. P-24) of accused Dinesh Kataria and **PW-10 Dr. Rajdeep Singh**, Medical Officer, General Hospital, Gurugram, proved the medico legal examination report of accused Swaroop Kataria.

The statement of the respondents were recorded under Section

313 of the Cr.P.C., where they controverted and rebutted the entire prosecution evidence and submitted that they are innocent and they have been falsely implicated in this case. They further submitted that they have been pressurized and black-mailed by the victim to deliver her a plot and a large amount of cash money as a compromise to withdraw her complaint. Yet they had preferred not to bend down on the blackmailing tactics of the victim.

5. After hearing the Public Prosecutor and the learned counsel for the respondents and perusing the record, the trial Court concluded that the prosecution has failed to prove the case beyond shadows of doubt. Accordingly, the respondents were acquitted of the charge framed against them, vide the judgment and order dated 05.07.2018.

6. Before this Court, the victim has filed an application for leave to appeal assailing the finding of the trial Court whereby the respondents were acquitted vide judgment and order dated 05.07.2018.

7. The trial Court has referred the following reasons while acquitted the respondents:-

(a) The victim did not give any specific date, time, month and year when she was allegedly repeatedly raped.

(b) In the earlier complaints Ex. D-1 and Ex. D-2 pertaining to the year 2015, the victim raised no allegations of rape/assault. Such allegations were raised for the first time in her complaint Ex. P-5 which is dated 13.05.2016 on the basis of which the present FIR was registered.

(c) There is no medical evidence in support of the version of the victim.

(d) The prosecution case is unbelievable that the victim was

allegedly continuously getting raped, she kept working in these conditions for more than 1½ year and even her father was also aware of this situation.

(e) Even in such a situation the victim talked about being given a 100 square yards area of plot and huge cash amount and this fact has been admitted by the victim and her father.

(f) There are many improvements and contradictions in the statement of the victim and her father.

8. Learned counsel for the appellant has submitted that the learned trial Court has acquitted the respondents despite the fact that the respondents have committed such a heinous crime. It is well settled law that if the testimony of the prosecutrix inspires confidence, there should be no necessity of corroboration of her evidence. The learned trial Court has ignored the testimony of the prosecutrix wherein she has clearly stated that the accused respondents threatened her and due to fear of her life, she could not raise her voice. The learned Sessions Judge has laid much stress on the point that in the earlier complaints Exs. D-1 and D-5 the allegations of sexual assault was not made and these have been made for the first time in the complaint (Ex. P-5). The learned trial Court has failed to appreciate that the said documents Ex. D-1 to D-5 clearly indicate that the accused respondents were threatening the prosecutrix and they were forcing her to enter into a compromise by giving weightage to immaterial facts. The trial Court has acquitted the respondents ignoring the well settled proposition of law that the testimony of the victim in a sexual assault case does not require any corroboration from medical evidence. Raising the aforesaid submissions, learned counsel for the appellant has submitted that the findings of the trial Court are liable to be set aside and prayed for grant of leave to appeal.

9. In the aforesaid circumstances, we have given thoughtful consideration to the aforesaid submissions and perused the record.

10. As per the version of the victim/prosecutrix (PW-6), she had taken up a job in the '*Dhaba*' of the respondents Dinesh Kataria and Swaroop Kataria in the year 2014 and she was paid the salary only for 02-03 months but thereafter she was not paid the salary for a period of 01 year and 05 months. She has been repeatedly asking them to pay the salary but they had promised to pay a lump sum amount at the time of marriage of her sister. This part of the statement of the victim that she continued working without salary for a period of 01 year and 05 months requires a deep scrutiny as a daily wage worker she requires some money to meet with her day to day expenditure and it is highly improbable that a person would stay silent and continue working at the same place for nearly 1½ year without getting any salary. No doubt there can be instances of exploitation of the workers but the case in hand is to be seen on the basis of evidence on record.

11. It is the version of the victim PW-6, in which she has stated that she felt Swaroop Kataria and Dinesh Kataria accused used to add some drug in her food and after consuming the same, she used to become unconscious and at one stage both of them committed rape upon her and also got her raped from another person. This is an improved version given in the Court. In the first version given in her written complaint Ex. P-5, the victim has not mentioned this fact that the said respondents used to add some drug in her food and she used to become unconscious.

12. The statement of the victim as recorded under Section 164 of the Cr.P.C. (Ex. P-6) indicates that she stated before the Magistrate that the victim told her father that her salary is Rs. 10,000/-. She further stated that

the respondents Swaroop Kataria and Dinesh Kataria did not give her any money and they had misappropriated the amount earned by her. They used to get wrong work done from her and when she refused to do the said work, they used to make her consume liquor, '*Ganja*' and other intoxicants. She has further stated that when she refused to do the wrong work and her father used to take her back and the said respondents told her father that they would give her a 100 square yards plot in Gurugram. The said part of the statement of the victim indicates that there was an issue of giving 100 square yards plot by the said respondents to the victim. This fact is further strengthened from the circumstance that when the matter was reported for the first time to the police, the victim has mentioned in her written complaint Ex. P-5 that the said respondents had been sexually exploiting her and also forcing her into prostitution and used to say that they would pay a huge amount and also a 100 square yards plot.

13. It is not disputed that prosecutrix is a major. She was married and having two children but living away from her husband and her children. She has herself testified that her children were staying with her husband and she was staying with her father and sister. Keeping in view the age of the victim and the long silence on the part of the victim, the prosecution was required to bring on record the cogent evidence to establish that the victim was forced to remain silent despite being sexually exploited under threat.

14. There is nothing on record to indicate that the victim was stopped by any circumstance or that she was under any pressure for not reporting the matter to the police at the first instance. Before giving the first information by way of making the complaint Ex. P-5, the victim had made certain complaints which are proved by the respondents as Exs. D-1 to D-5.

The victim (PW-6) stated in her cross-examination that the allegations against Dinesh Kataria and Swaroop Kataria (respondents) of rape and prostitution have been raised for the first time in the present complaint and these were not raised in the earlier complaints Exs. D-1 to D-5. The learned trial Court has dealt with the impact of the said complaints in order to consider the veracity of the victim. In her cross-examination, the victim has admitted that she has presented three complaints against Swaroop Kataria and Dinesh Kataria (respondents) dated 02.05.2015, 03.05.2015 and one undated which are Exs. D-1 to D-3. She has voluntarily stated that she has visited the police station on those days where her statements were recorded by way of the said applications and she had signed the said applications. She has further stated that when she has a problem she has visited the police station where the police used to get her signatures on certain papers.

15. The said complaints indicate that the victim was not hesitant in going to the police station. Even on the earlier occasions, she had visited the police station and made written complaints against the respondents. Ex. D-3 is a compromise made in the complaint Ex. D-2. The dates of the said complaints are very material, i.e. 02.05.2015, and 03.05.2015. In the present case, the victim has moved the complaint to the police on 13.05.2016. The said complaints were moved about 01 year before the registration of the present FIR. The victim has alleged that she was not paid salary for 01 year and 05 months and that the respondents Swaroop Kataria and Dinesh Kataria used to sexually abuse her after mixing drugs in her food and also used to get her raped from other persons but these facts are not the part of her earlier complaints which were moved to the police about one year ago and that too against Swaroop Kataria and Dinesh Kataria who were respondents in the

present appeal and accused in the present FIR. This fact makes the version of the victim highly doubtful. It is not the case of the prosecution that the victim is a lady or that she was hesitant in moving the authorities by reporting the matter but here in the present case, the victim had been visiting the police station making the complaints against the same respondents but not reporting any sexual harassment with her from their hands. There is no plausible explanation given by the victim for not reporting about her said exploitation in her previous complaints given to the police.

16. Ex. D-4 is a copy of the complaint filed by the police against the victim that she had used the abusive language against the police officer at Commissioner of Police office on 14.03.2016, i.e. about 02 months from the occurrence. The victim PW-6 has admitted in her cross-examination that a '*Calandra*' (complaint) was registered against her, which is Ex. D-4 regarding the incident of 14.03.2016, when she had entered the office of the Commissioner of Police in a drunken condition. She gave an explanation by voluntarily stating that respondent Dinesh Kataria had made her drink liquor and then dropped her at Commissioner of Police office. However, she has admitted that she had used abusive language against the police officer at CP office on that day but she gave an explanation that has been exonerated with the charges mentioned in Ex. D-4. Apart from this, she has also admitted another incident dated 01.07.2015, which took place about one year before the registration of the FIR. She has admitted that the said FIR was registered for using abusive language against SHO Police Station 5, Gurugram (Ex. D-5). She gave the explanation for registration of the said FIR by voluntarily stating that on that day she had consumed liquor at the Dhaba of Swaroop Kataria and Dinesh Kataria (respondents) and after eating food she along

with her friend Meenu were returning back where on the way they met a police gypsy. The SHO and SI Bhaiya Ram stopped them and used vulgar language. SI Bhaiya Ram caught hold of Meenu and she objected to protect her due to which a scuffle took place between them and police got wrongly registered the said FIR. There is nothing on record that the victim has ever filed any complaint to the higher authorities for registration of the said FIR on false grounds. No complaint is stated to have been made by the said Meenu for the alleged act of sexual harassment by SI Bhaiya Ram. Hence, the said exploitation is baseless. The victim had further admitted that she remained in the jail between August 2017 to October 7/8, 2017.

17. Though the aforesaid FIR and the complaint Ex. D-4 registered against the victim has no direct connection with the present incident but these complaints throw light that the victim was not having any hesitation in visiting the police station to report about her alleged sexual exploitation immediately when it allegedly happened for the first time. Having not done so causes serious doubts to the veracity of the victim.

18. There is another important factor which needs consideration while appreciating the veracity of the victim. She (PW-6) has testified in her cross-examination that having worked in the '*Dhaba*' of Swaroop Kataria and Dinesh Kataria (respondents) for about 1½ year, she was running her independent '*Khokha*' and after starting the said '*Khokha*' business, she had occasionally visited the '*Dhaba*' of Dinesh Kataria and Swaroop Kataria (respondents) as and when they demanded her to come and work. She has further stated that after her working independently at her '*Khokha*' whenever she visited the '*Dhaba*' of the said respondents on their request, she was raped by them but during this time they stopped taking her to hotels. There

was a Court question to the victim that how and why you are visiting the 'Dhaba' of the said respondents after working with them for 1½ year and that to when you were being ravished for money, the victim remained silent and did not give any answer to the said question. The trial Court had put the Court question to the victim (witness) in order to see her demeanor. The trial Court has rightly observed that despite the fact that her father has also intervened, and was having knowledge about her being sexually exploited by the accused under the promise of an offer of getting a plot of 100 square yards and cash by some of the respondents, no complaint was made by the victim at appropriate time and the victim kept silent to the Court's questions makes out a material fact regarding her demeanor which requires to be appreciated as a material piece of evidence.

19. We have also considered the medical report, first the doctor who has conducted the medical examination of the victim was not examined. However, copy of the medico-legal report of the victim was tendered into evidence and as such, no cross-examination could be conducted of the doctor who performed the medico-legal examination. Even otherwise the observation made by the trial Court with regard to the medical evidence are in consonance with the contents of the copy of the medico-legal report. The medico-legal report (Ex. P-26) indicate that she had already taken bath, changed her clothes and the said change of clothes were not available. Apart from this, it is an admitted fact that the victim is married having two children. As per the medico-legal report, there were no external injuries found on the person of the victim. No DNA matching report has been relied upon by the prosecution.

20. In view of the aforesaid reasons, we are of the considered

opinion that the testimony of the victim is surrounded with serious doubts. She is a major working lady who has to work for her livelihood. She is also having the support of her father and some other relatives. She had been presenting complaints to the police with regard to some previous incidents that too with some of the respondents but she has not leveled any allegation of sexual exploitation in the said complaints. She has a record of going to the office of the Commissioner of Police under the influence of liquor. Apart from this, the police had made a complaint against her for abusing a police official and using filthy language. She remained silent with regard to a material question put to her by the trial Court. Her long silence in reporting the matter to the police and the highly improbable circumstance put forth by her that she was not paid any wages for 1½ year, totally makes her version highly improbably. No doubt in a case of sexual assault the testimony of the victim is required to be believed without corroboration but in the present case there are serious doubts to the veracity of the statement of the victim and strong indications that a false case has been registered against the respondents with regard to some dispute regarding some plot.

21. The Hon'ble Supreme Court has repeatedly held that benefit of doubt ensues to accused. If two views are possible, the benefit of doubt must be granted to accused. It has been further held that if two views are possible, the order of acquittal should not be set aside by High Court because there is double presumption of innocence. The Hon'ble Supreme Court in **para 39 in Dhanapal v. State By Public Prosecutor, Madras, (2009) 10 SCC 401** while dealing with scope of interference at appellate stage has held:

“39.The following principles emerge from the cases above:

- 1. 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 acquittal bolsters the presumption that he is innocent.*
- 2. The 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, but the appellate court must give due weight and consideration to the decision of the trial court.*
- 3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.*
- 4. The appellate court may only overrule or otherwise disturb the trial court acquittal if it has "very substantial and compelling reasons" for doing so.*
- 5. If two reasonable or possible 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."*

22. In the case in hand, the opinion expressed by the trial Court is not only a possible view, but also it is fair and reasonable view and cannot be termed as perverse in any manner, thus, it does not warrant interference.

23. As noted above, there is always presumption of innocence and in case of acquittal, there is double presumption. The burden lies upon prosecution to prove the guilt beyond reasonable doubt. The learned trial Court has passed a detailed, reasoned speaking judgment and we find no infirmity in it. There is no manifest error, illegality or non-application of mind or non-appreciation of evidence which could compel us to form an opinion different from the opinion formed by the learned Trial Court.

24. It is a cardinal principle of criminal jurisprudence that the prosecution has to prove the case against the accused beyond all shadows of doubts. Having found the testimony of the victim surrounded with suspicion, we are of the considered opinion that trial Court has rightly disbelieved the version of the victim who cannot be treated as a person of sterling quality while acquitting the respondents.

25. Keeping in view the above we are of the considered opinion that the view which has been taken is a probable view and in the absence of any perversity since all evidence has necessarily been scanned and discussed, no case is made out for interference in the well reasoned order passed by the trial Court. Accordingly, the application for grant of leave to appeal is dismissed.

(HARPREET KAUR JEEWAN)
JUDGE

(G.S. SANDHAWALIA)
JUDGE

November 15, 2022
nitin

Whether Speaking

Yes

Whether Reportable

Yes