

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

208

CRM-A-219-2021

Date of decision: 05.07.2022

State of Haryana

....applicant/appellant

Versus

Deepak and another

...Respondents

**CORAM : HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

Present : Mr. Ankur Mittal, Addl. A.G. Haryana with
Mr. Saurabh Mago, A.A.G, Haryana.

ASHOK KUMAR VERMA, J.

1. The applicant/appellant-State of Haryana has filed the present application under Section 378(3) of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.) for grant of leave to appeal against impugned judgment dated 04.03.2020 passed by the learned Additional Sessions Judge, Rewari in Sessions Case No.204 of 2018 titled as 'State Vs. Deepak and another' whereby accused/respondents were acquitted from the charges framed against them.

2. Briefly stated the factual matrix of the case referred to in the impugned judgment is that the prosecutrix made a complaint to the police alleging that she is residing at the house of her aunt (Bua) since her childhood. She was the student of 10+2. Her date of birth is 09.02.2001. Accused Deepak son of Ashok was her senior in the school who had taken her mobile No.7027483235 from someone and used to call her from different mobile numbers. Prior to one month of the lodging of the FIR he

criminally intimidated her and asked her to come out of her house in the night at 11:00 p.m. otherwise he would kill her and her family. Out of fear she obeyed his command and went out of her house in the night. Both the accused/respondents were present there who forcibly took her on the motorcycle in a room at first floor above the shop of a scrap dealer at Motal Road, Berli Kalan and raped her one by one. Thereafter they dropped her outside her house and went away. On 19.06.2018 at about 6:00 p.m. accused-Deepak son of Ashok made a call to her mobile No.7027483235 and said that he would come in the night. Thereafter, both the accused repeatedly made calls to her and asked her to come out of her house at 11:00 p.m. otherwise they would kill her family. In the night both the accused/respondents along with Rahul and Krishan came out of the house. They took her on their motorcycle at the tube well of Deepak son of Balwan. They took her on the roof of the room and there both the accused/respondents again raped her one by one. At that time Rahul and Krishan remained as guard standing near the room. Thereafter, they dropped her outside her house at about 2:30 a.m. and criminally intimidated her not to disclose about the occurrence to anyone otherwise they would kill her family.

3. On the basis of aforesaid complaint, formal FIR was recorded. The police investigated the case. Statements of witnesses under Section 161 of the Cr.P.C. were recorded. The accused were arrested. The prosecutrix and the accused were got medico legally examined. After completion of investigation challan under Section 173 Cr.P.C. was submitted before the trial court. The accused/respondents were charge-sheeted for commission of offences punishable under Sections 363/34, 366/34, 376D, 506/34 of the IPC

and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 19 witnesses, produced material documents and objects which were exhibited. Statements of accused were recorded under Section 313 Cr.P.C. wherein they alleged false implication.

5. On consideration of the material on record and submissions made by learned Public Prosecutor for the State and learned defence Counsel, the learned Additional Sessions Judge, Rewari vide impugned judgment dated 04.03.2020 held that the prosecution has failed to prove its case except point No.1 regarding age of prosecutrix and acquitted both the accused/respondents from the charges framed against them.

6. Being aggrieved by and dissatisfied with the aforesaid judgment of acquittal, present application for grant of leave to appeal has been filed by the applicant/appellant-State of Haryana.

7. Learned State counsel has argued that the trial court did not properly appreciate the prosecution evidence and acquitted the accused/respondents. The trial court wrongly disbelieved the trustworthy evidence of prosecutrix and the prosecution. The trial court has wrongly held that there was delay in reporting the matter whereas there is sufficient explanation for the delay. The impugned judgment is based upon conjectures and surmises. Therefore, leave to appeal against the impugned judgment may be granted.

8. Heard.

9. Before advertng to the facts of the case, it would be worthwhile to refer to the scope in acquittal appeals. It is well settled in catena of decisions that an Appellate Court has full power to review, re-appreciate and consider the evidence upon which the order of acquittal is founded. However, the Appellate Court must bear in mind that in case of acquittal, there is prejudice in favour of the accused, firstly, the presumption of innocence is available to him under the Fundamental Principle of Criminal Jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of Law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reaffirmed and strengthened by the Trial Court.

10. In the present case, the prosecutrix, who appeared before the trial court as PW-4, deposed that the accused/respondents had committed rape upon her twice; firstly, prior to one month of the lodging of the FIR and secondly on 19.06.2018 by criminally intimidating her not to disclose about the occurrence to anyone. She also deposed that both the time the accused/respondents were came to her house at night on their motorcycle and forcibly took her with them. From the birth certificate Ex.PF and school certificate Ex.PY it is proved that the prosecutrix was aged about 17½ years. It is very hard to believe that the prosecutrix, who was studying in 10+2 class at the time of occurrence, did not tell her family members, school teachers and friends or any close relative about the incident when she was raped first time by the accused/respondents. The prosecutix also failed to mention any specific date of the first incident. There is also a contradiction in the versions of the prosecutrix. In original complaint Ex.PC and in Ex.PE, the prosecutrix mentioned that on second time the accused/respondents

committed rape upon her on the roof of the well. However, while appearing in witness box as PW-4 she deposed that it was a roof of the room. It is also not believable that the accused/respondents came to her house in the late night on their motorcycle and nobody wake up. Two times the prosecutrix went outside the house and came back in the night hours and it was very surprising that neither her family members nor any of the neighbourer heard any noise. The prosecutrix also admitted that they had two pet dogs in their house. It is also not possible to open the door in night hours in the presence of pet dogs.

11. In her testimony, PW-4 prosecutrix deposed that on 19.06.2018 she received a call on her mobile No.7027483235 from accused-Deepak s/o Ashok who criminally intimidated her and thereafter both the accused repeatedly called her and forced her to come out of the house in the night. However, the CDR Ex.PW3/E/1 regarding mobile No.7027483235 shows that only 12 SMS were received and not even a single call was received on the said mobile number on 19.06.2018. There are four mobile numbers i.e. 7027297335, 8930072020, 9467656574 and 9671919285 used by the accused/respondents. In her cross-examination PW-3 Rajesh Kumar Nodal Officer deposed that no call from these mobile numbers was made on mobile No.7027483235 which was used by the prosecutrix from 16.06.2018 to 22.06.2018. So the version of the prosecutrix that the accused repeatedly called her on 19.06.2018 and threatened her is not supporting her story.

12. PW-11 Dr. Vijay Arpan, who medico legally examined the prosecutrix and prepared MLR (Ex.PO), deposed that there is no external injury in fresh, seen over the chest, breast, abdomen, back thighs, buttocks and parineal area. If she was subjected to rape on the roof of a room then, at

least, scratches or some abrasions would have certainly come on her back but there is no such sign of this nature. Hymen ruptured, healed no oozing of blood and there was no bleeding over the vagina/foul smelling discharge. No external injury seen over external genitalia. After going through FSL report, she further deposed that there was no sign of recent sexual intercourse, however, possibility of intercourse cannot be ruled out. The medical evidence also does not support the story of the prosecutrix.

13. It may be noted that as per the settled legal position, when two views are possible, the judgment and order of acquittal passed by the trial Court should not be interfered with by the Appellate Court unless for the special reasons. A beneficial reference of the decision of the Supreme Court in the case of **State of Rajasthan versus Ram Niwas reported in (2010) 15 SCC 463** be made in this regard. In the said case, it has been observed as under:-

“6. This Court has held in Kalyan v. State of U.P., (2001) 9 SCC 632 :

“8. The settled position of law on the powers to be exercised by the High Court in an appeal against an order of acquittal is that though the High Court has full powers to review the evidence upon which an order of acquittal is passed, it is equally well settled that the presumption of innocence of the accused persons, as envisaged under the criminal jurisprudence prevalent in our country is further reinforced by his acquittal by the trial court. Normally the views of the trial court, as to the credibility of the witnesses, must be given proper weight and consideration because the trial court is supposed to have watched the demeanour and conduct of the witness and is in a better position to appreciate their testimony. The High Court should be slow in disturbing a finding of fact arrived at by the trial court. In Kali Ram V. State of Himachal Pradesh, (1973) 2 SCC 808, this Court observed that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to

the accused should be adopted. The Court further observed:

"27. It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiration. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent, of course, is always there in any system of the administration of criminal justice. Such a risk can be minimised but not ruled out altogether. It may in this connection be apposite to refer to the following observations of Sir Carleton Allen quoted on page 157 of "The Proof of Guilt" by Glanville Williams, second edition:

"I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no responsible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos."

28. The fact that there has to be clear evidence of the guilt of the accused and that in the absence of that it is not possible to record a finding of his guilt was stressed by this Court in the case of Shivaji Sahebrao, (1973) 2 SCC 793, as is clear from the following observations:

"Certainly it is a primary principle that the accused must be and not merely, may be guilty before a court, can be convicted and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations."

"9. The High Court while dealing with the appeals against the order of acquittal must keep in mind the following propositions laid down by this Court, namely,

(i) the slowness of the appellate court to disturb a finding of fact; (ii) the noninterference with the order of acquittal where it is indeed only a case of taking a view different from the one taken by the High Court."

8. In *Arulvelu and another versus State* reported in (2009) 10 Supreme Court Cases 206, the Supreme Court after discussing the earlier judgments, observed in para No. 36 as under:

"36. Careful scrutiny of all these judgments lead to the definite conclusion that the appellate court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment can not be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshaling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law."

14. In view of above, no case is made out for interference in the impugned judgment dated 04.03.2020 of acquittal passed by learned Additional Sessions Judge, Rewari. Accordingly, the present application filed under Section 378(3) of the Cr.P.C., being devoid of merits, is hereby dismissed.

(RITU BAHRI)
JUDGE

(ASHOK KUMAR VERMA)
JUDGE

05.07.2022

Kothiyal

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No