

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

208

CRM-A-658-2019

Date of Decision: 09.02.2023

AYASHA

-Appellant

Versus

STATE OF HARYANA AND ANR.

-Respondents

**CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE KULDEEP TIWARI**

Argued by: Mr. Naamparkash Singh Sandhu, Advocate
for the applicant.

Mr. P.P.Chahar, DAG, Haryana.

KULDEEP TIWARI, J.

1. The instant application, seeking grant of leave, is directed against the order of acquittal dated 26.10.2018, rendered by learned Additional Sessions Judge, Fast Track Court, Faridabad, whereby, the respondent No.2 has been acquitted from the charges framed against him, under Sections 376(2)(n) and 506 of Indian Penal Code (hereinafter referred to as "IPC"), in case FIR No.55 dated 06.04.2017, registered at Police Station Women, Faridabad.
2. The appellant has challenged the order of acquittal, on the averments that the learned trial Court has not appreciated, in its right

perspective, the cogent evidence as led by the prosecution, whereas, the statement of the prosecutrix (identity of the prosecutrix is withheld in view of provisions of Section 228(A) of IPC) (hereinafter referred to as the “prosecutrix”) alone was sufficient to bring home the guilt of the respondent No.2. Reliance has mainly been placed upon the statement of the prosecutrix, to aver that, in a case involving sexual offences, the statement of prosecutrix is self-sufficient, and, the same does not warrant any corroboration from any quarter for basing the conviction of the wrongdoer/respondent No.2. It is further averred that the learned trial Court has gravely erred in recording the order of acquittal, on the ground that, there is no corroborative evidence to substantiate the allegations of the prosecutrix. Moreover, the case of the prosecution stands fully supported and established from the testimony of Juber (PW3), husband of the prosecutrix, however, the learned trial Court did not take into consideration his statement, in its right perspective. Reliance has further been placed upon the statement of Dr. Bishanwati (PW11), who had medico-legally examined the prosecutrix, to buttress the allegations qua commission of repeated sexual intercourse with the prosecutrix, by the respondent No.2.

3. Before dealing with the legality of the impugned order of acquittal, it is apposite to first examine the factual aspects of the present case.

FACTUAL MATRIX

4. The prosecution has set up a case against the respondent No.2 that he subjected the prosecutrix to repeated sexual assault under the threat to viralize her obscene photographs, which he captured while she was taking bath. The prosecution case unfolds from the statement of prosecutrix, Ex.PA, which she suffered at Police Station: Women Cell, NIT, Faridabad, in the presence of her husband, and, legal aid counsel Ms. Poonam Saini (PW10), which is extracted hereunder:-

“Stated that I am resident of above address. I do work at home. I got married with Zuber son of Rahim Baksh in year 2015. Who live in Rajiv Colony, NIT, Faridabad. About one and a half years before my marriage Tamir son of Hajim Hakim resident of Fatehpur Taga, age 28 years, who is son of my uncle came to my house and shown me my photo while bathing. On seeing that I became frightened and started crying and said that delete this photo then he said, do as I say. In this manner after extending threats, he committed wrong act with me on 12th September 2016 at about 4/5 O'clock. I disclosed this matter to my mother and brother Sabur. But they also favored Tamir. Even after marriage when I used to visit my village Fatehpur Taga then also he used to do wrong act with me and used to threatened me that not to disclose it to anyone otherwise I will kill you. When my son Simran was born on 31st

January, 2017 then also after delivery he threatened me on phone and asked me to come otherwise I will disclose all about it to your husband Zuber. Now I alongwith my husband Zuber came to report. Tamir used to commit rape with my consent after giving threats. Legal action may be taken against him. I am giving this statement in the presence of my husband and legal advisor Poonam Saini Kheruni and brother Sabur.”

5. The above extracted statement led to registration of the present FIR against the respondent No.2, and, two others, namely, Saboor and Kharuni, brother and mother respectively of the prosecutrix.

INVESTIGATION PROCEEDINGS

6. On 06.04.2017, A.S.I., Neelam (PW7) (hereinafter referred to as the “Investigation Officer”) took the prosecutrix to B.K. Hospital, Faridabad, where she was medico-legally examined by Dr. Bishanwati (PW11). On the next day, the statement of the prosecutrix (Ex.PB), under Section 164 Cr.P.C., was recorded by the learned Illaqa Magistrate. Thereafter, the rough site plan (Ex.PK) of the place of occurrence was prepared by the Investigation Officer. The respondent No.2 was arrested on 14.04.2017, and, thereupon he was produced in the Court. During the course of investigation, the respondent No.2 suffered a disclosure statement (Ex.PD), which was witnessed by Constable Mahesh Kumar (PW5), and, in pursuance thereof, he got demarcated the place of

occurrence. Thereafter, the respondent No.2 was also taken to B.K. Hospital, Faridabad, where he was medico-legally examined by Dr. Rohit Gaur (PW8). On 15.04.2017, the husband of the prosecutrix, namely, Juber (PW3), handed over a C.D., and, a memory card to the Investigation Officer, allegedly containing conversation between the respondent No.2 and the prosecutrix, which were taken into possession vide recovery memo (Ex.PC). Subsequent to seizure of aforesaid articles, the Investigation Officer moved an application (Ex.PL) before the Illaqa Magistrate for taking voice samples of the respondent No.2, however, the respondent No.2 refused to give his voice samples. During investigation, the allegations, as leveled against the other two persons, namely, Saboor (brother of prosecutrix) and Kharuni(mother of prosecutrix) were not found true, and, accordingly they both were declared innocent by the investigation agency. After completion of investigation, the Final Report under Section 173 Cr.P.C. was presented before the concerned Illaqa Magistrate. Finding the case exclusively triable by the court of Sessions, the learned Illaqa Magistrate, committed the case to the court of Sessions vide committal order dated 28.07.2017.

PROCEEDINGS OF TRIAL COURT

7. Finding a prima facie case, the respondent No.2 was charge-sheeted for commission of offences punishable under Sections 376(2)(n), and, 506 of IPC, to which he pleaded not guilty and claimed trial. The prosecution, in order to prove its case against the respondent No.2,

examined as many as 12 witnesses. The respondent No.2, in his statement recorded under Section 313 Cr.P.C., pleaded innocence and false implication in the present case while denying all the allegations, as leveled against him. After completion of trial, and, upon appreciation of the entire evidence available on record, the learned trial Court recorded the order of acquittal, which is now being challenged before this Court.

ANALYSIS

8. There is no dispute that this Court can re-appreciate the entire evidence while dealing with a order of acquittal. The High Court has full power to appreciate the entire evidence to reach its own conclusions and it is also open for the High Court, to re-determine the question of facts and law. For this, we place reliance upon the judgment passed by Hon'ble Supreme Court in ***State of Maharashtra vs. Sujay Mangesh Poyarekar, 2008 (9) SCC 475.***

Also, Hon'ble Supreme Court in ***Chandrappa vs. State of Karnataka, 2007(2) RCR (Crl.) 92*** laid down broad principles to be followed while dealing with an appeal against an order of acquittal, which are as under:

“(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court, based on the evidence before it, may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence 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 reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

9. Ordinarily, the order of acquittal will not be interfered with, lightly, merely because other view is possible. Upon passing of an order of acquittal, presumption of innocence in favour of the accused gets reinforced and strengthened, as laid down by Hon'ble Supreme Court in

Harijana Thirupala vs. Public Prosecutor, High Court of A.P., (2002) 6 SCC 470.

10. The present is a very strange and sensitive case before us, where the prosecutrix has leveled allegations of repeated sexual assault against her first cousin and also is levelling allegations against her real mother and brother for not taking any action against the respondent-accused, rather, them trying to shield him while having complete knowledge about the crime. Before advertent to appreciate the evidence, as led by the prosecution, on the settled principles of law, it would be apt to first understand the social and family background of the prosecutrix, and, the respondent No.2, who are connected inter se, having same ancestors. As has surfaced from the evidence led, the paternal family of the prosecutrix is a joint family, which consists of her parents, five brothers, and, two sisters-in-law (Bhabis), who are residing under the same roof. The respondent No.2 is the first cousin of the prosecutrix, who also resides in the same vicinity. Now, another vital aspect which needs consideration is that the prosecutrix is a major lady having one son, however, except her husband, none has stepped forward amongst her family members, not even her own father, mother, or, brothers, to support the allegations of repeated sexual assault, against the respondent No.2. Scrutiny of record of the trial Court also reveals that, during trial, the prosecutrix had moved an application, under Section 319 Cr.P.C. for summoning and trying her own mother and brother, who were put in

column No.II by the Investigating Agency, namely Kharuni and Saboor, to face trial along with the respondent No.2. However, the said application was dismissed by the learned trial Court, and, that order has attained finality. Therefore, in view of the afore-discussed background, let us examine whether the allegations, as leveled by the prosecutrix, carry any credence, or, are cogent enough to inspire confidence of this Court, to form the basis for reversal of the order of acquittal to that of conviction.

11. The following points arise for determination of this Court, which need an in-depth analysis to arrive at any conclusion:-

- (i) *Age of the prosecutrix.*
- (ii) *Whether the prosecutrix was subjected to repeated sexual assault ?*
- (iii) *Whether such sexual assault was under any threat to viralize the obscene photographs of the prosecutrix ?*

(i) Age of the prosecutrix.

12. Perusal of all the three statements of the prosecutrix, i.e., her initial statement (Ex.PA) made to police, her statement (Ex.PB) recorded before Magistrate, and, her deposition before Court as PW1, reveals that, she has claimed herself to be a major individual, being 22 years of age. It is the consistent stand of the prosecutrix that she was more than 18 years of age, at the time of alleged commission of sexual assault. Therefore, in view of the above, and, without there being any conflict as regards the

age of the prosecutrix to be above 18 years at the time of alleged occurrence, this aspect needs no further discussion, and, is put to rest.

(ii) Whether the prosecutrix was subjected to repeated sexual assault?

(iii) Whether such sexual assault was under any threat to viralize the obscene photographs of the prosecutrix ?

13. Indubitably, in a case involving sexual offences, the statement of prosecutrix is of utmost importance, and, is a vital piece of evidence, which, if, in the opinion of the Court, carries any credence, does not warrant any corroboration for basing the conviction of the wrongdoer. However, in the present case, we do not, for the hereinafter elaborately assigned reasons, find the statement of prosecutrix, to be credible to hold respondent No.2 guilty:-

- (a) There are material contradictions in the statements of the prosecutrix (PW1), and, her husband Juber (PW3). The prosecutrix, in her statement (Ex.PA), stated that the respondent No.2 came to her house about 1½ years prior to her marriage, and, showed her obscene photographs to her, which he allegedly captured while she was taking bath, and thereafter, he committed “bad act” with her on 12.09.2016. She further stated that she had disclosed the above incident to her mother, and, her brother, however, they favored the respondent No.2 rather than supporting her. Such being her stand qua reporting the incident to her mother and brother, there appears material improvements in her deposition before the Court, vis-à-vis, upon a perusal of her

cross-examination carried out by defence counsel, it surfaces that the prosecutrix had disclosed the commission of above incident to her entire family prior to her marriage. As it stands already discussed above, the paternal family of the prosecutrix is a joint family and therefore, it is quite understandable that the family of the prosecutrix could have pardoned such an horrible act of the respondent No.2 may be for once, just for the sake of their family's honour, but, the case as projected by the prosecution is that the prosecutrix was subjected to repeated sexual assault, not only before her marriage, but, even thereafter. In our opinion, these allegations are lackluster, because, it sounds completely unnatural that despite acquiring knowledge about commission of such a ghastly act with the prosecutrix, such a sloppy approach may have been adopted by the family of the prosecutrix, where they allowed the respondent No.2 to continue sexually exploiting the prosecutrix, under the alleged threats to viralize her obscene photographs. More so, it is also not feasible that none amongst the family members of the prosecutrix had gathered courage to restrain the respondent No.2, and, on the contrary, advised the prosecutrix to remain silent qua the alleged sexual atrocity committed upon her. If the allegation qua threats by respondent No.2 to viralize the obscene photographs of the prosecutrix are taken to be true, just for the sake of argument, it does not make any sense that none of the family members of the prosecutrix, despite being well aware, did not get such

photographs deleted from the mobile of respondent No.2, who hails from their own family. Even if rest of the family members of the prosecutrix are believed to have not supported the prosecutrix, her father cannot be a mute spectator to the plight of his own daughter, especially in the absence of any cogent evidence to support that her family members had any motive/reason behind such behaviour.

- (b) The prosecutrix, in her statement (Ex.PB), recorded under Section 164 Cr.P.C., and, in her statement recorded in the Court, has also alleged that, upon getting pregnant due to sexual intercourse by the respondent No.2, the respondent No.2 had administered her some pills, as a result whereof, she suffered miscarriage/abortion. However, no such incident of administering pills to her, for abortion, finds a slightest mention in her initial statement (Ex.PA). Apart from this, there is not an iota of evidence available on record to establish that she was administered any such pills for abortion. Perusal of MLR (Ex.PR) of the prosecutrix reveals that no such history of abortion has been cited by her to the doctor concerned, at the time of her medico-legal examination. These above anomalies lead us to draw an inference that such allegations of abortion, by administering pills, are afterthought, which have been introduced by the prosecutrix just to bring strength to her case.
- (c) Dr. Bishanwati, M.O., B.K. Hospital, Faridabad, was examined as PW11, who had medico-legally examined

the prosecutrix. The prosecutrix gave alleged history of sexual assault, lastly done in September, 2016, i.e. 7 months prior to her medico-legal examination. Dr. Bishanwati, upon medico-legally examining the prosecutrix, recorded the following observations:-

“Patient was conscious oriented, secondary sexual character well developed, hymen was torn with healed irregular margins, at the time of examination. No mark of external injury was seen. She was advised for USG lower abdomen. In my opinion, in this case, the possibility of sexual intercourse cannot be ruled out.”

During cross-examination, she had made a categorical admission that there was no external injury found on the person of prosecutrix, and, that no sample was collected, due to elapse of considerable time since last incident. We have examined the MLR (Ex.PR) of the prosecutrix, and, it becomes clear that the MLR neither proves, nor disproves, the case of the prosecutrix. The prosecutrix is a married lady, who was medico-legally examined near about 7 months after the last alleged sexual assault, therefore, the opinion of doctor that “possibility of sexual intercourse cannot be ruled out” is of no significance.

- (d) Insofar as relevance of the C.D., and, the memory card is concerned, the same allegedly contain conversation between the prosecutrix, and, the respondent No.2. However, we are unable to assign any significance to these articles, as the seizure thereof by the investigation agency is itself doubtful. The C.D., and,

the memory card were allegedly handed over to the police by Juber (PW3), husband of the prosecutrix, to establish the guilt of respondent No.2, however, the original mobile was never taken into possession by the police, to conclusively prove the genuineness of the C.D, and, the memory card. Juber (PW3), in his cross-examination, has taken a stand qua his handing over the original mobile to the police, which was returned to him by the police after about 1½ months, however, no recovery memo in respect of seizure of mobile is available on record, nor is there any reason assigned for return of the mobile, which could have turned to be an important piece of evidence.

- (e) There is also a considerable delay of approx. 7 months in lodging the instant FIR by the prosecutrix, as the last incident of alleged sexual assault upon the prosecutrix, took place in September, 2016, whereas, the FIR was lodged on 06.04.2017. Not only this, it is the version of the prosecutrix herself that she had disclosed all the incidents to her husband after the birth of their son in January, 2017, but, even then also, there is delay of about three months, on her part, in approaching the police for reporting the matter, as the initial statement (Ex.PA) of prosecutrix was recorded on 06.04.2017, which formed the basis of the FIR. There appears a vague attempt on the part of Juber (PW3), who, while stepping in the witness box, deposed that he along with the prosecutrix went to Women Police Station on 23.03.2017, where the prosecutrix moved a complaint, however, he did not

depose about the fate of that complaint, or, about any action taken thereupon. On the other hand, there is no mention of any such complaint dated 23.03.2017 in any of the statements of the prosecutrix. Though, delay may not always be fatal to the case of prosecution, if explained well, however, in the present case, no sufficient cause has been assigned by the prosecutrix, or, her husband, which may have led to delay in registration of the FIR.

- (f) Moreover, the testimony of Juber (PW3), husband of the prosecutrix, does not carry any probative value in the eyes of law, as the same falls within the category of “*hearsay evidence*”. He has just simply deposed the version of the prosecutrix, whereas, he admittedly did not have any knowledge of any incident. He became able to depose against the respondent No.2 only upon his being disclosed all the alleged incidents by the prosecutrix, a few days before registration of the instant FIR. The testimony of Juber (PW3) is nothing else, but, merely hearsay evidence, which is inadmissible in evidence, and, it would not be legally correct to act upon such evidence for the purpose of reversing any finding of acquittal of the trial Court. Besides Juber (PW3), husband of the prosecutrix, no one, either amongst the in-laws of the prosecutrix, or, amongst her paternal family, has come forward to support her case.

14. Upon a cumulative reading and appreciation of the evidence on record, this Court comes to a conclusion that the statement of the

prosecutrix is not credible because the same is found to be replete with infirmities. There are considerable discrepancies in the statements of the prosecutrix. Moreover, the reasoning given in the trial Court's judgment does not suffer from any gross perversity or absurdity of mis-appreciation and non-appreciation of the evidence on record. It is trite law that order of acquittal should not be disturbed unless there are substantial or compelling circumstances.

15. Therefore, this Court does not find any ground to interfere with the order of acquittal. In sequel, the **application for leave to appeal** is hereby **declined**, it being bereft of merit, and, the **impugned judgment of acquittal**, rendered by the learned Additional Sessions Judge, Fast Track Court, Faridabad, is hereby **upheld**.

16. The case property, if any, be dealt with in accordance with law. The record be forthwith sent down.

(SURESHWAR THAKUR)
JUDGE

(KULDEEP TIWARI)
JUDGE

09.02.2023
devinder

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