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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 24th August, 2023

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CRL.L.P. 452/2022

STATE

..... Petitioner

Through: Ms. Manjeet Arya, APP for State.

versus

JASWANT SINGH

..... Respondent

Through: Mr. Vikas Arora, Ms. Radhika Arora
& Mohd. Azhar, Advocates.**CORAM:****HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)****CRL.M.A. 18977/2022 (Condonation of delay)**

1. *Vide* the present application, the petitioner/State seeks condonation of 75 days' delay in filing the present Criminal Leave Petition.
2. For the reasons and grounds stated in the present application, the application is allowed, the delay of 75 days in filing the present Criminal Leave Petition is allowed.
3. Accordingly, the application is disposed of.

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4. The present Criminal Leave Petition under Section 378(3) of the Code of Criminal Procedure, 1973 (*hereinafter referred to as 'Cr.P.C., 1973'*) has been filed on behalf of the petitioner/State seeking Criminal Leave to Appeal against the Judgment dated 28.11.2020 whereby the learned Additional Sessions Judge-06, Special Court, POCSO (North), Rohini



Courts, Delhi acquitted the accused/respondent-Jaswant Singh @Saka of the charges punishable under Sections 376(2)(G)/377/341/34 of the Indian Penal Code, 1860 (*hereinafter referred to as 'IPC, 1860'*) registered *vide* FIR No. 147/2009 dated 30.08.2009 at Police Station Crime Branch.

5. The case of the prosecution is that on 02.08.1997, the victim Ms.VG, a German girl, aged 17^{1/2} years old, missed the last Tramline from Luisenplatz to her home situated at Stadtweg Darmstadt, Germany. It was about 00:45 hours (midnight) and consequently she decided to walk back home. While she was walking, three foreigners followed her. As she reached the entrance of Herrngarten (a garden or park), the accused/respondent-Jaswant Singh (whom she had described as “*Nasty Man*” in her complaint) caught her and pulled her towards the garden and when she resisted, the accused/respondent slapped and raped her. The other two foreigners, who were later identified as co-accused, namely, Karan Singh and Muhammad Shahzad, kept standing on the path by the lake. After being raped by accused/respondent Jaswant Singh, co-accused Karan Singh and Muhammad Shahzad also raped the prosecutrix and also had oral sex with her. Thereafter, co-accused Karan Singh and Muhammad Shahzad raped the victim for a second time, followed by another sexual assault by the accused/respondent Jaswant Singh, who also attempted to have unnatural sex with the prosecutrix.

6. The prosecutrix reported the matter to the local police and the incident was also reported in the press.

7. On the information of one Mr. Nurteza Kilickaya, a restaurant owner in Pfungstadt, co-accused Karan Singh and Muhammad Shahzad were apprehended by the police; and later tried and convicted by the German



Court.

8. The third suspect whose name was later ascertained as Jaswant Singh managed to escape to Netherlands on 13.08.1997 and arrived in India on 14.08.1997.

9. The owner of the restaurant, namely, Kilickaya, where the accused/respondent was working, identified the accused/respondent from the photograph, during TIP. The prosecutrix also identified the accused/respondent from the photograph. Mr. Kilickaya handed over the documents of the accused/respondent vide which he had sought asylum in Germany, to the police on the basis of which he could be traced in India.

10. The Embassy of Federal Republic of Germany, New Delhi sent a Verbal Note on 01.08.2002 to the Ministry of External Affairs, India regarding complicity of the accused/respondent in the aforesaid crime committed by him in Germany. The copies of the record of the case were also forwarded to the Ministry of External Affairs, India with a request to initiate criminal proceedings against the accused/respondent in India. All the Trial Court documents and the Charge Sheet along with the Order of the Court of Germany convicting the other two accused, namely, Karan Singh and Muhammad Shahzad, were sent to India via Embassy of Federal Republic of Germany, New Delhi which were then forwarded to the Delhi Police, on 23.06.2008.

11. The investigations were carried out and an FIR No. 147/2009 under Sections 376(2)(G)/377/341/34 of IPC, 1860 was registered at Police Station Crime Branch.

12. During the investigations, the address of accused/respondent was traced to House No. 44, Gali No. 13, Sanjay Nagar, Delhi and his telephone



number was revealed as 7226778 which was the same as had been mentioned in his application for asylum in Germany, to German Authority.

13. The accused/respondent was arrested on 30.08.2009 and subjected to interrogation. In his disclosure statement, he admitted the commission of offence.

14. During the course of investigations, blood sample of the accused/respondent were taken and sent to Forensic Science Laboratory (FSL) for generating DNA profile for matching the same, at a later stage.

15. The specimen of Fingerprints of the accused/respondent was also taken in India. On 16.09.2009, the fingerprints of the accused/respondent were received from the Embassy of Germany, New Delhi which matched with the specimen fingerprints of the accused/respondent which were taken in India. The photographs of the accused/respondent were also received from the Embassy of Germany, New Delhi, from which he had been identified by the prosecutrix during the investigation conducted in Germany. The Sanction under Section 188 of Cr.P.C., 1973 for prosecution of the accused/respondent in India, was obtained.

16. On completion of the investigation, the Charge Sheet was filed.

17. Eleven witnesses were recorded by the prosecution in support of its case. The most material witness was the prosecutrix who was examined as PW-6. The other material witness was PW-7/Ms. Cristina Nolle to whom the prosecutrix had first confided about the incident on the same night.

18. The learned Additional Sessions Judge has observed that no TIP of the accused/respondent was conducted by the Investigating Officer in India and there was no cogent evidence in regard to the correct identification of the accused/respondent after a gap of eighteen years. The material witness,



Mr. Nurteza Kilickaya, the owner of the restaurant who had given the photograph and who was instrumental in identification of the accused/respondent, was not examined. The copy of the Order of the court of Germany convicting the other two accused has not been proved according to Section 86 of the Indian Evidence Act. There were material contradictions in the testimony of the prosecutrix. The fingerprints that were lifted from the Beer bottle were not sent to India for matching it with the fingerprints of the accused/respondent. The DNA profiling of the accused/respondent though done, but the FSL report was not collected for matching the DNA.

19. In light of these contradictions, the learned Additional Sessions Judge acquitted the accused/respondent *vide* Judgment dated 28.11.2020.

20. Aggrieved, the present Criminal Leave Petition has been filed on behalf of the petitioner/State seeking Criminal Leave to Appeal against the impugned Judgment dated 28.11.2020.

21. **Submissions heard.**

22. The incident of rape of the prosecutrix/Ms. VG, a German girl aged about 17^{1/2} years, happened on 02.08.1997 at about 00:45 hours (midnight), while she was walking back to her home, having missed the last Tramline. She had deposed that the accused/respondent had caught her and pulled her into the garden and raped her and also had committed unnatural sex. She reported the matter to the local police. During the investigations, the Germany Police identified two other accused, namely, Karan Singh and Muhammad Shahzad, who were chargesheeted, tried and convicted by the Court of Germany.

23. The identity of the accused/respondent was established through the



photograph which was provided by the owner of the restaurant, Mr. Nurteza Kilickaya, where the accused/respondent was employed. The accused/respondent's antecedents were established through the application filed by him for seeking asylum in Germany. It was also found that he immediately after the incident escaped from Germany and came to India via Netherlands on 14.08.1997.

24. The main challenge in the case of prosecution was to the identification of the accused/respondent as being the offender. Before considering the testimony of the prosecutrix, it is pertinent to mention that though as per the Charge Sheet, the copies of the document/statements recorded during the investigation in Germany and also the Order of conviction were forwarded to the Ministry of External Affairs, Government of India, but no authentic documents have been filed on record. It is significant to mention that the original or the certified statement of the prosecutrix to the Investigating Agency or to the Court had not been forwarded and also did not form part of the Charge Sheet. Likewise, all the documents procured by the Germany Police during investigations and the certified copies of the entire proceedings before the Germany court were also not forwarded.

25. Now coming to the testimony of the prosecutrix as PW6, the incident had taken place around midnight. In her deposition before the Superintendent Department, Germany the prosecutrix stated that the lights were poor but she could at least see something. However, in her cross examination before the Learned Trial Court she stated that the light inside the garden was sufficient to see faces of the accused persons. The prosecutrix, though in her testimony as PW6 had identified the



accused/respondent as the perpetrator of the crime, but there are serious loopholes in the identification of the accused/respondent.

26. In the first instance, during the investigations in Germany, in TIP proceedings held on 05.08.1997 by the Department of Superintendent in Germany, she identified Karan Singh as the offender whom she had been addressing as the “*Nasty Man*”. However, she had been addressing the accused/respondent Jaswant Singh as the “*Nasty Man*” in her complaint and during the investigations in Germany. Therefore, the prosecutrix, in the first instance failed to correctly identify the accused/respondent.

27. The second limb of identification was through a photograph. It is only a copy of photographs which has been forwarded and the original/authentic photograph was not made available even during the trial. The accused/respondent was described as a fair boy with curly hair without moustache and beard by the prosecutrix. However, when after about 18 years, the prosecutrix appeared as a witness in the proceedings before the Trial Court, the accused/respondent was supporting a beard and turban. Though the prosecutrix claimed that he is the same person who had raped her and she identified him from his facial features, however, it is difficult to accept her testimony. She was unable to identify the accused/respondent from the photograph immediately after the incident. It is unbelievable that after about 18 years when not only a person matures but his physical appearance has also changed, she is still able to identify him. This is significant as the incident had happened in a park in the middle of night when it was dark with little lighting. The respondent being the only person shown as the accused may have been the reason for her to identify him as the perpetrator of crime in the court. The physical features of the accused/respondent, as described



by the prosecutrix during her testimony were totally different from what he looked like when he was present in the court at the time of her testimony; it is highly improbable that her identification of the accused/respondent was from having seen him on the day of incident.

28. There is ambiguity regarding the photograph used by German police for fixing the identity of accused Jaswant Singh. The prosecutrix in her deposition stated that the photograph of accused Jaswant Singh that was shown to her in Germany, was not in the court record. It was explained by the prosecution that the photograph was taken from the application filed by the accused/respondent seeking asylum in Germany, but the prosecution has failed to prove that any such an application was made by the accused. The application seeking asylum has not been produced at any stage of trial to authenticate the photographs used for T.I.P.

29. Additionally, the copy of the register entry pertaining to issuance of passport of the accused/respondent had also been traced, but the original copy of the passport had not been filed on record and it is difficult to appreciate that the person whose photographs were being shown is, in fact, the respondent. Even if it is held that the photographs are of the accused/respondent, the contradictions in the testimony of the prosecutrix do not prove beyond reasonable doubt that he was the perpetrator of the crime. Also the presence of the accused/respondent at the scene of crime has not been established by the prosecution, beyond reasonable doubt.

30. Significantly, Mr. Nurteza Kilickaya, the owner of the restaurant who provided the photograph, though cited as a witness No. 3 in the list of prosecution witnesses was never examined by the prosecution to either prove that he had given the photographs or had divulged the information



about the identity of the accused/respondent.

31. PW-9 Inspector Satya Prakash (Retd.), who was the Investigating Officer admittedly, did not get any photo TIP of the accused/respondent done in India. The prosecutrix identified the accused/respondent after the commission of offence, for the first time in the court. The photographs apparently which became the basis of photo TIP were never produced or proved in the trial.

32. Significantly, the fingerprints of the accused/respondent were taken during the investigations, but no endeavour whatsoever was made to match them with the specimen fingerprints that were lifted from the Beer bottle from the scene of crime. The specimen fingerprints of the accused/respondent have been matched with the fingerprints of the accused/respondent taken at the time of his filing the application seeking asylum in Germany. Such matching may be sufficient to establish that the accused/respondent was the person who had sought asylum in Germany by filing the application, but it does not in any manner, connect him to the commission of offence or prove his presence at the scene of crime in the absence of any matching with the chance prints lifted from the Beer bottle from the scene of crime.

33. Interestingly, the blood sample of the accused/respondent had also been taken to develop his DNA profiling, but during the investigations, it was left midway since the FSL report was never obtained from Germany for matching his DNA profiling with the sample that may have been collected from the scene of crime.

34. It cannot be denied that the prosecutrix had been subjected to the most heinous crime and that too in a brutal manner not by one person, but by



three persons, as narrated by her in her testimony. While we can understand the pain and trauma of the prosecutrix which got prolonged over 22 years, but at the same time, the accused/respondent cannot be held guilty in the absence of any incriminating evidence proved on record.

35. The learned Additional Sessions Judge has thus rightly concluded that the prosecution has not been able to prove the charges against the accused/respondent and given him the benefit of doubt.

36. Accordingly, we do not find any infirmity in the impugned Judgment dated 28.11.2020 acquitting the accused/respondent.

37. Accordingly, Criminal Leave to Appeal against the impugned Judgment dated 28.11.2020 is hereby dismissed along with pending applications, if any.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

AUGUST 24, 2023
S.Sharma