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IN THE HIGH COURT OF DELHI AT NEW DELHI

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

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CRL.A. 284 of 2018

Between: -

STATE (NCT OF DELHI)

.... APPELLANT

(By: Shri Utkarsh, Additional Public Prosecutor for the State with Sub-Inspector Arti, Police Station Vasant Kunj.)

AND

**KALLU RAJPUT @ HIRA LAL
S/O SH. ACHEYA LAI @ MOHAN LAI R/O,
R/O- SUMIT BABA MOLA, AYA NAGAR,
NEW DELHI**

.... RESPONDENT

(By: Shri Siddharth Verma and Mr. Ravi Bhushan, Advocates.)

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Pronounced on: 20.01.2023

J U D G M E N T

1. This appeal under Section 378 of the Criminal Procedure Code, 1973 (in short "Cr.P.C.") is directed against the judgment of acquittal dated 31.07.2015, passed by the learned Additional Sessions Judge, Patiala House Courts, New Delhi, in connection with FIR No. 296/2013 at Police Station Vasant Kunj (South), Delhi for the offence punishable under Section 376 of the Indian Penal Code 1860 (in short "IPC").

2. Learned APP for the State submitted that the impugned judgment of acquittal is illegal and improper and the same has been passed in ignorance of material evidence against the respondent/accused.

According to him, the judgment of acquittal is contrary to the law laid

down by the Hon'ble Supreme Court and this Court. He, therefore, submitted that the learned trial court has erred in acquitting the respondent/accused.

3. Learned counsel appearing on behalf of the respondent/accused, on the other hand, opposed the prayer and submitted that the learned trial court has rightly concluded that the prosecution has failed to prove the case beyond reasonable doubt. According to him, the reasoning given by the learned trial court for the acquittal of the respondent/accused is based on sound legal principle that the respondent/accused cannot be convicted unless the prosecution proves the case beyond a reasonable doubt. Further, the counsel has placed reliance on the decision of the Hon'ble Supreme Court in the matters of *Rahul v. State of Delhi Ministry of Home Affairs and Anr*¹, *Solanki Chimanbhai Ukabhai v. State of Gujarat*², *Mohan Singh v. Prem Singh*³, *Abdul Sayed v. State of Madhya Pradesh*⁴, *Narasappa vs State of Karnataka*⁵, *Narender Kumar v. State of NCT Delhi*⁶, *Rajesh Dhiman v. State of Himachal Pradesh*⁷, and *State of Rajasthan v. Talevar and Anr*⁸.

4. I have heard the learned counsel appearing for the parties and perused the record.

5. The case of the prosecution is that on 17.07.2013, the prosecutrix (PW-4) with her sister-in-law Shayam Bai (PW-5) had gone in the jungles of Ghitorni to collect firewood. During the search for firewood, her sister in-law (PW-5) went in the other direction and meanwhile the accused, namely, Kallu Rajput came from behind and grabbed the

¹ 2022 SCC Online SC 1532

² (1983) 2 SCC 174

³ AIR 2002 SC 3582

⁴ (2010) 10 SC 259

⁵ (2007) 10 SC 770

⁶ (2012) 7 SCC 171

⁷ 2020 (10) SCC 740

⁸ 2011 (11) SCC 666

prosecutrix (PW-4). Thereafter, the respondent/accused made her lie down on the ground and committed rape on her. When the prosecutrix tried to raise an alarm, the respondent/accused told her to keep quiet as nobody would be able to hear her in the jungle. After the incident, the prosecutrix came back with PW-5 and narrated the incident to her husband Asha Ram (PW-3).

6. Thereafter, PW 3 (husband) called the PCR on 100 number and Head Constable Rajneesh (PW-8) posted in PCR West Zone recorded the said PCR call *vide* DD No.39/A exhibited as Ex.PW 8/A. The said DD entry was handed over to Women Sub Inspector Surekha (PW-17) PS Fatehpur Beri, who visited the prosecutrix and PW-3 at Babe Mohalla, Near Mangal Dass Mandir, Delhi. The prosecutrix narrated the incident to PW-17 (WSI Surekha), whereafter they visited the accused, namely, Kallu Rajput who was then taken into custody in the Emergency Response Vehicle, PS Fatehpur Beri.

7. After the respondent/accused was taken into custody, the prosecutrix PW-4, her husband PW-3 went along with PW-17 to the place of the incident and it was revealed that the jurisdiction did not fall within PS Fatehpur Beri, rather the jurisdiction fell within PS Vasant Kunj (South). From the place of the incident, PW-17 took them to PS Vasant Kunj (South) and handed them over to Women Sub-Inspector Brahmo Devi (PW-18). Then PW-18 recorded the statement of the prosecutrix, prepared the *rukka* and the same was handed over to Duty Officer (PW-1), who registered the FIR bearing No. 296/2013, exhibited as Ex.PW1/A, and the investigation was assigned to PW-18.

8. PW-18 took the prosecutrix (PW-4) along with her husband (PW-3) and Women Constable Sunita (PW-2) to AIIMS for her medical examination. At AIIMS, Dr. Sumita Aggarwal (PW-7) Senior Resident examined the prosecutrix *vide* MLC No. 7060 of 2013 Ex.PW7/A, which

records that there was no evidence of any external injuries. PW-7 collected samples from the prosecutrix comprising of her vaginal and perianal smears, hair and nail clippings and underwear of the prosecutrix. The same were sealed and handed them over to PW-2, who seized the same *vide* memo Ex.PW2/A. PW-2 handed over the said samples to the Investigating Officer (IO) PW-18. The prosecutrix was taken to the place of the incident by PW-18 who prepared the site plan Ex.PW18/A at her instance. Thereafter, PW-18 came back to the police station, interrogated the respondent/accused and arrested him *vide* memo Ex.PW3/A, carried out his personal search *vide* memo Ex.PW3/B and recorded his disclosure statement *vide* Ex.PW3/C.

9. On 18.07.2013, the respondent/accused, was sent for his medical examination with Constable Shyam Bihari (PW-11). Dr. Sukriti (PW-9), Senior Resident AIIMS examined the respondent/accused *vide* MLC No. 378345 Ex.PW9/A. There were no visible injuries on the body of the respondent/accused. Dr. Hans Raj Singh (PW-6) Junior Resident AIIMS also examined the respondent/accused on 18.07.2013 and carried out his potency test *vide* MLC Ex.PW6/1 as per which nothing was found to suggest that he was incapable of performing sexual intercourse. PW-6 collected the penile swab, control swab, blood in gauze and underwear of the accused which were sealed and handed over to PW-11 who seized the same *vide* memo Ex.PW 11/A.

10. PW-18, thereafter, moved an application before the learned Chief Metropolitan Magistrate, New Delhi for having the statement of the prosecutrix recorded under Section 164 of the Cr.P.C. The said statement is exhibited as Ex.PW4/B. The samples taken from the prosecutrix and the accused was sent to CFSL CBI through Constable Hari Om (PW-12) and Head Constable Dharmender (PW-13) for forensic examination. The same were examined by Dr. B.K.Mohapatra (PW-16), CFSL CBI. *Vide*

his report Ex.PW 16/A, he opined that the male DNA profile generated from the blood samples of Kallu Rajput (respondent/accused) was found to have been existing in the vaginal smear and stains on the underwear of the prosecutrix.

11. After recording the statements of witnesses and collecting necessary reports, PW-18 filed the chargesheet. By order dated 29.11.2013 charge under Section 376 of the IPC was framed against the accused to which he pleaded not guilty and claimed trial.

12. The learned Additional Sessions Judge after considering the entire material available on record acquitted the respondents. The prosecution examined following witnesses :-

	Name	Role of Witnesses
PW 1	Naresh Kumar	ASI
PW 2	Sunita	Women Constable (W Ct)
PW 3	Asha Ram	Husband of the Prosecutrix
PW 4	Prosecutrix	
PW 5	Shayam Bai	Sister in-law
PW 6	Dr. Hans Raj	J.R.FMT AIIMS Trauma Center
PW 7	Dr. Sumita Agarwal	S.R. Gyne AIIMS Hospital
PW 8	Rajneesh	Head Constable
PW 9	Dr. Suariti Kapoor	J.R. AIIMS Trauma Center
PW 10	Sumit	Landlord
PW 11	Shyam Bihari	Constable
PW 12	Hari Om	Constable
PW 13	Dharmendra	Head Constable
PW 14	Anil Kumar	Constable
PW 15	Ms. Manisha Khurana	MM Patiala House Court- Statement was recorded u/Section 164 Cr.P.C



PW 16	Dr. B.K. Mohapatra	CFSL CBI
PW 17	Surekha	Sub Inspector (SI)
PW 18	Brahmo Devi	Women Sub Inspector (W/SI)

13. During, examination, the prime witnesses PW-3 (husband of the prosecutrix), PW-4 (prosecutrix) as well as PW-5 (sister-in-law) did not support the version of the prosecution and failed to identify the respondent/accused in court. They claimed that it was Kallu Rajput who had committed rape upon the prosecutrix but the person who had been arraigned in this trial and present before the court was Hira Lala and not the person who committed the offence. They also claimed that the accused present in court was not the person who had been apprehended by the police. The examination of PW-3 is reproduced as under: -

“Smt, Halli is my wife and Shyama Bai is my Bhabhi, I and family and my brother are residing at above mentioned address, I am a Mason doing the work in the area of Aaya Nagar, I am native of Village Bhavya, District Chattarpur, About 5-6 months ago, my wife went to collect the wood from jungle along with my Bhabhi Smt, Shyama Bai, On return she told that one Kallu has committed rape with her, I called the Police, Statement of my wife was recorded. She was got medically examined. She was brought to the court but I cannot say whether her statement was recorded or not. The culprit was not apprehended in my presence. After seeing the accused present in the court, the witness has stated that he is not the person apprehended by the Police.”

14. The examination of PW5 is reproduced as under: -

“Asha Ram is the younger brother of my husband and Smt. Halli is his wife. We are native of Village Bhavya, District Chattarpur, M.P. We are doing labour work. About 5-6 months ago I and Halli went to collect fire wood in nearby jungle where one person by the name of Kallu committed rape with Halli. On our return to our house, Halli informed his husband about the incidence. Police was called by Asha Ram.

Halli was medically examined. My statement was examined. Accused Hira Lai present in the court is not Kallu."

15. The examination of PW 4 is reproduced as under: -

"About 6-7 months ago, at about 5 PM I along with my Jethani Shayam Bai went in a jungle to collect fire wood one Kallu committed rape with me. I raised alarm and on my return to my house I told all these facts to my husband who informed the Police. Police arrived at my house and recorded my statement. Today my statement is read over to me. The same statement which I gave to the Police. That Statement is Ex. PW4/A which bear my thumb impression at point A. I was taken for medical examination. My medical examination was conducted. I showed the place to the Police. After my examination, my inner garments were taken by the doctor which were seized in my presence along with other items vide memo Ex. PW2/A. My statement was recorded before the Magistrate. At this stage a sealed envelope sealed with the seal of court of Shri Manisha Khurana Kakkar is opened and the statement is taken out which is read over to the witness who admitted that this statement was made by her. The statement is Ex. PW4/B. Accused Hira Lai today present in the court is not the person who has committed rape with me."

16. The above witnesses were cross-examined by the learned Additional Public Prosecutor for the State but during the cross-examination, they remained on point and denied all the suggestions made to them. The husband of the prosecutrix PW-3 denied the suggestion that he was present when the respondent/accused was arrested. He also denied that it was the present respondent/accused who was also known by the name of Hira Lal and denied the suggestion that he has stated before the police that Kallu and Hira Lal were the same person. Even the prosecutrix PW-4 denied the suggestion that the accused before the court and Hari Lal were the same person, who had committed rape upon her and similarly PW-5 denied the similar suggestions.

17. The prosecution even cross-examined the landlord, namely, Sumit PW-10, where the prosecutrix resided along with her husband. PW-10 denied all the suggestions put forth by the Chief Prosecutor. He denied the suggestion that he knew Kallu Rajput, and that Kallu Rajput was a tenant at his place. Further, PW-10 denied that PW-3 (husband of the prosecutrix) and the respondent/accused Kallu Rajput belong to the same State and village.

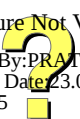
18. The prosecution had also examined Constable Anil Kumar PW-14, who deposed that on the instruction of the IO PW-18 he had visited the village of the accused and met Hira Bai the mother of the accused. PW-14 obtained a birth certificate exhibited as Ex.PW14/A from the school but the mother was not examined as a witness. Further, Women Sub Inspector (WSI) Surekha PW-17 was examined, and she identified the respondent/accused before this court as the person who was apprehended by her and whose custody was handed over by her to PW-18, the IO. The IO PW-18 has also identified the accused before the court as the person who was handed over by PW-17.

19. In the present case, the prosecution has relied on various evidences which include ocular and medical evidence, but the prime witnesses PW-3 (husband of the prosecutrix), PW-5 (sister-in-law) and prosecutrix PW-4 have denied that the accused present before the court is the accused. On the contrary, the other witnesses stated that the person present before the Court is the accused and majorly relied on the examination of PW-14, PW-18 and PW-17. The above examination of PW-3, PW-4 and PW-5 was steadfast, as even during the cross-examination, their statement did not change that the respondent/accused present before the court is not the accused.

20. In view of the aforesaid discussion, it is found that in the present case prosecution has relied mainly on the medical evidence and suspicion

over the respondent/accused. So far as the cross-examination is concerned, only the police officials have supported the prosecution story, which does not include the prosecutrix PW-4, sister-in-law PW-5 and the husband of the prosecutrix PW-3. They all have denied the story of the prosecution stating that the present respondent/accused is not the accused who committed the offence and also denied that the accused was arrested in their presence. Therefore, the very identity of the respondent/accused has not been duly established, and the entire case of the prosecution falls flat on the very first circumstance having not been duly proved by any evidence much less clinching evidence, against the respondent/accused. It is clear that there was not enough evidence against the present respondent to implicate him in the said offences. After the perusal of the facts including the medical evidences and the ocular evidences, the prosecution had failed to prove the charge beyond a reasonable doubt.

21. In the present case, the prosecution had only one incriminating evidence against the respondent which was the medical evidence which showed that there was sexual intercourse between the present accused and the prosecutrix. The case of the prosecution went on the back foot when not only the prosecutrix but PW-3 as well as PW-5 have claimed that the present respondent/accused is not the person who had committed rape upon the prosecutrix. There is absence of link between the present accused and medical evidence which is tendered before the court. The medical evidence in actuality has no probative force in and of itself, as the prosecutrix including other witnesses have denied that the present person before the court is not the main accused person. Therefore, there is no proven nexus between the present accused and the medical evidence. The only evidence is that the police officers claimed that the present person before the court is the main accused in the matter.



22. The Hon'ble Supreme Court in the matter of *State Of Maharashtra v. Sujay Mangesh Poyarelar*⁹ while considering its earlier pronouncements including the decision in the case of *Chandrappa & Ors. v. State of Karnataka*¹⁰ has held that the power of the appellate court in an appeal against acquittal cannot be said to be restrictive and the High Court has full power to re-appreciate, review and reweigh at large the evidence on which the order of acquittal is relied and to reach its own conclusion on such evidence. Both questions of fact and of law are open to determination by the appellate court. It has also been held that nonetheless, it is not correct to say that unless the appellate court in an appeal against acquittal under challenge is convinced that the finding of acquittal recorded by the trial court is 'perverse', it cannot interfere. If the appellate court on re-appreciation of evidence and keeping in view well established principles, comes to a contrary conclusion and records conviction, such conviction cannot be said to be contrary to law.

23. The Supreme Court in the matter of *Hakeem Khan & Ors. v. State of M.P.*¹¹ has again considered the powers of the appellate court for interference in cases where acquittal is recorded by the trial court. In the said decision it has been held that if the 'possible view' of the trial court is not agreeable to the High Court, even then such 'possible view' recorded by the trial court cannot be interdicted. It is further held that so long as the view of the trial court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the verdict of the trial court cannot be interdicted and the High Court cannot supplant over the view of the trial court.

24. Having considered the aforesaid facts and circumstances, this court finds that the prosecution has not been able to successfully prove the

⁹ (2008) 9 SCC 475

¹⁰ (2007) 4 SCC 415

¹¹ (2017) 5 SCC 715



charge beyond a reasonable doubt. On examination of the material available on record, this court is not inclined to take a different view other than the view which has already been taken by the court below. Accordingly, the appeal is dismissed.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

JANUARY 20, 2023
‘SID’

