

State Vs. Vinay Kumar

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Court : Delhi

Decided On : Oct-25-2013

Judge : Kailash Gambhir

Appellant : State

Respondent : Vinay Kumar

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.L.P. 31/2013 STATE
..... Petitioner Through: Mr.Saleem Ahmed, Standing Counsel Additional versus
VINAY KUMAR Respondent Through: None. CORAM: HON'BLE MR.
JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE INDERMEET KAUR

ORDER

2510.2013 % KAILASH GAMBHIR, J.

1. By this petition filed under Section 378(1) of the Code Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C.), the petitioner seeks criminal leave to appeal to challenge the judgment dated 4.5.2012, passed by the learned Additional Session Judge, thereby acquitting the accused of the charges framed against him under Sections 363 and 376, Indian Penal Code, 1860.

2. The facts and circumstances which gave rise to the registration of the case against the accused person, as per prosecution, are that:

In the year 2009, prosecutrix used to live with her family including sister, brother Mohd. Arif and parents in the area of Nabi Karim, Delhi. Prosecutrix was born on 15.08.1995. Sh. Nazaqat Ali, father of the Prosecutrix used to drop her and her sister at Nav Shakti Vidya Mandir, Arakasha Road, Nabi Karim, Delhi. On 26.11.2009 too the Prosecutrix and her sister accompanied their father on the scooter at about 7.00 a.m. for their school. They were dropped by him at some distance from the school i.e. near the street, as there were big pot holes in the street. After having alighted from the scooter of father, the Prosecutrix and her younger sister started proceeding towards the school. Whereas the sister of the prosecutrix entered the school, the Prosecutrix was still outside the school, accused was found standing there. He caught hold of the Prosecutrix by her hand and pulled her. Accused then asked her to sit on his bike and also threatened with dire consequences. At that time accused was having a blade in his hand which he showed her. Accused then took prosecutrix in Inderprastha Park on his bike, made her to sit there. He kept talking to her. Ultimately, he dragged the prosecutrix by her hand and brought her out of the park, made her sit on the bike, kept on driving the bike through street near her school and ultimately took her to Hotel Orient Palace. In a room of the Hotel, accused is alleged to have attempted to commit rape on the prosecutrix. He then opened the door and brought prosecutrix out of the hotel, drove his bike and left her near her house. On the way when accused reached near Mikky Hotel, Mohd. Arif, brother of the prosecutrix and her parents saw him and the prosecutrix. Accused was caught hold by her father and brother, and then taken to the police station. Younger sister of the prosecutrix returned from the school, she informed her parents that the prosecutrix had not attended the school. That is how parents of the prosecutrix and Mohd. Arif had left in search of prosecutrix. Parents of the prosecutrix when took prosecutrix to the police station, she made statements levelling allegations on the accused. SI ram narain appended endorsement to the statement of the prosecutrix and got the case registered.

3. Addressing arguments in support of the present criminal leave to appeal, Mr. Saleem Ahmed, Additional Standing Counsel for the State submits that the learned Trial Court failed to appreciate that the victim of crime in the present case was a small child of 12 years of age and she was under a threat and fear because

the accused had shown a knife while kidnapping her. Contention raised by the counsel for the petitioner is that the learned Trial Court failed to appreciate that a small child, facing a threat, could not have raised any hue and cry to resist the accused, when she was physically lifted by the accused to sit on his bike. Ld. Counsel in support of his contention, further invited attention of this Court to the statement made by the accused, under Section 313 Cr.P.C., wherein the accused had himself admitted that he took the prosecutrix on his bike first to IP park, Naib Sarai Kale Khan and then to the hotel, where he remained with the prosecutrix for about 1 hours. Contention of counsel for the petitioner is that this admission on the part of the accused under Section 313 Cr.P.C. is sufficient enough to prove that he had kidnapped the said minor child and then had raped her in a room taken by him in a hotel. Counsel further argued that the learned Trial Court failed to appreciate the fact that the victim had fully supported the case of the prosecution by making the statement under Section 164 Cr.P.C., supported by the other circumstantial evidence, yet the learned Trial Court has passed an order of acquittal ignoring the statement of prosecutrix and other incriminating evidence, proved on record by the prosecution. Based on these submissions counsel for the petitioner prayed for the grant of criminal leave to appeal to challenge the said judgment on acquittal.

4. We have heard learned counsel for the petitioner and given our thoughtful consideration to the arguments advanced by him. We have also gone through the impugned judgment and other material placed on record.

5. It is a settled legal position that in an appeal against an order of acquittal, the Appellate Court should not normally interfere with the findings of fact arrived at by the learned Trial Court unless the reasoning given by the learned Trial Court is perverse or illegal on the very face of it. The Appellate Court should also bear in mind that with the acquittal of the accused persons by the learned Trial Court, the presumption of innocence of the accused persons has been given the legitimacy. It is also a settled legal position that where there is possibility of arriving at two different conclusions on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal arrived at by the Lower Court merely because the other possible view is a preferred view. It is useful here to refer to the judgment of the Honble Apex Court in the matter of Rangaiah vs. State of

Karnataka reported in AIR 2009 SC1411 Relevant paras of the same are reproduced as under:

From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge: (1) An appellate Court has full power to review, reappraise 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 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.

6. In the aforesaid background of the legal position and an appreciation of the material on record, we are not persuaded to take any contrary view as has been arrived at by the learned Trial Court in acquitting the accused. In her first statement to the police, proved on record as Exhibit PW-1/A, the prosecutrix did not raise any charge of rape against the accused rather she clearly stated that an attempt was made by the accused to commit sexual intercourse with her. The allegation of the rape was levelled for the first time by the prosecutrix in her Court deposition. By taking into consideration the various discrepancies in the deposition

of the prosecutrix and improvements made by her in her Court deposition, the learned Trial Court rightly held that her testimony did not inspire any confidence. The allegations of the prosecutrix also do not find any support from the medical evidence, as in the MLC proved on record as Exhibit PW4/A, gynaecologist Dr. Ritu clearly opined that her hymen was intact and there were no mark of injury or bruises on the person of the prosecutrix. Doctor further specifically mentioned in the MLC that the prosecutrix did not give any history of sexual intercourse. Even the testimony of PW6, Manager of the hotel, also did not support the prosecution story that the prosecutrix was raped by the accused. Learned Trial Court thus rightly disbelieved the version of the prosecutrix that she was raped by the accused in a room of the hotel, after she was kidnapped by the accused.

7. So far as the offence under Section 363 IPC is concerned, we find ourselves in agreement with the finding given by the learned Trial Court that the prosecutrix did not raise any hue and cry or even jumped from the motor cycle on their way, from school to park and then to hotel. Had she been kidnapped by the accused then certainly she would have either jumped from the motor cycle or raised some hue and cry to invite the attention of the public. Learned Trial Court is correct in observing that as per the case of the prosecutrix she was kidnapped from outside the school after she was left outside the street leading to the school along with her sister and there cannot be any possibility that the alleged kidnapping of the child was not witnessed by the other students of the school and so freely the accused could drive down the prosecutrix from school to park and then to hotel through the streets of the walled city without attracting the attention of any passer-by or public person.

8. In the background of these facts, the learned Trial Court is right in observing that the prosecution has failed to prove that the accused had kidnapped or enticed away the prosecutrix from the custody of her parents. We also find no merit in the contention of counsel for the State that the statement made by the accused under Section 313 Cr.P.C., is sufficient enough to drive home the said charges against him. In fact the statement of the accused, under Section 313 Cr.P.C., appears to us to be more truthful and probable and no where he has admitted his guilt either for kidnapping the prosecutrix or making even an attempt to sexually assault her.

9. There is no merit in the present leave to appeal petition and the same is hereby dismissed. KAILASH GAMBHIR, J.

INDERMEET KAUR, J.

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