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State vs.wasim & Anr.

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Court : Delhi

Decided On : Apr-24-2017

Appellant : State

Respondent : Wasim & Anr.

Judgement :

$~44 * + % IN THE HIGH COURT OF DELHI AT NEW DELHI CRL. L.P. 242/2017 STATE Date of Judgment:

24. h April, 2017 Through : Mr.Rajat Katyal, APP for State along Insp.Yogesh, SHO & ASI ....

... Petitioner
with Jaiveer, PS Khajuri Khas. versus WASIM & ANR. CORAM: Through : None. ....

... RESPONDENTS
HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MS. JUSTICE VINOD GOEL G.S.SISTANI, J.

(ORAL) Crl.M.A. 6688/2017 (for Condonation of Delay) 1. This is an application filed by the State/petitioner seeking condonation of delay of 297 days in filing the leave to appeal. Though the application does not satisfactorily explain the reasons for the delay, however, since we have heard the matter on merits as well, we condone the delay.

2. Application stands disposed of. Crl. L.P. 242/2017 3. The present leave to appeal has been filed by the State under Section 378 (1) of the Code of Criminal Procedure, 1973 (in short Cr.P.C.) being aggrieved by the judgment dated 22.03.2016 passed by the Trial Court in Sessions Case 448
by virtue of which the respondents have been acquitted from charges under Sections 363/366/376/506 of Page 1 of 12 Crl. L.P. 242/2017 the Indian Penal Code, 1860 (briefly the IPC) against the respondent no.1 and Section 368 IPC against the respondent no.2.

4. Briefly put the case of the prosecution is that on 26.07.2011 at around 11:50 AM, the complainant Jagdev (PW-1) lodged a missing report regarding his daughter/prosecutrix (PW-2) aged about 16 years, who had gone missing the day before at about 6:30 AM after her elder brother had scolded her. Later on 04.08.2011, the complainant (PW-

1) raised suspicion against his neighbour respondent no.1 alleging that he was also missing from his house for the past few days.

5. Thereafter on 20.08.2011 a raid was conducted by SI Dinesh (PW-13) and the missing girl was recovered from the custody of respondent no.1. On 23.08.2011, the statement of the prosecutrix (PW-2) was recorded under Section 164 Cr.P.C in which she stated that respondent no.1 had kidnapped her forcibly in order to marry her against her wishes. She further stated that she was taken to Hapur where she was confined in a room and the respondent No.1 threatened to kill her and her family and pour acid on her if she tried to escape. She stated that respondent no.1 took her to his friends house in Jyoti Nagar where she was confined in a room and respondent no.2/Satish used to keep a vigil to ensure that the prosecutrix does not escape. She further stated that during the entire period on confinement respondent no.1 committed rape on her.

6. 7. The co-accused/respondent no.2 was arrested from West Jyoti Nagar. After hearing arguments, charges under Section 363/366/376/506 IPC were framed against respondent no.1 and respondent no.2 was charged with offence punishable under Section 368 IPC. Both the respondents pleaded not guilty and claimed trial. Page 2 of 12 Crl. L.P. 242/2017 8. To bring home the guilt of the

respondents, the prosecution examined 14 witnesses in all. Both the accused declined to lead evidence in their defence. Statements of the both the respondents were recorded separately under Section 313 Cr.P.C and both of them denied all implicated evidence put to them and claimed to be falsely incriminated in the case. Respondent no.1 claimed that 15 days prior to the incident a quarrel had taken place between his family and the victims family on the issue of drainage and in order to take revenge the victims family had falsely implicated him in the present case. Respondent no.2 also claimed to be falsely incriminated in the case by the police. He claimed that he was stopped by police officials of P.S Khajuri Khas and was asked to pay a bribe after he could not produce the documents demanded by them, he was falsely implicated. Respondent no.2 further stated that he did not even know his co- accused/respondent no.1.

9. After examining the evidence before it, the Trial Court acquitted both the respondents. The Trial Court found that only the testimonies of the complainant (PW-1) and the prosecutrix (PW-2) were relevant and the former, could not be relied upon as the same was mere hearsay and the latter had contradicted herself with respect to her prior statements. Aggrieved, the State has come seeking leave to appeal against the judgment.

10. Mr.Katyal, learned APP for the State, submits that the impugned judgment is manifestly wrong, illegal and against the facts on record and thus, warrants interference by this Court. It is submitted that the Trial Court erred in not relying upon the statement of the prosecutrix recorded under Section 164 Cr.P.C., which was recorded just three Page 3 of 12 Crl. L.P. 242/2017 days after her recovery. Learned APP for the state contends that the testimony of prosecutrix (PW-2) was consistent on all material aspects and improvements, if any, were minor and did not warrant her testimony to be discredited.

11. In response to the contradictions and improvements noted by the Trial Court, Mr.Katyal submits that bye and large the prosecutrix has supported the case of the prosecution and therefore, her testimony could be relied upon to convict the respondents. It has been submitted that the Learned Trial Court had failed to appreciate that some contradictions are bound to occur in the truthful deposition of

facts and the entire case cannot be brushed aside on account of contradictions until and unless they are fatal to the case. Consequently, the testimony of the prosecutrix could be relied upon to prove the charges against the respondents/accused.

12. We have heard learned counsel for the State and have carefully examined the judgment of the Trial Court.

13. The only contention urged before us is whether the Trial Court erred in not relying upon the statement of the prosecutrix to convict the accused/respondents?.

14. Since the Trial Court had come to the conclusion that the evidence of the prosecutrix was unworthy of credence and no reliance could be placed on her testimony, we deem it appropriate to analyse the various statements given by the prosecutrix (PW-2).

15. The prosecutrix in her first statement recorded on 20.08.2011 stated that she had developed a friendship with the respondent no.1 who was residing in the same neighbourhood and the respondent no.1 proposed to marry her and she got enticed. They decided to run away on Page 4 of 12 Crl. L.P. 242/2017 25.07.2011 to get married. She further stated that they had not married till date and the respondent no.1 had not committed rape. Therefore, as per the statement, the prosecutrix was a consenting party to the act of eloping and the respondent no.1 had not committed rape.

16. In her subsequent statement recorded under Section 164 of the Cr.P.C on 23.08.2011 while, during the intervening period, she was in the company of her parents, she deposed that she had gone to the market to buy shampoo where the respondent no.1 was also present. After she was at some distance from her house, the respondent no.1 caught her hand and pulled her into a TSR parked nearby and forcibly made her sit in it. The respondent No.1 put a cloth on her mouth and took her to Hapur where she was locked in a room. She stated that respondent no.1 threatened to kill her and her family and throw acid on her face in case she tried to run away and kept her there for about a week or two and during this time respondent no.1s sister also used to reside in the same house. She

further deposed that she was brought to Jyoti Nagar from Hapur to a place owned by respondent no.1s friend who used to keep a guard outside the room where she was confined in order to prevent her from escaping and during the entire period of illegal confinement respondent no.1 committed rape on her.

17. The third statement of the prosecutrix (PW-2) was recorded in the form of her testimony before the Trial Court on 08.10.2012. In this statement, she stated that on the fateful day she had gone to buy shampoo at about 6 AM and respondent no.1 caught hold of her hand and pulled her forcibly into a TSR where one other person apart from respondent no.1 and the driver was sitting on the rear seat. She further stated that when she tried to raise an alarm the respondent no.1 put a Page 5 of 12 Crl. L.P. 242/2017 cloth in her mouth and threatened to throw acid on her face if she tried to escape. She then became unconscious and when she regained consciousness she found herself in the house of the sister of the respondent no.1 in Hapur where she was confined in a room after her hands and legs were tied and she was forced to marry respondent no.1. She further deposed that respondent no.1 committed rape on her during this period and after 4-5 days she was brought to the house of the respondent no.2 house in Jyoti Nagar, where she was again kept in confinement and raped by respondent no.1 while respondent no.2 used to keep a watch on her in order to prevent her from escaping.

18. The Trial Court had refused to place credence in the testimony of the prosecutrix (PW-2) as it came to the conclusion that the testimony was full of contradictions and improvements. We deem it appropriate to reproduce the relevant paragraphs of the judgment of the Trial Court in this regard in extenso below: 16. The cross-examination of this witness also requires mention. There she deposed that she could not raise an alarm as accused Wasim was having acid with him and had threatened to throw it upon her. This fact was never deposed by her in either of her previous statements that she had seen any acid bottle in the hand of the accused Wasim and is a clear improvement. She further improvised her previous statement Ex. PW2/A by introducing two other persons whose presence by her in the TSR. 17. It was next deposed by this witness in her cross examination that wife of accused Kaku used to remain with her in the same room

where she was confined at Jyoti Nagar and that she was having a child. She also deposed both the accused used to leave the house in the day time and used to come back in the evening at about 09/10:00 pm. It means that she had ample opportunity to run away as she Page 6 of 12 Crl. L.P. 242/2017 never deposed that the accused used to lock her in the room. Rather, according to her, wife of accused Kaku used to remain with her in the day time. It is not her case that she ever complained to the wife of Kaku that she had been kidnapped or raped. She admitted that her father was having a mobile phone at that time but she never tried to contact her father during this period. 19. She differently deposed stay in Hapur. In her statement under Section 164 Cr.P.C she deposed that she was kept at Hapur for about one or two weeks while in her deposition before the court she stated that she was kept for about four weeks.

20. It was deposed by the PW-2 that she was taken to Hapur in the TSR which is totally impossible as no TSR is permitted to travel beyond the limits of Delhi. It is also noteworthy that the witness further made improvements in her deposition by deposing that she was made unconscious by accused Wasim by putting handkerchief on her mouth. This version never came out of her mouth in either of her previous statements. It was also deposed by PW-2 in her cross examination that one of her relatives had visited her in the room at Jyoti Nagar but she could not recollect his/her name. This means in confinement.

21. It is noteworthy that the victim and the accused Wasim were apprehended at Bhajanpura Chowk. It was deposed by PW-3, PW-4, PW-11 and the IO PW-13, recovery witnesses that it was a crowded place and both of them were standing together. PW-4 deposed that the victim appeared to be normal at the time of recovery. It is not the case of the victim that even at that place she had tried to run away or raise any alarm though PW-4 deposed that the victim was nervous at that time but no other witness deposed this fact. PW-3 deposed that they were identified by him as they were residents of his beat while other recovery witnesses, as aforesaid, stated that the two were identified on the basis of photographs which they were having. The place where the accused allegedly had kept the victim either at Hapur or at Jyoti Nagar was not identified by the victim. that she was never Page 7 of 12 Crl. L.P. 242/2017 22. IO, PW-13 admitted that he had not

taken photographs of the room at Jyoti Nagar nor prepared any site plan of the said house or conducted any inquiry from the neighbours. The place was identified only on the pointing of the accused which is an inculpatory statement and cannot be used against the accused in the absence of any corroboration. The place at Hapur was never got identified by either accused Wasim or the victim. Similarly, the statement of the sister of the accused Wasim in whose house the victim was allegedly confined was also not recorded. Thus, it is even doubtful if the victim was ever taken to Hapur or Jyoti Nagar and confined at any place, in the absence of the identification of the two places.

27. In the instant case as observed above, the victim never tried to run away or raise any alarm. Her conduct shows, beyond any doubt, that she had accompanied the accused and resided with him with her own will. (Emphasis Supplied) 19. It is clear that the Trial Court found glaring inconsistencies and contradictions in the testimony of the prosecutrix (PW-2). Even though there is no quarrel with the proposition that conviction can be based on the sole testimony of the prosecutrix but at the same time, it must be unimpeachable and beyond reproach precluding any shadow of doubt over her veracity. We may only refer to few pronouncements of the Apex Court in this regard. In Ramdas v. State of Maharashtra, (2007) 2 SCC170 it was held as under: 23. It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality. Page 8 of 12 Crl. L.P. 242/2017 25. In the instant case there are two eyewitnesses who have been examined to prove the case of the prosecution. We have rejected outright the evidence of PW5 We have also critically scrutinised the evidence of the prosecutrix, PW2 She does not appear to us to be a witness of sterling quality on whose sole testimony a conviction can be sustained. She has tried to conceal facts from the court which were relevant by not deposing about the earlier first information report lodged by her, which is proved to have been recorded at the police station. She has deviated from the case narrated in the first

information report solely with a view to avoid the burden of explaining for the earlier report made by her relating to a non-cognizable offence. Her evidence on the question of delay in lodging the report is unsatisfactory and if her deposition is taken as it is, the inordinate delay in lodging the report remains unexplained. Considered in the light of an earlier report made by her in relation to a non-cognizable offence, the second report lodged by her after a few days raises suspicion as to its truthfulness. (Emphasis Supplied) 20. The Supreme Court in State of Rajasthan v. Babu Meena, (2013) 4 SCC206 has observed as under: for 9. We do not have the slightest hesitation in accepting the broad submission of Mr Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused. Page 9 of 12 Crl. L.P. 242/2017 21. We may also note the following observations in Mohd. Ali v. State of U.P., (2015) 7 SCC272 29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no

injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon.

30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unreproachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, the her inspire confidence, and testimony does not Page 10 of 12 Crl. L.P. 242/2017 circumstantial evidence remotely does not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the appellant-accused for the alleged offences and the High Court has fallen into error, without reappreciating the material on record, by giving the stamp of approval to the same. (Emphasis Supplied) 22. Applying the aforegoing principles to the present case, the Trial Court was correct in its view that the testimony of the prosecutrix could not be relied upon to convict the accused as her testimony was plagued with contradictions and improvements. To conclude, the sole testimony of the prosecutrix (PW-2) could not be relied upon to convict the accused as her testimony failed to dispel the shadow of doubt.

23. Therefore, we are not inclined to grant the present leave to appeal. Even otherwise, it is settled law that the appellant court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so [See Sheo Swarup v. King-Emperor, AIR 1934 PC227(2); M.G. Agarwal v. State of Maharashtra, AIR 1963 SC200(paragraph 16 and 17); Tota Singh and Anr. v. State of Punjab, AIR 1987 SC108 (1987) 2 SCC529(paragraph 6); State of Rajasthan v. Raja Ram, (2003) 8 SCC180(paragraph 7); and Chandrappa v. State of Karnataka, (2007) 4 SCC415(paragraph 42)]..

24. Accordingly, we find no illegality or infirmity in the judgment of the Trial Court warranting interference. Crl. L.P. 242/2017 Page 11 of 12 25. Thus, the leave to appeal is dismissed. APRIL24 2017 // G. S. SISTANI, J.

VINOD GOEL, J.

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