

State vs.mohd. Faizan & Ors

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Court : Delhi

Decided On : Apr-22-2019

Appellant : State

Respondent : Mohd. Faizan & Ors

Judgement :

\$~3 * % + IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment Reserved on:

15. h February, 2019 Judgement pronounced on:

22. d April, 2019 CRL.LP.404/2018 STATE Through: Mr. Ravi Nayak, APP for State with SI Appellant Balbir, PS K. Khas. Versus MOHD. FAIZAN & ORS Respondent Through: Mr. P.K. Saxena, Advocate (DHCLSC) for respondent Ashraf. CORAM: HON'BLE MR. JUSTICE SIDDHARTH MRIDUL HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL SANGITA DHINGRA SEHGAL, J.

1. By the present Leave Petition filed under Section 378 (1) of the Code of Criminal Procedure, (hereinafter referred as Cr.P.C.), the State seeks leave to appeal against the judgment dated 13.03.2018 passed by the learned Trial Court in Session Case No.44614/15, whereby all the respondents (accused before the Trial Court) were acquitted of the charges punishable under Sections 307/344/365/366/3

of the Indian Penal Code (hereinafter referred as IPC).

2. Brief facts of the case, as noticed by the learned Trial Court, are as under: - (i) That DD No.35-A was registered on receiving a Call from the control room at Police Station Khajuri Khas, on 04.02.2009 at about 12.10 am, in receipt of the information that 2-3 persons have forcibly kidnapped one minor girl and the brother of the minor girl has been CRL.LP.404/2018 Page 1 of 23 given knife blows by the delinquent accused persons. The said DD was marked to SI Kunwar Pal Singh, and accordingly he was informed that the injured has been already taken to Bara Hindu Rao Hospital, subsequent to which SI Kunwar Pal Singh along with Constable (Ct.) Brijpal departed for Bara Hindu Rao Hospital and on their arrival, the injured Ravi Kumar was declared fit for recording his statement and accordingly his statement was recorded. (ii) Based on his statement recorded by SI Kunwar Pal Singh (PW-14) and the contents of his Medical Examination Report, FIR No.

was registered under Section 307/3

of the Indian Penal Code. On the same day, accused Mukesh Mishra was arrested vide arrest memo (Ex.PW1/A) and his disclosure statement was recorded. Thereafter the accused was medically examined and was accordingly remanded to the judicial custody. On the 08.02.2009, accused Mohd. Faizan was arrested from A Block, Gali No.6, Part-II, 1st Pushta, Sonia Vihar vide arrest memo (Ex.PW1/D), his disclosure statement was recorded and thereafter the accused was medically examined and was accordingly remanded to the judicial custody. (iii) Further during the course of the investigation, on 29.03.2009, the victim girl child who was kidnapped during the aforesaid quarrel on 04.02.2009, arrived at Police station Khajuri Khas and on her arrival the victim was inquired by SI Kunwar Pal Singh and Ct. Rubi(PW- 4), with regard to the her rescue. On which the victim girl child said that accused named Ashraf is responsible for her kidnapping because he had wrongfully confined her in an unknown room for a certainly long time. She further added that accused Ashraf used to frequently beat her and sexually assault her, which was completely against her free will and desire. Accordingly, SI Kunwar Pal Singh seized and sealed the Burqua and the Hijab, which was used by the minor victim girl for her emancipation from the custody of the accused. Subsequent to recording her statement, she was medically examined at GTB CRL.LP.404/2018 Page 2 of 23 Hospital and was thereafter sent to Nirmal

Chhaya at Nari Niketan. Statement of the victim U/s 164 Cr.P.C was recorded on 31.03.2009 and accordingly non-bailable warrants were issued against accused Ashraf. (iv) On 15.06.2009, an information was received that accused Ashraf will be arriving at TSR Stand, Main Road, Chauhan Patti, Sabharpur and accordingly, accused Ashraf was arrested at the alleged location vide arrest memo (Ex.PW11/1). His disclosure statement was recorded and was medically examined at GTB Hospital vide MLC No.2582/2009 and was accordingly remanded to the judicial custody. It is worth mentioning that initially FIR No.(v) 24/2009 was registered under Section 307/3

IPC, only and on the prosecutrix, supplementary charge sheet was filed vide order dated 20.07.2010, charges U/s 3

IPC, 3

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IPC was framed against the respondents and additional charge U/s 376 IPC was framed against the respondent no.3. the statement of To bring home the guilt of the respondents, the prosecution has 3. examined 15 witnesses in all. Statements of the respondents were recorded under Section 313 of Cr.P.C. wherein they denied the charges framed against them and claimed to be falsely implicated in the case.

4. After hearing the counsels for both sides and on appreciation of entire evidence available on record, the learned Trial Court acquitted the respondents for the charged offences.

5. Mr. Nayak, learned counsel appearing for the State contended that the impugned judgment dated 13.03.2018 is based on conjectures, surmises and the learned Trial Court has not appreciated the testimony CRL.LP.404/2018 Page 3 of 23 of the prosecutrix in its right perspective ignoring the well-settled proposition of law that the sole testimony of the victim of sexual offence is sufficient to base conviction of the accused.

6. Learned counsel for the State further contended that the learned Trial court has failed to acknowledge the testimony of victim PW-2 (prosecutrix), PW-6 Ravi

Kumar(brother of the prosecutrix) and PW-8 Pramod Muni (stepfather of the prosecutrix) and placed undue weightage on the minor discrepancies in the testimonies of the prosecution witnesses, contrary to which all the testimonies are consistent and corroborative in nature and there are no major omissions and contradictions in the aforesaid testimonies.

7. He further contended that the accused is a habitual offender and had already been convicted in FIR No.276/2008 for the offences punishable under Section IPC against the same victim. Learned counsel for the state further contended that the learned session judge failed to take notice of the knife injuries inflicted on the neck of the injured Ravi Kumar and ignored the testimony of PW-13 Dr. Jayachandra CMO, who examined the injured and opined that there is no possibility that the injuries can be self inflicted. Learned counsel for the state further contended that the testimony of PW-6 Ravi Kumar(brother of the prosecutrix) and PW-8 Pramod Muni (stepfather of the prosecutrix) is clear and unambiguous to prove the guilt of the accused persons.

8. Per contra, learned counsel for the respondent contended that there is no infirmity in the impugned judgment passed by the learned Trial Court and no interference is called by this Court. He further contended CRL.LP.404/2018 Page 4 of 23 that the testimony of prosecutrix is bristled with a lot of contradictions, inconsistencies and improvements. She has given different versions in her statements recorded at different stages. Counsel admitted that it is true that sole testimony of the prosecutrix in a case of rape can be based for conviction of the accused subject to same inspires confidence of the Court, but in instant case, the sole testimony of the prosecutrix is not sufficient to establish the case of rape against the respondents.

9. It is further submitted that the FIR No.276/2008, registered at Police Station Khajuri Khas, in which the respondents have been convicted is of no relevance to the present case because the same has been registered on the basis of a separate incident.

10. We have heard the learned counsel for the parties and carefully examined the impugned judgment and the material available on record as well.

11. It is a settled principle of law that conviction can be based on the sole testimony of the victim of sexual assault without corroboration from any other evidence. The statement of the victim is the most reliable than any other witness. Where the testimony of victim of sexual assault installs the confidence in Court, the same can be relied upon for conviction of the accused. It is also a well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the victim is not a requirement of law but a guidance to prudence under the given circumstances. CRL.LP.404/2018 Page 5 of 23 12. In State of Himachal Pradesh Vs. Manga Singh , reported in 2018 (15) SCALE895 the Apex Court has observed as under: - the testimony of

"11. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.

12. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court. 13. Returning to the facts of the present case, the moot point involved for consideration in present leave petition is whether evidence adduced by the prosecution, particularly the testimony of the prosecutrix (PW-2) is trustworthy, credible and worthy of reliance.

14. From the perusal of record it transpires that there are various contradictions between the testimonies of the victim recorded by the police and the statement recorded under Section 164 of the Cr.P.C. As per her initial statement recorded

under Section 161 of the Cr.P.C. CRL.LP.404/2018 Page 6 of 23 (Ex.-PW-2/DA) by the police, she categorically stated that on 29.03.09 she was conveyed by Ashraf to Jama Masjid on the pretext of meeting with her father and he instructed her to stay at the alleged spot. Subsequently she met with a boy named wasim at the aforesaid location who transported her to Saboli(to her grandfathers house) and then thereafter to the Police Station Khajuri Khas. However, when her statement was recorded under Section 164 of the Cr.P.C (Ex.PW2/A), she altered her version and stated that on 04.01.2009, three accused persons kidnapped her from her house and had inflicted stab injury on the neck of her brother. On the concurrent circumstances, when she had raised hue and cry, accused Mukesh Mishra had threatened her with the warning of inflicting knife injury on her neck. Accordingly, after she was conveyed to Jama Masjid by Ashraf on the pretext of meeting with her father. She had subsequently met with an unknown boy namely wasim, who had helped her in arriving at her parents house. After arriving at her parents home, the door was found locked due to which wasim had informed the police officials about their location and accordingly police had arrived at the spot and had taken her custody. 15. The prosecutrix was examined as PW-2 and during her examination- in-chief dated 20.03.2012, she stated that respondent Ashraf along with his associate Mohd. Faizan and Mukesh Mishra had kidnapped her from the first floor of her house. The relevant portion from the examination in chief of PW-2 reads as under: - On 03.02.2009 at about 10.45pm, I was present in a room of 1st floor of my aforesaid house. Accused Ashraf present in Court (correctly identified), along with his CRL.LP.404/2018 Page 7 of 23 associates namely Mohd. Faizan and Mukesh Mishra, both present in Court (correctly identified) and another associate had come at my aforesaid residence by Tata-407 (Tempo) and they took me forcibly to a unknown place by aforesaid vehicle in the presence of my brother Ravi Kumar. When my brother Ravi had opposed one of associate of accused Ashraf had caused stabbed injury on his neck.

16. Further, she appeared for her examination in chief on 05.02.2014, wherein she deposed that she did not know respondent Ashraf personally because he was the friend of her brother and on the alleged date of the incident, he had taken her to an unknown place and committed penetrative sexual assault on her, consequent to which she deposed inversely with regard to her rescue. Relevant portion from the

examination in chief dated 05.02.2014 reads as under: - I have never been to any court, police station or public office prior to the present cases. I did not know accused Ashraf personally but he was friend of my brother. Ashraf had taken me to some unknown place. I do not know whether the place was situated in Delhi or outside Delhi. Ashraf had committed sexual intercourse with me against my will 2-3 times. It was a room where Ashraf had taken me. I do not know whose room it was. Ashraf had taken me to that room in Van of white color and we had reached the above said unknown place after about 2-3 hours. Ashraf had kept me in that room for two days. Ashraf used to beat me and therefore I was in a very bad condition in that room. After two days Ashraf had taken me to some other place in a auto rickshaw. There one lady was present Ashraf had left me with that lady. On the same day in the evening police had come at that place and police called me and taken me and brought me to Delhi. That lady had also accompanied the police. At the time when police had come they were with a lady and later I come to know that she had CRL.LP.404/2018 Page 8 of 23 disclosed about my whereabouts to police. Police had recorded my statement. After I was kidnapped by accused Ashraf and his associates on 03.02.2009 from the first floor of my house, I was taken to some place but since it was night time I cannot say as to what place that was. At that place Ashraf had asked me not to make statement against him in the court regarding the earlier incident which was occurred about 5-6 months prior to 03.02.2009. Ashraf had also asked me to make a statement in the court, the fact that I had accompanied him of my own free will. Ashraf had committed sexual intercourse with me twice against my will. Ashraf had kept me at that place for 3 days. My condition was bad at that place. I used to resist the advances of Ashraf for sexual intercourse and due to this he used to beat me. In that room one Burkha was lying. In the evening time one unknown boy had come on that room and he unbolted the room which was bolted from outside and I had apprised that unknown boy about my condition and he agreed to help me by saying that he will take me to the place where I wanted to go.

17. During her cross examination, by the Learned Prosecutor for the State, she admitted that she told the police that on 29.03.2009, respondent Ashraf took her to a masjid on the pretext of meeting her father and instructed her to stay at the aforesaid masjid, subsequent to which a person namely Wasim approached her

and helped her escape from the situation and that Wasim was the person who helped her in reaching the Police Station Khajuri Khas. Relevant portion from her cross examination reads as under: - It is also correct that I stated to the police in the said statement that on 29.3.2009 Ashraf took me on the pretext of meeting my father who was arriving and then through various streets brought me to a masjid where he CRL.LP.404/2018 Page 9 of 23 left me saying that I should wait for him and that he would come after meeting someone and then went away and thereafter, one person namely wasim came there whom I called and disclosed all the facts to him and he brought me to Saboli but there I could not identify the house of my grandparents and then on my asking, wasim brought me to my house but no one met us there and I came to know that my parents have shifted to our native village after vacating the said house and I also came to know that my parents had lodged a report at PS Khajuri Khas and then wasim brought me to the PS where I made the statement. It is correct that when wasim met me, I had kept the burqua which I was made to wear by Ashraf when he brought me to the room from the mosque, in polythene and had produced the same before the police. 18. Further, during her cross examination directed on behalf of learned counsel for respondent Faizan, she has deposed that the respondents were known to her prior to the alleged incident and she had not seen respondent Faizan after she was abducted in the tempo or at any other place where she was taken: - It is correct that all three accused were known to me prior to the incident as they resided near my house. It is correct that my mother entered into a second marriage with Sh. Pramod Muni after the death of my biological father. Before shifting to Chauhan Patti, we were residing at ITO. The house at Chauhan Patti was situated on the road side. We were residing on the second floor of that house and there were other tenants on the ground floor and first floor but I do not know their names or other particulars. I do not know till what time in the night, the main gate of the said house used to remain open. I do not know if any other person apart from my brother had come for my rescue on the day of Incident. It is wrong to CRL.LP.404/2018 Page 10 of 23 suggest that since no such incident took place, therefore, I never raised any alarm and accordingly no one came for my rescue. Since it was dark in the night, therefore, I could not see how many other persons were there apart from the three accused who had come in the tempo on

03.02.2009 and had taken me away. It is wrong to suggest that I could not see due to darkness as to who came upstairs and who downstairs remained and who was waiting near at the tempo. There was only one room on rent with us on the second floor of the house where my both parents and we four brothers and sisters were residing there. It was a big room but I cannot tell the exact size. It was a school earlier. All my family members were sitting in the room at the time of Incident. My brothers and sisters apart from my brother who tried to save me were too young at that time and were sleeping. It is wrong to suggest that no such incident took place and as such, no one got up (Vol. later every one came), the main gate is just near to the staircase leading from the second floor. It is wrong to suggest that I could not see the face of the person who gave a knife blow to my brother, due to darkness. (Vol, I could see his face and he was Faizan as he had suddenly come in front of my eyes). It is wrong to suggest that I had stated to the police in my statement dated 29.03.2009, ExPW2/DA that Ashraf had told me that my father had taken Rs,20000/- from him and that I did not know who gave the knife blow, (Confronted with portion A to A of Ex.PW2/DA where it is so recorded). It is wrong to suggest that Faizan was not involved in the alleged incident and he has been falsely implicated in the case at the behest of my brother and father. It is correct that I had not seen Faizan after I was abducted in the tempo at any their place where I was taken. CRL.LP.404/2018 Page 11 of 23 19. Accordingly, during her cross examination by learned counsel for respondents Mukesh Mishra and Ashraf, she has considerably contradicted with her examination-in-chief and with her statement recorded U/s 164 Cr.P.C.(Ex.PW2/A):-

"Court Question: How did you come to know accused Ashraf?. Ans. He was having a shop in the gali through which I used to go for my tuitions and I knew him only for that. I had not stated before this court in my examination in chief that I did not know Ashraf personally but he was friend of my brother. (Confronted with portion A to A of examination in chief dated 05.02.2014) I had not stated to the learned MM in my statement Ex.PW2/A that accused ashraf had committed sexual intercourse with me against my will two to three times. (Vol. It was never asked from me). I had not stated to the Ld. MM in my statement Ex.PW2/A that accused Ashraf had taken me to a room. or that I was taken in a white color van and we had reached the above said unknown place after about two-three hours, or that I

was kept by Ashraf in that room for two days, or that he used to beat me and therefore I was in very bad condition in that room. (Vol. It was never asked from me). I had not stated to the Ld. MM in my statement Ex.PW2/A that after two days Ashraf had taken me to some other place in an auto rickshaw and one lady was present there and left me with that lady, or that in the same evening police had come at that place and police called me and taken me and brought me to Delhi, or that that lady also accompanied the police, or that later I came to know that the said lady had disclosed about my whereabouts to the police. (Vol. It was never asked from me and I had answered whatever questions were put to me. I had not stated to the Ld. MM in my statement Ex.PW2/A that after I was kidnapped by accused Ashraf and taken to some place, he had asked me not to make statement against him in the Court regarding the earlier incident CRL.LP.404/2018 Page 12 of 23 five-six months prior which occurred about to 03.02.2009 and had asked me to a make a statement in the Court that I had accompanied him of my own free will. (Vol. It was never asked from me and I had answered whatever questions were put to me). I had not stated the Ld. MM in my statement Ex.PW2/A that Ashraf had kept me at that place for three days and my condition was bad, or that I used to resist the advances of Ashraf for sexual intercourse and due to this he used to beat me, or that burqa was lying in that room. or that in the evening, one unknown boy had come at that room and he unbolted the room which was bolted from outside and I apprised that unknown boy about my condition and he agreed to help me saying that he will take me to the place where I wanted to go, or that I wore the burqa and came out of that room alongwith that unknown boy and went to my parents' house at Sonia Vihar but found it to be locked at that time and on enquiry, one of my neighbor told me that my parents alongwith my brother had gone to our native village being scared after my kidnapping and injuries to my brother and apprehending some untoward incident, or that thereafter, I went to my grandparents (mama-mami of my father) at Nand Nagari who tried to contact my parents but they could not be contacted and thereafter, they informed the police of Khajuri Khas which arrived at the house of my said grandparents and brought me to the PS and that I myself tried to contact my parents on phone but they could not be contacted. (Vol. It was never asked from me and I had answered whatever questions were put to me).

20. Contradicting the version of the prosecutrix, the Investigating Officer (PW-14) is completely silent about the recovery of the victim and the victim being brought to the police station by some other boy, who was unknown or was named as Wasim. He also failed to corroborate the fact that the victim was recovered at the instance of the police from CRL.LP.404/2018 Page 13 of 23 her grandparents house at Nand Nagri. Relevant portion from his statement recorded on 05.06.2017 reads as under: - On 29.03.2009, the victim came at the PS. I made inquiries from her in the presence of lady Ct. Rubi. I prepared the memo regarding recovery of the victim. The said memo dated 29.03.2009, already Ex. PW4/A bears my signature at point B. I recorded her statement under section 161 Cr.P.C. The victim produced a burqua and hijab to me. I kept the same in a polythene pack and sealed the same in a cloth pullanda with the seal of KP and seized the same. The seizure memo already Ex.PW4/B bears my signature at point B and the victim put her signature at point C. I called the NGO official, who counseled the victim. Thereafter, the victim was sent to GTB Hospital along with lady Ct. Rubi for medical examination. After her medical examination, lady Ct. Rubi came to the PS along with the victim and handed over her MLC and three pullindas in sealed condition with the seal of MLC GTB Hospital along with the sample seal to me. I seized the said pullindas and sample seal. The seizure memo dated 29.03.2009; already Ex.PW4/C bears my signature at point B. I deposited all the seized articles in the malkahana. 21. However, while analyzing the aforesaid deposition of the prosecutrix, the entire version regarding her recovery comes under a shadow of doubt as the same also does not corroborate the testimony of the investigating officer i.e. (PW-14). Auxiliary, the prosecution has relied upon the testimonies of Ravi Kumar (PW-6) i.e. brother of the prosecutrix and Pramod Muni (PW-8) i.e. stepfather of the prosecutrix, as they have also testified with regard to the alleged incident. As the FIR in the present case was registered after recording the statement of Ravi Kumar (PW-6) wherein he has categorically stated that respondent Ashraf along with his 3-4 associates trespassed CRL.LP.404/2018 Page 14 of 23 into his house and forcibly abducted his sister. On resisting, the alleged crime, one of them, stabbed him with a knife, leaving an injury on his neck. Relevant portion from his statement recorded on 29.04.2016 reads as under:-

"On 03.2.2009, at about 10.45 pm I was present on the ground floor of my house. At that time, one person namely Ashraf came to our house along with 3-4 persons in TATA407 They all went to the first floor of my house and started taking always my younger sister/victim along with them. When I and my father resisted, Ashraf exhorted his associates to kill me and then one of the boy inflicted knife blow on my neck and thereafter they all kidnapped the victim and took her along with them in TATA407 I knew Asraf as he is in my locality. 22. Further in his cross examination dated 29.04.2016 by the learned counsel for accused Faizan, he has deposed that they were residing in rented premises and there were many more tenants residing in the same house and the wife of the third tenant had opened the door for the respondents. At the time of incident, we were residing on rent at Mangal Bazaar, Chauhan Patti. There as one room set on the first floor of the house in our possession. Three other families were also residing in the same house on rent. The said tenants were lagan and Rakesh but I do not remember the name of third tenant. Lagan and Rakesh were not present at the time of incident. The landlord of the house was not residing in the said house. When the accused persons came at our house, I was on the ground floor in the room of Lagan and was taking heat from fire. The above said persons did not enter in the room of Lagan and they went to the first floor directly. The main door of the house was knocked by aforesaid accused persons and one Lady who was wife of the third tenant whose name I do not remember, opened the door as she was under impression that her husband knocked at the door. I do not know if the police made inquiries from the said Lady or not. When the accused persons went to the first floor in our house I was not present on the first floor. It is correct that I was not present on the first floor that is why, I did not see when the accused entered in our house. I did not see the lady who was wife of third tenant, opened the door of main gate when the accused entered in the house. It is correct that I do not know about the incident on the first floor. (Vol. When the accused persons were taking away my sister I saw them on staircase and I objected and tried to save my sister then accused gave the knife blow on my neck.) 23. The most crucial part for consideration in the aforesaid deposition is that, he has only mentioned the name of respondent Asraf in his examination in chief and has not mentioned the name of the other respondents Mohd. Faizan and

Mukesh Mishra, whereas in his cross- examination dated 23.11.2016, he has been confronted with his initial statement and has deposed that he has not given the name of the other respondents, despite being well acquainted with them. Relevant portion of his cross-examination dated 23.11.2016 reads as under:-

"I have studied up to 6 standard. I am doing nothing presently. I know accused Mukesh Mishra as he was residing in our locality along with his family members. It is correct that I had not given the name of Mukesh Mishra in my statement made to the police despite the fact that I knew him prior to this incident 24. Eventually, the names of both the respondents Mukesh Mishra and Mohd. Faizan have appeared in the statement of Pramod Muni (PW-8), wherein he has also deposed that his son Ravi Kumar was inflicted a knife blow by respondent Ashraf. Relevant portion from his CRL.LP.404/2018 Page 16 of 23 examination-in chief of Pramod Muni (PW-8) recorded on 23.11.2016 reads as under:-

"I am residing at the aforesaid address for the last about one year. On 03.02.2009, it was Tuesday. At about 10.45pm, I, my wife and my daughter (victim) were present at my house. My son Ravi was also present. One tempo TATA407 came and stopped in front of my house. Five/six boys came out from the said tempo. The accused Ashraf present in the court was among those five/six boys, whom I identified as he was resident of my locality. Accused Ashraf started talking to me whereas other persons were standing with him. Accused Ashraf was asking about the whereabouts of my son Ravi and the victim. Those persons pushed me as a result I fell down. My son Ravi came from his room and started apprehending Ashraf. Accused Asraf exhorted his associates and asked them to hit the knife to my son Ravi. Accused Ashraf was having a knife in his hand and gave knife blow on the neck of Ravi and thereafter he gave the knife to one of his other associates who also gave knife blow to Ravi on his neck. Blood started oozing out. Those persons including accused Ashraf took away the victim in the said tempo. Two-three persons from the nearby houses also reached there. I and my wife and one or two other persons of the area took Ravi to Hindurao Hospital where he was admitted. I made a call to the police station Khajuri Khas. Some other person also made a call at 100 number from the spot. Police officials reached at Hindurao Hospital. I had narrated the incident to the police. I had given the names of Ashraf,

Faizan and Mukesh whom I knew prior to this incident. 25. Therefore, while analyzing the testimonies of the prosecution witnesses it is doubtful as to who inflicted knife injury on PW-6 Ravi Kumar(brother of the prosecutrix). The injured himself has failed to name the person who inflicted injuries on him. PW-8 Pramod Muni CRL.LP.404/2018 Page 17 of 23 (stepfather of the prosecutrix) on the other hand named two accused who inflicted knife injuries on his son, however MLC of the injured Ex.PW.1

negated the testimonies of PW-8, as the MLC reveals only one injury on the body of the injured Ravi Kumar.

26. Further, the story set up by the prosecution failed to find support from the medical examination of the prosecutrix as well as the FSL report. Dr. Sanjeeta Behera, (PW-7) CMO, Gynae Department, GTB Hospital, appeared on behalf of Dr. Sapna who had examined the victim on 29.03.2009 and proved her report as Ex.PW7/A vide MLC No.B-1288/09, wherein it was opined that there were no marks on the body, the hymen was torn with old tear and fresh tear on left side and as per the vaginal examination it was opined that the uterus was found 6 to 8 week size and anteverted with YTP as positive. Further, the FSL Report No.2009/B-3320 was concluded with the finding that human semen had been detected on the seized exhibits, but the same could not be matched with the semen of the respondent, as the sample was putrefied.

27. Accordingly, from the medical examination it is not established that it was the respondent(Ashraf) who is primarily responsible for committing rape and penetrative sexual assault on the prosecutrix. Thus, the medical examination report also does not lend any support to evidence of the prosecutrix and there is no other evidence available on record which supports the offence of rape having been committed upon her.

28. In a case of rape, the onus is always on the prosecution to prove each ingredient of the offence alleged against the accused and such onus CRL.LP.404/2018 Page 18 of 23 never shifts on the accused. There is no dispute with the proposition sought to be urged by counsel for the State that there is no bar in law to convict the accused on the basis of the sole testimony of the victim,

however, the Court must be satisfied that the testimony of the victim is of sterling quality and inspires confidence.

29. Therefore, the testimony of the prosecutrix has to be consistent in line with the case of the prosecution, as it cannot be always presumed that the statement of the prosecutrix is always true and without any embellishment. With regard to the evidentiary value of the medical evidence the Honble Apex in a very recent judgement titled as Balvir Singh Vs State of Madhya Pradesh (Crl. A. 1115/2010) decided on 19.02.2019, has specified that oral evidence always has supremacy over medical evidence because the same can be only considered as optionative in nature. Relevant part from the aforesaid judgment is extracted below: 26. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. In Ramanand Yadav v. Prabhu Nath Jha and others (2003) 12 SCC606 the Supreme Court held as under:-

"17. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the court has to draw adverse inference. The same principle was reiterated in State of U.P. v. Krishna Gopal and another (1988) 4 SCC302 where the Supreme Court held that eyewitnesses account would require a careful independent assessment and evaluation CRL.LP.404/2018 Page 19 of 23 for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. 30. Retracting the same version the Honble Apex court in the case of Yogesh Singh vs. Mahabeer Singh and others reported in AIR 2016 SC5160 has held that the medical evidence is only corroborative in nature and not conclusive. The germane portion of Yogesh Singh (Supra) is extracted below: In any event, it has been consistently held by this Court that the evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence. [See Solanki Chimanbhai Ukabhai Vs. State of Gujarat, (1983) 2 SCC174 Mani Ram Vs. State

of Rajasthan, 1993 Supp (3) SCC18 State of U.P. Vs. Krishna Gopal & Anr., State of Haryana Vs. Bhagirath, (1999) 5 SCC96 Dhirajbhai Gorakhbhai Nayak Vs. State of Gujarat, (2003) 5 SCC223 Thaman Kumar Vs. State of U.T. of Chandigarh, (2003) 6 SCC380 Krishnan Vs. State, (2003) 7 SCC56 Khambam Raja Reddy & Anr. Vs. Public Prosecutor, High Court of A.P., (2006) 11 SCC239 State of U.P. Vs. Dinesh, (2009) 11 SCC566 State of U.P. Vs. Hari Chand, (2009) 13 SCC542 Abdul Sayeed Vs. State of M.P., (2010) 10 SCC259 and Bhajan Singh @ Harbhajan Singh & Ors. Vs. State, 2011) 7 SCC421.

31. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are of the considered view that the evidence of the prosecution witness are unworthy of acceptance. There being considerable inconsistencies and discrepancies in the statement of the victim, which makes the case fabricated and unreliable. As the CRL.P.404/2018 Page 20 of 23 entire version regarding the recovery of the victim comes under a shadow of doubt because of the major improvements made by the victim and the same does not find corroboration with the testimony of the investigating officer. Accordingly the contention of learned Prosecutor for the state, that the respondent be convicted in the present case as he has been already convicted in a separate FIR No.276/2008, does not hold ground as both the incidents are separate in nature with different circumstances and situations. Therefore, the prosecution has failed to disclose the true genesis of the crime and establish the charges against the respondents persons for the offence punishable under Sections 307/344/365/366/3 of IPC.

32. It is a settled law that the Appellate Court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so. In Muralidhar and Ors. Versus State of Karnataka reported at (2014) 5 SCC730 it has been held that :

12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu v. State: AIR 1954 SC1 Madan Mohan Singh v. State of U.P.: AIR 1954 SC637 Atley v. State of U.P.: AIR 1955 SC807

Aher Raja Khima v. State of Saurashtra: AIR 1956 SC217 Balbir Singh v. State of Punjab : AIR 1957 SC216 M.G. Agarwal v. State of Maharashtra: AIR 1963 SC200 Noor Khan v. State of Rajasthan : AIR 1964 SC286 Khedu Mohton v. State of Bihar: (1970) 2 SCC450 Shivaji Sahabrao Bobade v. State of Maharashtra: (1973) 2 SCC793 Lekha Yadav v. State of Bihar (1973) 2 SCC424 Khem Karan v. State of U.P.: (1974) 4 SCC603, Bishan Singh v. State of Punjab: (1974) 3 SCC288, Umedbhai Jadavbhai v. State of Gujarat: (1978) 1 SCC228 K. Gopal Reddy v. State of A.P.: (1979) 1 SCC355 Tota Singh v. State of Punjab: (1987) 2 SCC529 Ram Kumar v. State of CRL.LP.404/2018 Page 21 of 23 Haryana:

1995. Supp (1) SCC248 Madan Lal v. State of J and K: (1997) 7 SCC677 Sambasivan v. State of Kerala: (1998) 5 SCC412 Bhagwan Singh v. State of M.P.: (2002) 4 SCC85 Harijana Thirupala v. Public Prosecutor, High Court of A.P.: (2002) 6 SCC470 C. Antony v. K.G. Raghavan Nair: (2003) 1 SCC1 State of Karnataka v. K. Gopalakrishna: (2005) 9 SCC291 State of Goa v. Sanjay Thakran: (2007) 3 SCC755and Chandrappa v. State of Karnataka: (2007) 4 SCC415 It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of

acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court. CRL.LP.404/2018 Page 22 of 23
33. Keeping in view the aforesaid propositions, we see no compelling and substantial reason to interfere with an order of acquittal passed by the learned Trial Court in the present case and therefore, upon overall analysis, we are of the view that the present leave petition preferred by the State being meritless deserves to be dismissed.

34. Accordingly, the present leave petition being devoid of merit is dismissed.

35. Trial Court Record be sent back.

36. Copy of this order be sent to the Jail Superintendent/Tihar Jail for SANGITA DHINGRA SEHGAL, J SIDDHARTH MRIDUL, J information. APRIL22, 2019 gr//
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