

State Vs. Radhey Shyam @ Radhey

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Court : Delhi

Decided On : Nov-13-2014

Judge : Pratibha Rani

Appellant : State

Respondent : Radhey Shyam @ Radhey

Advocate for Pet/Ap. : Mr. Neeraj Kumar Singh

Judgement :

\$~23 * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision :

13. h November, 2014 % + CRL.L.P. 202/2011 STATE Through : Petitioner Mr. Neeraj Kumar Singh, APP for the State with SI Roshan Lal PS Nangloi versus RAHDEY SHYAM @ RADHEY Through : None. Respondent CORAM: HON'BLE MS. JUSTICE PRATIBHA RANI PRATIBHA RANI, J.

(ORAL) Crl.M.A. No.4970/2011 (Condonation of delay) 1. This is an application moved on behalf of the State/Petitioner praying for condonation of delay of 300 days in filing the present leave petition.

2. For the reasons given in the application, the delay in filing the present leave petition is condoned.

3. Application stands disposed of. Crl.L.P. No.202/2011 1. Being aggrieved by the acquittal of the Respondent/Accused Radhey Shyam @ Radhey in Sessions Case No.117/08, FIR No.666/2007, under Section 363 IPC (Sections 366/376 IPC added later on), P.S.Nangloi, Delhi, the State is seeking leave to appeal under Section 378 (3) Cr.P.C. against the judgment/order dated 24.04.2010 passed by the learned Addl. Sessions Judge, Delhi.

2. Vide the impugned judgment, the learned Trial Court acquitted the Respondent/accused of the charges under Section 366/376 IPC, However, while observing that at the time of occurrence, the Prosecutrix was under 18 years of age, the Respondent/Accused was convicted for committing the offence punishable under Section 363 IPC and sentenced for the said offence.

3. Notice of the petition was sent to the Respondent/Accused and Mr.S.K.Tripathi, Advocate appeared on behalf of the Respondent/Accused on 18.08.2011. Thereafter none appeared on behalf of Respondent/Accused andailable warrants were issued against the Respondent. Theailable warrants issued against the Respondent received back unexecuted with the report that the Respondent was not residing at the given address.

4. I have heard Mr.Neeraj Kumar Singh, learned APP for the State.

5. Briefly stating, the case of Prosecution is that FIR No.666/2007 under Section 363 IPC was registered at PS Nangloi on 17.08.2007 on the basis of statement made by Smt. Uma Devi, mother of the Prosecutrix. The Complainant Smt.Uma Devi made statement to the effect that her daughter M (name of the Prosecutrix withheld to conceal her identity) aged about 11 years, who used to work alongwith her in a kothi at Paschim Vihar, left the house at about 6.00 pm for going to Nihal Vihar Market. When M failed to return, she searched for her and came to know that one boy Radhey, resident of Nihal Vihar, had also been missing from that very day. She suspected Radhey to be the person who had taken away her daughter and prayed for legal action.

6. Efforts were made to search the Prosecutrix. CRL.L.P. 202/2011 pamphlet/public notice published with the photograph of the Prosecutrix to seek

help to trace the girl, mentioned her to be 17 years old.

7. During investigation, the Prosecutrix was recovered by the police when she alongwith the Respondent/Accused was sitting in a park near Delhi Railway Station.

8. After recovery of the Prosecutrix and arrest of the Respondent/Accused, both of them were sent for medical examination. Statement under Section 164 Cr PC of the Prosecutrix was also got recorded before learned MM and after completion of investigation, chargesheet was filed.

9. The Prosecution examined 15 witnesses to prove its case. In his statement recorded under Section 313 Cr.P.C., while denying the case of prosecution, the Respondent claimed that he got married to the Prosecutrix on 15.05.2006 and the marriage was also got registered with Registrar, Hindu Marriage, Baharaich, U.P. After living with the Respondent/Accused for about a year, she left the house.

10. The learned Trial Court, while noticing that the Complainant was illiterate, observed that the Prosecutrix, at the time of preparation of her MLC, had given her age to be 19 years. However, at the time of recording her statement under Section 164 Cr PC, she mentioned her age to be 16 years but when application Ex.PW11/B was filed before learned MM for sending her to Nari Niketan, her age was mentioned to be 19 years. Learned Trial Court also noted that the marriage certificate produced by the Respondent/Accused, the name of the Prosecutrix is correctly mentioned but the name of the bridegroom (Accused) is mentioned as Radhika Prasad whereas as per the chargesheet, his name is Radhey Shyam @ Radhey. However, marriage certificate contained the photograph of the Prosecutrix and the accused and discrepancy was only in the name of the bridegroom. Further contradiction was noted in respect of the date from which the Prosecutrix was missing as to whether it was 14.08.2006 or 14.08.2007. Learned Trial Court considered the fact that though the prosecutions case is that of commission of rape, her version before the Court was materially different from what she stated in her statement recorded under Section 164 Cr PC before learned MM. The learned Trial Court also referred to the statement of PW-3 Dr.Renu Gupta, who deposed that as per the version given by the Prosecutrix

before her, the Prosecutrix had run away with the guy and got married. However, when the application was moved for sending the Prosecutrix to Nari Niketan, the Prosecutrix was set at liberty by learned MM observing that Prosecutrix wanted to go with the accused. Thus, learned Trial Court arrived at the conclusion that the Prosecutrix had gone with the accused of her own and was a consenting party to the sexual intercourse. Thus, the Respondent/accused was acquitted of the charges under Section 366/376 IPC.

11. Feeling dissatisfied with the acquitted of the Respondent/Accused for the offences punishable under Sections 366/376 IPC, this leave petition has been filed by the State on the following grounds :(i) As per ossification test report, the age of the Prosecutrix was between 14 years to 16 years. Thus, she was below 18 years of age and had not attained the age required for valid marriage. (ii) The marriage certificate produced by the Accused had been disbelieved by the Trial Court and despite that Respondent/Accused has been acquitted of the charges under Sections 366/376 IPC. (iii) Merely because, the Prosecutrix did not state before Dr.Renu Gupta (PW-3) that she was forcibly raped, does not mean that she was a consenting party to the sexual intercourse. (iv) All essential ingredients of Section 366/376 IPC have been proved by the Prosecution and despite that accused has been acquitted of charges under Sections 366/376 IPC.

12. I have perused the Trial Court Record which reveals that in the complaint itself, the Respondent/Accused Radhey was suspected by the Complainant (mother of the Prosecutrix) to be the person who had taken away the Prosecutrix, meaning thereby that she was in the knowledge of the affair between the Respondent/Accused and her daughter. Further mentioning the age of Prosecutrix to be 11 years, with a view to book the Respondent for a more serious offence and appears to be to ensure severe punishment for the accused with whom the Prosecutrix had eloped. Not only that, from the record it is clear that the Prosecution had stayed with the Accused of her own free will and got married to him and marriage was also got registered. Even when she was produced before learned MM with application Ex.PW11/B for sending her to Nari Niketan, she expressed her desire to be with the Respondent/Accused. It appears that subsequently under pressure from her parents, she preferred to give a different

version though at the time of her recovery, she was living with the Respondent/Accused after marrying him and even in the Court made her intentions clear to live with the Respondent/Accused.

13. Another question that arises for consideration is about the age of the Prosecutrix. First of all, in the public notice issued by the concerned SHO to seek help to trace the Prosecutrix, contains her age to be 17 years. At the time of preparation of her MLC, she gave her aged to be 19 years. Even if the ossification test report of the Prosecutrix is considered, which estimates her aged, to be 14 to 16 years, sexual intercourse with a wife above 15 years of age, cannot be termed as rape as per Exception (2) to Section 375 IPC which provides that Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape. Even if it is assumed for the sake of arguments that at the time of marriage, the Prosecutrix was under 18 years of age, the marriage does not become void.

14. Legal position is well settled that the Appellate Court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside merely because the Appellate Courts view is more probable. The Appellate Court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either perverse or wholly unsustainable in law. (Vide :

2009. (10) SCC2006.

15. In the case of State of U.P. vs. Nandu Vishwakarma AIR 2009 SC3188 it was observed that when on the basis of the evidence on record two views could be taken - one in favour of the accused and the other against the accused - the one favouring the accused should always be accepted.

16. Thus, I do not find it to be a fit case to grant leave to appeal. Accordingly, the leave petition is hereby dismissed. Trial Court record be sent back forthwith along with a copy of this order. PRATIBHA RANI (JUDGE) NOVEMBER13 2014/st