

State Vs. Suresh Kumar and anr.

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Court : Delhi

Decided On : Dec-15-2010

Judge : Anil Kumar ; S.L.Bhayana, Jj.

Acts : Limitation Act - Section 5; Indian Penal Code,(IPC) - Sections 363/366/376(2)(g); Code of Criminal Procedure (CrPC) (Cr.P.C.) - Section 164

Appeal No. : Crl. L.P. No. 437/2010

Appellant : State

Respondent : Suresh Kumar and anr.

Advocate for Pet/Ap. : Mr. Ranjit Kapoor, Adv.

Judgement :

This is an application by the appellant/applicant seeking condonation of delay in filing the petition for leave to appeal on the ground that the impugned judgment was pronounced on 31st March, 2010 and considerable time was taken in procuring the certified copy of the judgment, which was received on 26th June 2010. On 7th August 2010, the learned additional public prosecutor had prepared the draft and the matter was referred to the Prosecution Department for taking the appropriate action in this regard.

The applicant has given the details as to who has considered the file to decide whether a petition for leave to appeal is to be filed or not. The applicant has relied on Collector of Land Acquisition v. Katiji, (1987) 2 SCC 107 and State of Nagaland

v. Lipok Ao, 2005 (3) SCC 752 holding that sufficient cause should be considered with pragmatism in justice oriented approach rather than a technical defection of sufficient causes for explaining every days delay having regard to considerable delay of procedural red tape in the decision making process of the government, certain amount of latitude is permissible and should be given. The applicant has contended that the State Government is the impersonal machinery working through its officers or servants hence it cannot be put on the same footing as an individual.

The petitioner/applicant, in the circumstances, has contended that there is sufficient cause for condoning the delay of 146 days in filing the petition for leave to appeal.

Considering the averments made in the application, it is apparent that the petitioner has been able to make out sufficient cause for condonation of delay in filing the petition for leave to appeal. Consequently, the application under Section 5 of the Limitation Act, seeking condonation of delay of 146 days in filing the petition for leave to appeal is allowed and delay is condoned.

The petitioner has sought leave to appeal against the order dated 31st March, 2010 passed by the Sessions Court in Sessions Case No. 151/2008 titled as State vs. Suresh Kumar and Sunil arising out of FIR 828/2006 under Section 363/366/376(2)(g) of IPC, at P.S. Mehrauli acquitting the accused persons on all charges.

The case of the prosecution in brief is that the victim girl (name not given and withheld and hereafter referred to as prosecutrix) studying in a Government School in Chatterpur and residing with her parents at D-95 Chatterpur Enclave, Delhi while returning from her school to her house on 17th November 2006, was accosted by respondent Sunil, who is distantly related to the family of the prosecutrix. Sunil informed the prosecutrix that her mother had been taken to a hospital due to an accident. On hearing this at the instance of Shri Sunil, the prosecutrix took an auto rickshaw which had been hired by Sunil. At some distance three boys boarded that auto rickshaw and one of them was respondent Suresh whereas the other two were not known to the prosecutrix. While travelling,

one of them put a handkerchief on the face of the victim prosecutrix rendering her unconscious. Finally she found herself in a room where accused Suresh and Sunil were present. They ravished her and continued to do so at 7 to 8 places where prosecutrix was shifted by them from time to time.

Further case of the prosecution was that when the prosecutrix victim did not reach home on 17th November 2006, her father PW-2 Bare Lal searched for her. When he could not trace and locate her, he lodged a report at Police Station Mehrauli. The information was recorded by the police as an entry in a daily diary which was proved as Ex. PW12/A No. 38B, recorded at 9:30 pm on 19th November 2006. Unable to trace her, father of the prosecutrix expressed suspicion that it could be accused Suresh who might have taken the prosecutrix away. He lodged a complaint on 23rd November 2006 Ex. PW2/A and on the basis of this complaint HC Ved Prakash got the case registered as FIR No. 828/2006, Ex. PW 14/A for offence u/s 363 IPC. Later on the investigation was entrusted to SI Rajesh Brar.

On 8th December 2006 SI Rajesh Brar was on leave. Father of the prosecutrix received an information that his daughter and accused Suresh were in a house in Sultanpur, which was communicated by him to the police officials. This information was recorded as DD66B and ASI Lala Ram PW-8 proceeded with Bare Lal PW-2 to village Sultanpur and there prosecutrix was found in a room in a house which house belonged to Sh.Veer Singh of village Sultanpur.

Accused Suresh was arrested on 8th December 2006 from the same room in which the victim prosecutrix was recovered vide arrest memo Ex PW 2/C. He made a disclosure during interrogation and it was recorded as Ex. PW8/B. However no fact or incriminating article had been discovered and recovered pursuant to his disclosure. Accused Suresh was medically examined and MLC Ex. PW6/A was recorded incorporating that there was nothing to suggest that he was incapable of performing sexual activity under normal circumstances. The underwear of accused and blood sample in a gauze were sealed and handed over to the police. Co- accused Sunil was found missing and absconding and subsequently he was arrested on 29th August 2008 and supplementary challan was submitted against him. Prosecutrix was medically examined at AIIMS on 8th

December 2006 and her MLC Ex. PW1/B was recorded by doctor in which prosecutrix narrated the history of being kidnapped and raped by the accused Suresh.

During investigation the proof of age of the girl was collected in the form of her school admission application, mentioning date of birth; school admission register Ex. PW7/B and school leaving certificate Ex. PW7/C mentioning her date of birth as 22nd October 1990. With the evidence and material collected during investigation the accused were charge-sheeted. Prosecution examined 14 witnesses. Prosecutrix had also been produced before the Magistrate for recording her statement on oath on 18th January 2007 under Section 164 Cr.P.C. A certificate of voluntariness of her statement had also been proved by the MM as Ex. PW13/B.

Both the accused claimed trial by pleading not guilty to all the charges. Respondent Sunil denied his involvement in the case stating that he had been falsely implicated as there existed a property dispute in their native village between his father and the father of the prosecutrix. Accused Suresh also denied the prosecution story stating that he had never committed any wrongful act with the prosecutrix and that he was in love with the prosecutrix. In support and to substantiate his plea, he produced a photograph. The prosecutrix was also confronted with the photograph which was taken in a photo studio in Sultanpur, Delhi about 7/8 months prior to the alleged incident. The trial court after considering the inconsistencies in the statement of prosecutrix and other witnesses has acquitted both the accused of the charges which were framed against them. The petitioner has sought leave to appeal against the judgment Of the trial court acquitting the accused. This is no more res integra that in reversing the finding of acquittal the High Court has to keep in view the fact that the presumption of innocence is still available in favor of the accused which is rather fortified and strengthened by the order of acquittal passed in his favor. Even if on fresh scrutiny and reappraisal of the evidence and perusal of the material on record, if the High Court is of the opinion that another view is possible or which can be reasonably taken, then the view which favors the accused should be adopted and the view taken by the trial Court which had an advantage of looking

at the demeanour of witnesses and observing their conduct in the Court is not to be substituted by another view which may be reasonably possible in the opinion of the High Court. Reliance for this can be placed on 2009(1) JCC 482=AIR 2009 SC 1242, Prem Kanwar v. State of Rajasthan; 2008 (3) JCC 1806, Syed Peda Aowlia v. the Public Prosecutor, High Court of A.P, Hyderabad; Bhagwan Singh and Ors v. State of Madhya Pradesh, 2002 (2) Supreme 567; AIR 1973 SC 2622 Shivaji Sababrao Babade & Anr v. State of Maharashtra; Ramesh Babu Lal Doshi v. State of Gujarat,(1996) 4 Supreme 167; Jaswant Singh v. State of Haryana, 2000 (1) JCC (SC) 140. The Courts have held that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.

The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the findings are against the evidence or record or unsustainable or perverse. However, before reversing the finding of acquittal the High Court must consider each ground on which the order of acquittal is based and should record its own reasons for not accepting those grounds and not subscribing to the view of the trial Court that the accused is entitled to acquittal. Relevant trial court record has been produced by this court and the learned Additional Public Prosecutor has been heard at length. The basis of the prosecution case is the testimony of the prosecutrix. The prosecutrix had given an elaborate narration of the incident before the doctor while recording the MLC, and also gave her statement on oath before the Magistrate under section 164 of the Cr. P.C and before the Court also. It has been alleged by the prosecution that all the statements made by the prosecutrix are consistent and have the ring of truth and sufficient to inculcate the respondents. In the circumstances it is contended that the judgment of the trial court is unsustainable and the findings are not supported by the evidence on record. Perusal of the statement of prosecutrix, however, reveals that with regard to the allegations of kidnap and rape made

against respondent Sunil, the prosecutrix herself in her cross examination has absolved him. She had deposed as follows:

"it is correct and true that accused Sunil had not committed sexual intercourse with me and only accused Suresh had been committing sexual intercourse with me." It has also been established in evidence that accused Sunil was available to the police, but then a story was made showing Sunil as being involved and then found absconding and thereafter charge- sheeted with a gap of two years had been filed. The Trial Court rightly observed that the testimony of the prosecutrix exonerates the accused Sunil of the charge of rape.

With respect to the allegation that Sunil had picked the prosecutrix in an autorikshaw, the trial court has observed that in the history narrated by the prosecutrix to the doctor as recorded in the MLC vide Ex. PW1/B, she had stated that on 17th November 2006 she was told by a person named Suresh Chowkidar that her mother met with an accident and took her to an unknown place by auto. There is no assertion made that she was taken by respondent Sunil or that she was rendered unconscious by putting a handkerchief to her face. Omission of this material fact by the prosecutrix is material and the Trial Court has rightly given benefit of doubt to the accused Sunil Kumar. The findings of the Trial Court in this regard cannot be termed to be us-sustainable, illegal or perverse.

The allegation of his involvement in the offence of gang rape was also critically analyzed by the Trial Court. In her deposition the prosecutrix though deposed that both the respondents were present at all times with her from 17th November 2006 to 8th December 2006. However this deposition is in complete contradiction to the deposition of PW-3, mother of the prosecutrix who had stated in her cross-examination that Sunil used to visit the Police Station but he used to be released by the Police till the recovery of the prosecutrix. Meaning thereby that respondent Sunil had been brought to the Police Station in order to have a clue about the whereabouts of the prosecutrix and he was not with the prosecutrix all the time as was deposed by her. This had demolished the prosecution version that Sunil was throughout in the company of the co-accused Suresh and prosecutrix till she was recovered.

In the circumstances the learned counsel for the petitioner has not been able to show any cogent evidence on the basis of which accused Sunil can be inculpated or it can be held that the findings in his favor are not sustainable and are not based on the evidence on record. The judgment of the trial court acquitting the respondent Sunil cannot be faulted in the facts and circumstances and there are no grounds to grant leave to appeal against his acquittal. So far as the allegations against accused Suresh are concerned, the trial Court has found the respondent Suresh not guilty. Trial Court observed that as per the school records the date of birth of the prosecutrix is 22nd October 1990 and the alleged date of incident is 17th January 2006. The prosecutrix had crossed the age of 16 years on the date of alleged incident. Next point for consideration is whether or not the prosecutrix was forcibly raped by the respondent Suresh or it was a consensual sex or relationship between the two. The prosecutrix had specifically deposed that she was subjected to sexual intercourse against her wish and consent. The trial court has considered the veracity of this deposition. It has been held that even though it was alleged by the prosecution that accused Suresh had kept prosecutrix from 17th November 2006 to 8th December 2006 against her wishes, however the mother of the prosecutrix, PW-3 had deposed that she saw the accused Suresh at the police station on the 7th of December 2006, which clearly negates the prosecution story, according to which the accused was arrested on 8th December 2006. The deposition of PW-3, in fact supports the plea of the respondent Suresh that he was picked up by the police officials on 3rd or 4th December 2006 from his native village in UP. He had further deposed that in fact he had been taken to AIIMS on 7th December 2006 evening for his medical examination and when he told the doctor that he had been arrested on 4th December 2006, doctor had sent him back. In the Police Station he was beaten for disclosing the fact of his arrest earlier to the doctors. On 8th December 2006 he was again brought to AIIMS and medically examined. The trial Court has further noted that as per the deposition of the prosecutrix herself, during the course of her kidnap she was shifted to 7/8 places. However no explanation whatsoever is given to justify why no act of resistance was put up by the prosecutrix nor it has been disclosed as to why she could not escape or run away. She hasn't deposed at all as to what prevented her to escape from the places she was taken or had gone and why she could not take

help of neighbor or other persons who were in the vicinity of places where she was shifted to about 7/8 times. It has also been observed by the trial court, that on receiving the information that the accused along with the prosecutrix was present in the room in the village of Sultanpur Delhi, an honest and efficient investigation was expected on the part of the police, which they had failed to conduct. As all that PW-8 ASI Lala Ram states on oath is that he reached the house which probably belonged to one Beer Singh, where the prosecutrix was found. No attempt was made to conclusively ascertain as to whom the house belonged, or to assess the situation of the alleged room in which the prosecutrix was recovered. The prosecution had not tried to ascertain from the other occupants of the house whether the prosecutrix was locked there in the room or whether she was living in the room with accused Suresh willingly. These crucial aspects were omitted by the prosecution and thus the trial Court has given benefit of doubt to the accused Suresh and these findings of the Trial Court cannot be termed to be illegal or unsustainable or perverse so as to entail any interference by this Court. It is also a matter of record that the father of the prosecutrix was aware that the prosecutrix was living in a room at Sultanpur village, however he also did not make any attempt to go said room.

On perusal of the Trial Court record and the evidence of all the witnesses, it is apparent that the allegations of kidnap and rape have not been proved against the accused persons. There are too many inconsistencies in the statement made by the prosecutrix before the doctor, before the Magistrate and in court so as to place any reliance on her deposition. The deposition of the prosecutrix has not been corroborated by any other material evidence on record and her testimony is inconsistent with the testimony of her mother. On the basis of her testimony only in the facts and circumstances it is not appropriate to convict accused Suresh. In light of all the above stated facts and circumstances, the testimony of the prosecutrix that she was subjected to sexual intercourse against her wish and consent does not inspire any confidence. Her MLC also substantiates this finding as no kind of injury mark on any part of her body was found. It has also been observed that the prosecutrix had stated in the history of her MLC that Suresh had taken her from 18th to 21st November 2006 to different places and on 21st November 2006 she was raped by him at around 6 pm. She further states that she

tried to shout and save herself, but he beat her and forcibly raped her. However she has not uttered a word about the beatings or the sexual intercourse on the 21st November 2006 in her testimony before the Court. Clearly the prosecutrix is not a witness of sterling quality and the trial court has rightly not placed any reliance on her testimony. On perusal of the testimonies of the other witnesses also, this Court is unable to find any cogent evidence against the respondents Suresh and Sunil on the basis of which it can be inferred that the prosecutrix was kidnapped and raped. The view taken and inferences drawn by the trial court are feasible and this court in the facts and circumstances will not substitute the view of the trial court with its own view if a different view is possible. This court, however, concurs with the inferences and the findings of the trial court. In the circumstances, the petitioner has failed to make out a case u/s 376 against the accused persons. Thus, there are no grounds to grant leave to appeal to the petitioner and the decision of the Trial Court dated 31st March, 2010 cannot be faulted. The learned counsel for the State Mr. Ranjit Kapoor is unable to point out any such illegality or perversity in the said judgment which would entail grant of leave to appeal to the petitioner in the facts and circumstances of the case. The petition for leave to appeal, in the facts and circumstances, is without any merit and therefore, the prayer of the petitioner to grant leave is declined and the petition is dismissed.

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