The State Vs Shailender Kumar Mishra

Criminal L.P No. 440 of 2010

Court: Delhi High Court

Date of Decision: Dec. 14, 2010

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 207, 313#Penal Code, 1860 (IPC) â€" Section 352, 353, 376

Hon'ble Judges: S.L. Bhayana, J; Anil Kumar, J

Bench: Division Bench

Advocate: Vikas Pahwa, for the Appellant; Nemo, for the Respondent

Final Decision: Dismissed

Judgement

Anil Kumar, J.

Crl. M.A. 17987/2010

1. This is an application seeking exemption from filing the certified copies of the annexures.

2. Allowed subject to just exceptions.

Crl. M.A. No. 17986/2010

3. This is an application by the Petitioner/applicant seeking condonation of delay of 170 days in filing the petition seeking leave to appeal.

4. The applicant has contended that the judgment was passed on 10th March, 2010, acquitting the Respondent and its certified copy was applied

on 24th April, 2010 which was delivered to the applicant on 3rd May, 2010. In this application, the applicant has given the details of the officials,

who considered and dealt with the file of the case and the various steps which were taken by the applicant to decide filing of the present petition

seeking leave to appeal.

5. In the circumstances, it is contended that the delay in filing the petition for leave to appeal is not deliberate and is on account of procedural

aspect and was unavoidable.

6. The applicant has also relied on Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, holding that refusal to condone

the delay can result in a meritorious matter being thrown out at the very threshold and may cause injustice. Reliance has also been placed on State

of Nagaland Vs. Lipok AO and Others, holding that when the appeals are filed by the State Machinery, the sufficient cause should be considered

with pragmatism in a justice oriented approach rather than a technical defection of sufficient cause seeking explanation for every day"s delay. It

was held that due consideration should be given to the procedural red tape in the decision making process of the Government and such applicants

are entitled for some latitude, if permissible. The Supreme Court had also held that the State Government is the impersonal machinery working

through its officers or servants and it cannot be put on the same footing as an individual.

7. Considering the facts and circumstances and law laid down by the Supreme Court, the Appellant/applicant has been able to make out a

sufficient cause for condonation of 170 days delay in filing the petition for leave to appeal. Therefore, the application for condonation of 170 days

delay is allowed and delay is condoned in filing the petition for leave to appeal.

Crl.L.P. No. 440/2010

8. This is a petition by the State seeking leave to appeal against the judgment dated 10th March, 2010 passed in Session"s Case No. 171/2008

arising out of FIR No. 254/2008, PS Hauz Khas u/s 376 of IPC acquitting the Respondent of the offence u/s 376 of Indian Penal Code giving him

the benefit of doubt.

9. The case of the prosecution against the Respondent, Shailender Kumar Mishra, was that on 3rd July 2008 the Respondent took the five months

old daughter of his neighbour, namely, Anjali on the pretext that he wanted to play with her in his TCR DL1354. After he had taken the five

months old girl child, her mother had heard her crying and when she rushed there she found her daughter in the lap of the Respondent and bleeding

from her private part. On the complaint of the mother, the girl was medically examined, vide MLC No. 54934/08 and the hymen of the five months

old girl child was found ruptured and therefore, a case u/s 376 of IPC was registered against the Respondent and his TSR was seized. The vaginal

swab and the blood samples of the girl were taken and the Respondent/accused was also taken for medical examination and his underwear, pant

and shirt were taken into possession by the police. After investigation and complying with the requirements, contemplated u/s 207 of the Code of

Criminal Procedure, charge was framed against the Respondent u/s 376 of IPC to which he pleaded not guilty and claimed trial. During the trial,

prosecution examined 17 witnesses and the statement of the Respondent u/s 313 Code of Criminal Procedure was also recorded. The

Respondent also examined two witnesses in his defence.

10.The Trial Court considered the testimony of the mother of the child Ms. Puneeta Chaudhary, PW-1 and other witnesses PW-2 and PW-5 and

inferred that none of the witnesses had deposed that they had seen accused committing rape of the five months old girl child. Reliance was also

placed on the FSL report, which did not show any sign of injury on the parts of the body of accused or girl child. According to the Trial, Court,

direct or circumstantial evidence including the medical evidence does not prove conclusively the guilt of the accused. The Trial Court observed that

to constitute rape, it must be proved that some part of the male organ of the accused should have gone into the girl"s genital, no matter how little

and the only thing to be ascertained is whether the private part of the male accused entered into the private part of the girl or not. The Trial Court

also noticed that it is not essential that the hymen should be ruptured provided it is established that there was penetration even though partial. The

Trial Court also relied on the fact that seminal emission is not necessary to establish rape and what is necessary is that there must be penetration.

11. The Trial Court also noticed that the accused used to take the girl child from her mother often with a view to play with her. However, neither

the mother nor the witnesses PW-2 & PW-5, namely, Shakuntala Devi and Vishakha Devi deposed that they had seen accused committing rape

or inserting his male organ in the female genital of the minor girl. The mother of the girl child who is alleged to have been raped rather denied that

she had stated to the Police that when she reached at the TSR, she saw the accused/Respondent committing rape on her daughter or that she was

sitting on the private part of the accused. The mother of the victim rather deposed that it may be possible that the girl had fallen down from the lap

of the Respondent.

12. Similarly, PW-2 and PW-5"s statements were considered and from them it could not be inferred that the accused had raped the minor girl.

From the medical report, it was inferred that blood group on the underwear of the accused/Respondent could not be ascertained nor could it be

matched with the blood of the minor girl. The testimony of the defence witnesses was also considered who had deposed categorically that the

Respondent had not raped the girl child. They rather cogently deposed that he used to play with the girl everyday and that they could not rule out

the possibility that the girl might have fallen down from the lap of the accused and sustained injury. Even PW-4 Dr. B.B. Das, Sr. Gynecologist,

AIIMS had deposed that the rupture of hymen could be either by male organ or by something else.

13. Relying on the ratio of Chander Dev Rai v. State 2009(1) JCC 67 and Dhanpal v. State by Public Prosecutor, Madras 2009(4) JCC 2914, it

was held that if there is no evidence to show conclusively that the girl child was raped and if two reasonable or plausible view can be reached, one

that leads to acquittal and the other to conviction, the Court must rule in favour of the accused.

14. In the circumstances, the benefit of doubt was given to the Respondent/accused and he has been acquitted of the charges of rape by judgment

dated 10th march, 2010 which is impugned before this Court and leave to appeal is sought.

15. 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, Prem Kanwar Vs. State of Rajasthan, ; Syed Peda

Aowlia v. the Public Prosecutor, High Court of A.P, Hyderabad 2008 (3) JCC 1806; Bhagwan Singh and Ors v. State of Madhya Pradesh 2002

(2) Supreme 567 ; Shivaji Sahabrao Bobade and Another Vs. 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.

16. 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.

17. This Court has called for the Trial Court Record and has perused the testimony of the witnesses and the relevant documents and has also

heard the learned Additional public prosecutor in detail. Perusal of the testimony of PW-1, mother of the girl child reveals that she categorically

stated that she had not told the Police about the Respondent raping her daughter when she reached the TCR after hearing her daughter cry. She

specifically denied the suggestion about the accused raping her daughter or her daughter sitting on the private part of the accused. She denied the

suggestion that she was deposing falsely to save the accused. She admitted that the accused was living with his wife and family and used to often

take the little girl for playing with her. She rather volunteered that her daughter may have fallen down from the lap of the accused and could have

started bleeding on account of the fall. The statements allegedly signed by her which was recorded by the police was not admitted by her on the

ground that she is illiterate and that she had only put signatures at the instance of the police officials.

18. PW-2 Shakuntala Devi is the grandmother, who deposed that she was present at the Jhuggi after the death of the husband of the mother of the

girl child. She also did not depose anything so as to inculpate the Respondent that he raped the minor girl who was five months old. She rather

denied the suggestion categorically that the Respondent had raped little girl, aged five months.

19. Dr. B.B. Das, Sr. Gynecologist also opined that rupture of hymen could either be by insertion of male organ or by something else. PW-5 Smt.

Vishakha deposed that she was coming from market and when she reached there, she found the mother and grandmother of the child present and

the girl bleeding from her private part. She, however, did not depose that she had seen the accused raping the little girl aged five months. In the

cross-examination, she rather deposed that she had not heard from anyone that the accused has committed any wrong act with the girl. She denied

that she has been won over by the accused to save him.

20. Dr. Sudipta Ranjan Singh, PW-6 had medically examined the Respondent and had given an opinion about the intake of Alcohol by him.

Another witness Sh. Naresh Kumar, Senior Scientific Assistant (Biology), FSL, has deposed that the blood semen and other biological clue

material were not detected in the auto of the accused. The learned additional public prosecutor, in the facts and circumstances, is unable to show

any cogent or reliable evidence on the basis of which it can be inferred that the accused had tried or penetrated his male organ in the female genital

of the girl child. From the evidence it also cannot be inferred that the Respondent/accused had raped the five months old girl child. Though the girl

child was bleeding from her private part, however neither the blood nor the semen nor any other biological thing was detected from the TCR in

which the Respondent was playing with the girl child and had allegedly raped her. Even the blood spot on the underwear of the accused could not

be ascertained to be of which group and as to whether it matched with the blood of the girl child.

21. The learned additional public prosecutor has emphasized that since there was a blood spot on the underwear of the Respondent, it is sufficient

to infer that the Respondent had raped the little girl. This contention of the learned Counsel cannot be accepted. The burden to prove that the child

girl was raped was on the Respondent. Since, the mother, grandmother and another lady, who were present there have categorically denied that

the girl child was raped by the Respondent, merely on the basis of a blood spot on the underwear of the Respondent, which blood group did not

match with the blood of the prosecutrix, the girl child, the inferences as has been drawn by the learned public prosecutor cannot be drawn. The

burden to prove that the accused had raped the girl child was on the prosecution. Suspicion, however, strong cannot take the place of the proof

beyond reasonable doubt. Neither is there any medical evidence nor any oral evidence that the girl child was raped by the accused/Respondent. A

blood spot on the under garment of the Respondent which could not be matched with the blood of the girl child is not sufficient to prove the

allegations made against the Respondent.

22. Though, this Court after appreciating the entire evidence and documents, if reaches another plausible conclusion different from the conclusion

reached at by the Trial Court, however, while granting leave to appeal, this Court will not differ from those inferences and will not substitute its

inferences with the inferences of the Trial Court. In any case, on perusal of the evidence and the documents, even this Court is of the view that the

prosecution has failed to establish that the Respondent had raped the five months old girl child, named, Anjali.

23. The learned Counsel for the State Mr. Vikas Pahwa has then contended that if the Respondent has not committed the rape as there is no

evidence, he is liable to be convicted u/s 353 of the IPC. This argument of the learned Counsel also cannot be accepted as there is no evidence on

the basis of which the charge u/s 352 of IPC can be made out against the Respondent.

24. It has not been established that the blood on the underwear of the Respondent was that of the five months old girl child, named, Anjali. From

the evidence on record and the categorical deposition by the mother and grandmother of the girl child even the case u/s 353 of the IPC is not made

out against the Respondent.

25. In the circumstances, the learned additional prosecutor has not been able to make out any ground showing that the inferences drawn by the

Trial Court are not based on evidence or are contrary to evidence and the inferences have been arrived at by ignoring the material evidence.

26. In the circumstances, it has not been established that the findings of the Trial Court are unsustainable or perverse in any manner so as to entail

any interference by this Court. In the circumstances, the petition for leave to appeal is without any merit and it is, therefore, dismissed.