(2013) 04 DEL CK 0344

Delhi High Court

Case No: Criminal REV. P. 227 of 2007

Neha		APPELLANT
	Vs	
State and Another		RESPONDENT

Date of Decision: April 8, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164

Citation: (2013) 5 AD 284 : (2013) 3 JCC 1538 : (2013) 4 RCR(Criminal) 188

Hon'ble Judges: G.P. Mittal, J

Bench: Single Bench

Advocate: Arti Gupta, for Delhi Commission for Women, for the Appellant; Rajdipa Behura, APP for the State and Mr. C.L. Dhawan, for R-2, for the Respondent

Judgement

G.P. Mittal, J.

This Revision Petition relates to an unfortunate incident which is alleged to have been taken place sometime between 05.12.2005 and before 14.01.2006 when the Respondent No. 2 allegedly committed rape on his grand daughter who was aged about 13-14 years at the time of the incident. Respondent No. 2 has been acquitted by an order dated 28.02.2007 by the learned Additional Sessions Judge (''ASJ'') and the Petitioner through her grandmother seeks leave to Appeal against the impugned judgment.

2. While acquitting the Respondent No. 2, the learned ASJ observed that the parents of the prosecutrix, that is, son and daughter-in-law of the Respondent No. 2 were residing separately from him; there was a property dispute between the parents of the prosecutrix and they were on inimical terms with Respondent No. 2; the incident which had allegedly taken place between 05.12.2005 and before 14.01.2006 admittedly was brought to the notice of Vimla Devi, the prosecutrix''s grandmother, yet the FIR was recorded only on 28.01.2006 without any plausible explanation for the delay; it had come in evidence that the prosecutrix who was a child of 13-14

years was accompanied by her mother and grandmother while her statement u/s 161 and 164 Cr. P.C. was recorded and she had made a statement at the instance of her mother and grandmother; thus, the tutoring of the prosecutrix by the mother and the grandmother, particularly when there was a property dispute could not be ruled out.

3. Thus, the learned ASJ came to the conclusion that the prosecution case was not established beyond all reasonable doubt and accordingly acquitted Respondent No. 2 giving him benefit of doubt. Paras 7 to 11 and 24 to 28 & 30 of the impugned judgment are extracted hereunder:-

7. In cross examination she admitted that her nani and mother told her to give statement in the court and therefore she was giving statement. She admitted that her parents and her grand father/accused were not on talking or visiting terms as their relations were stained. She admitted that accused never visited their house. She further admitted that her maternal grand mother and accused were not on talking or visiting terms. In cross examination dated 14.2.2007 she stated that name of her chacha is Ajay. She did not know if her uncle is married or has children. She admitted that Aana and Mana are daughters of Ajay. Name of her Bua is Manju who has one son Vipul. She admitted that her grand father disowned her parents. She admitted that she never went to the house of her grand parents. Court question was put to her that earlier she had deposed that she went to the house of her grand parents but later she stated that she never went to the house of her grand parent, which version was correct. She replied that her version that she went to her grand parent is correct. She also admitted that at the time of recording her statement by the police, her mother and maternal grandmother were with her. She admitted that police recorded her statement as told by her mother and nani. Her maternal grand mother was with her when she gave statement u/s. 164 Cr. P.C.. She was confronted with her statement Ex. PW 1/A where factum of her parental grandfather giving danda blow on her leg, accused doing so twice by putting her on a cot are not mentioned.

8. PW-2 Sanjay Kumar is father of the victim. He deposed that he did not see the accused doing any act with the victim. The victim and his wife never told him that accused had done any galat kam with victim. He was cross examined by Ld. APP in which he stated that police did not record his statement. He is denied having told the police that character of his father was not good or that his wife had complained to him several times for said conduct. He denied that he started living separately from his father due to said complaint of his wife or that his wife and daughter told that accused had done galat kam with her during her stay with the accused. He denied that he was deposing falsely to save the accused who was his father. In cross examination by counsel for the accused he admitted that he separated from his father six months after getting job, due to dispute regarding partition of property. His wife made complaint to him against his father even after separation.

9. PW-3 Mohini is chachi of the victim. She stated that victim did not come to the house of the accused. She did not come to know that accused committed rape on the victim. In cross examination by Ld. APP she stated that police did not record her statement. She denied that accused committed rape on victim or that she has joined hands with the accused being her father in law to save him. In cross examination by Ld. counsel for the accused she admitted that her jethani Shakuntla was not on visiting terms with her parents in law because she was disowned from the property. She admitted that there were enemical terms between her jethani and her sasur since beginning. In her presence victim and her family members never came to the house of the accused. She lived in the family of the accused and he bears a good character. Her nanad Manju Lata who is widow has been residing with her along with her son.

10. PW-4 Bimla Devi is nani of the victim. She stated that on 5.12.2005 her son in law came to her and took his daughter for medical treatment. on 15.1.2006 the victim again came to her and started residing with her. On the night of 15.1.2006 the victim cried and wept. She inquired from her as to what was the matter. The victim told her that her Dada had committed galat kam with her. In the morning she made phone call to father of the victim and told him about this fact. In the meanwhile she called mother of the victim in her house. She, victim and Shakuntla (mother of the victim) went to the police station and lodged the report. In cross examination she stated that she did not know whether her daughter and her family members were disowned in the property by the accused. She admitted that she and Shakuntla were present at the time of medical examination and at the time of loading report. They were present at the time of statement u/s. 164 Cr. P.C.. She volunteered that father of the victim was also present. She denied that victim did not tell the fact of committing rape by the accused. She denied that there used to be quarrel over the property between her daughter and her family on the one side and accused on the other side and for that reason she falsely implicated the accused.

11. PW-5 Shakuntla is mother of the victim. She made a statement similar to that of PW-4. She proved arrest memo of the accused as Ex. PW 5/A and letter given by her to the police regarding conduct of the accused with her and victim as Ex. PW 5/B. In cross examination by counsel for the accused she admitted that terms between her and her father in law were not good. She admitted that her father in law ousted her, her husband and her family from his house. She was confronted with her statement u/s. 161 Cr. P.C. which is Ex. PW 5/DA where the factum of her daughter confirming the incident is not mentioned. Rather what is mentioned in portion A to A of said statement is that her daughter told the entire things. She denied that she used her daughter as a tool to take revenge with the accused for ousting them from his house.

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24. Omission of PW-1 telling the police that accused gave danda blow on her leg, accused came over top of her, accused doing so twice by putting her on a cot are fatal. Merely because the said facts have come in statement u/s. 164 Cr. P.C. does not cure the defect. Original report is the earliest version and is more trust worthy. Statement u/s. 164 Cr. P.C. can be after thought.

25. The counsel for the accused strenuously urged that father of the victim and chachi of the victim did not support the case of the prosecution when examined as PW-2 and PW-3. He submitted that merely because they are relative of the accused does not mean that they are not reliable. If the prosecution thought on those line, it should not have cited them as PWS. He also contended that if they are relative of the accused, they are relative of the victim also.

26. The original report shows that on 5.12.2005 Dada of the victim took victim from the house of her Nani. But PW-4 gave a different version that on said date father of the victim took the victim.

27. It is admitted fact that there is a property dispute between the parents of the victim and the accused, the accused has ousted the parents of the victim from his property. So the plea of the accused that he had been falsely implicated due to said property dispute, cannot be ruled out.

28. The counsel for the accused drew my attention towards MLC of the prosecutrix which shows that there was old healed tear of hymen. It also shows that hymen can be torn because of causes other than sexual intercourse.

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30. The counsel for the accused relied upon decision in Samey Singh Vs. State, in which his Lordship of Hon''ble Mr. Justice Dalbir Bhandari as his Lordship then was held that child witness is prone to tutoring, hence the court should look to corroboration particularly when the evidence betrays traces of tutoring. In that case from the evidence of prosecutrix it was found that she was tutored by her parents. There were material infirmities and contradictions in her evidence, old enmity and the FIR was lodged after four days with no explanation at all for the delay. In these circumstances the accused was acquitted. The present case is akin to the cited case. Here also the mother and Nani of the prosecutrix were with her at all the stages, at the stage of report to the police, at the time of medical examination, at the time of statement u/s. 164 Cr. P.C.. There is old enmity between the accused and the mother of the prosecutrix. There is delay of about two months from 5.12.05 to 28.1.06 in lodging the FIR. The explanation furnished for the delay that prosecutrix told the incident to her Nani on 15.1.2006 and from 15.1.2006 to 28.1.2006 is that the father of the prosecutrix did not lodge the FIR due to shyness, is mere excuse.

4. It is urged by the learned counsel for the Petitioner that there is no discrepancy in the statement of the prosecutrix, her hymen was found to be torn; her testimony

was corroborated by her mother (PW-5), thus the learned ASJ erred in disbelieving the prosecution version and acquitting the Respondent.

5. I shall not agree. The hymen can be torn for so many reasons as was indicated in the MLC Ex. PW-6/I. Moreover, there was no fresh tear. Hence healed hymen tear would not be in any way indicative of the sexual assault by the Respondent. The learned ASJ noticed contradiction in the testimony of the prosecutrix and her admission that she had made the statement u/s 161 and 164 Cr. P.C. at the instance of her mother and grandmother. The prosecutrix admitted presence of other family members in the house at the time of alleged rape. It is highly improbable that in presence of other family members in the house (may be in other room/rooms) the Respondent would have the audacity to rape his own granddaughter. All the more delay in lodging the FIR after 15.01.2006 is not understandable.

6. The principles which govern and regulate the hearing of Appeal by the High Court, against an order of acquittal passed by the Trial Court are well settled by a catena of judgments of the Apex Court.

7. While considering a Petition for Leave to Appeal by the prosecution or the complainant against an order of acquittal, the Court must be convinced that there is grave miscarriage of justice on account of erroneous view of the law or that the finding reached by the Trial Court is perverse. Mere errors in the Trial Court''s reasoning are insufficient to interfere in an order of acquittal. There has to be substantial and compelling reasons to interfere with an order of acquittal. As to what constitute such reasons, has been spelt out in Chandrappa and Others Vs. State of Karnataka, as follows:

In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court''s acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court''s acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court''s decision. "Very substantial and compelling reasons" exist when:

(i) The trial court''s conclusion with regard to the facts is palpably wrong;

(ii) The trial court''s decision was based on an erroneous view of law;

(iii) The trial court''s judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court''s judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the Ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached-one that leads to acquittal, the other to conviction-the High Courts/appellate courts must rule in favour of the accused. Had the well settled principles been followed by the High Court, the accused would have been set free long ago. Though the appellate court''s power is wide and extensive, it must be used with great care and caution.

8. The learned ASJ has given good reasons to come to the conclusion that the case against Respondent No. 2 is doubtful. He acquitted the accused giving benefit of doubt. It will not be permissible for me to interfere with the order of acquittal. The Revision Petition is accordingly dismissed.