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**IN THE HIGH COURT OF DELHI AT NEW DELHI
CRL. L. P. 23/2016**

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Date of Judgment : 12th January, 2016

STATE (NCT OF DELHI) Appellant

Through : Ms. Aashaa Tiwari, APP for the State.

Versus

FIROZ KHAN & ANR. Respondents

Through : None.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J. (ORAL)

CRL.M.A. 486/2016

1. This is an application under Section 5 of the Limitation Act filed by appellant/State seeking condonation of 109 days delay in filing the present leave to appeal petition.
2. Heard counsel for the appellant and also perused the present application. In this application, not even a single ground has been urged by the appellant seeking condonation of delay. This application has been filed without any application of mind and is also devoid of material particulars, but since we have heard the matter on merits, we allow the present application. The appellant shall ensure in future that at least application seeking condonation of delay should contain material particulars.

3. Accordingly, delay in filing the present criminal leave to appeal petition is condoned. Let criminal leave to appeal petition be taken on record.
4. Application stands disposed of.

CRL.L.P. 23/2016

5. Present leave to appeal petition has been preferred by the State under Section 378 (1) of the Code of Criminal Procedure assailing the judgment dated 10.02.2015 passed by learned Additional Sessions Judge, New Delhi District, by which the respondent No.1/Firoz Khan has been acquitted of the charges framed under Section 376 of Indian Penal Code read with Section 4 & 6 of POCSO Act, 2012 and Section 506/384 of Indian Penal Code and respondent No.2/Karan @ Shyam Lal has been acquitted of the charges under Section 17 of POCSO Act, 2015 read with Section 109 of Indian Penal Code in case FIR No. 289/2013 registered at Police Station Sarojini Nagar.
6. The case of the prosecution is that the prosecutrix aged about 16 years was introduced to respondent No. 1 in April, 2013, who introduced himself as Sameer. After this short introduction, respondent No. 1 started visiting the school of the prosecutrix and started talking to her on the phone. One day in the evening, respondent No. 1 called the prosecutrix to Sarojini Nagar and thereafter took her to DG Park where the respondent No.1 misbehaved with her and raped her. After this incident, the

prosecutrix stopped talking to respondent No. 1 but he regularly tried to contact her. Since the prosecutrix did not respond, the respondent No. 1 threatened to commit suicide. After the threat of suicide, the friendship between the prosecutrix and respondent No. 1 got restored. One day respondent No. 1 took the prosecutrix to Jain Guest House in Yusuf Sarai and under the threat to slit her throat with a knife took nude photographs with his mobile and raped her. The respondent No.1 provided a mobile phone to the prosecutrix and directed her to remain in touch with him. The respondent No. 1 blackmailed the prosecutrix and took her to the same Guest House many times and committed rape on her on various occasions. The story of prosecution further is that the respondent No. 2/Karan, a friend of respondent No. 1, Caretaker in the Jain Guest House arranged a room for them without making any entry in the Guest Register at the reception. According to the prosecution, the respondent No. 1 extended threats to the prosecutrix and demanded money from her and the prosecutrix withdrew money from the ATM of her mother and gave the same to respondent No.1. The respondent No. 1 asked the prosecutrix to convert to Islam and on refusal he threatened to upload her nude photographs on the internet. The story of the prosecution further is that the prosecutrix thereafter narrated all the incidents to her mother and an FIR under Section 4 of POCSO Act, 2012 and Section 376/384/506 of Indian Penal Code was registered on her complaint and both the respondents were arrested.

7. Respondent No. 1 was charged for committing offences punishable under Sections 376 of Indian Penal Code read with Section 4 & 6 of POCSO Act, 2012 and section 506/384 of Indian Penal Code and respondent No. 2 was charged for committing the offence punishable under Section 17 of POCSO Act, 2012 read with Section 109 of Indian Penal Code. Both the respondents claimed trial.
8. The prosecution in order to bring home the guilt of the respondents, examined as many as 15 witnesses. The prosecutrix was examined as PW2, her mother as PW6 and Investigating Officer was examined as PW13. All other witnesses examined by the prosecution were formal in nature.
9. Learned APP for the State has challenged the impugned judgment on the ground that the same is based on presumptions, conjectures and surmises and cannot stand the scrutiny of law and is not sustainable. It is argued that the trial court failed to appreciate the testimony of the prosecutrix and that most of the prosecution witnesses supported the case of the prosecution and the Trial Court also ignored the material pieces of evidence.
10. While recording the acquittal of the respondents, the learned Trial Court observed as follows:

“46. xxxxxxx However, as already mentioned above, the rape according to the prosecutrix was committed in a room on the second floor. Moreover, the Investigating Officer had deposed in his cross examination that the Guest Register of Jain Guest House was handed over to him by Sh. Sunil Jain, though he did not record his statement. However, no such Guest Register has been placed on

record or proved. **There is not a single employee or the care taker or any other person of the said guest house to corroborate and prove the visits of the accused Feroz along with the prosecutrix to the said Guest House.**

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47. XXXXXX The only inference that can be drawn in this situation is that the accused and the prosecutrix never visited the said guest house. A suggestion has been given to the prosecutrix on behalf of the accused that they both used to roam around, but never went to any guest house. **In the absence of any cogent evidence to prove the visits of the accused and the prosecutrix to the guest house, it cannot be held that there existed any opportunity for the accused to commit rape upon the prosecutrix.**

48. XXXXXX **The prosecution has not been able to prove beyond reasonable doubt that the accused had taken the prosecutrix on 13.07.2013 and on 30.07.2013 to Jain Guest House and had committed rape upon her.**

49. XXXXXX Even, though the mobile phone and the memory card of the mobile phone of the accused have been seized by the Investigating Officer, but no such nude pictures were found in the mobile phone or in the memory card. **Rather, the memory card had been sent to FSL for examination and the report Ex.PW15/A was submitted in regard to the said memory card. The photographs have been generated. the photographs Ex.PW15/B1 to B4 merely show the accused and the prosecutrix hugging each other, while B-5 to B-7 are of the prosecutrix alone. None of these photographs show any obscene postures or nude pictures of the prosecutrix. The claim of the prosecutrix that the accused had taken her nude pictures in his mobile phone or was threatening her on this account is neither believable in the light of the conduct of the prosecutrix nor has been proved by any cogent evidence on record. In this context, it may also be noted that the prosecutrix has been evasive in cross examination in admitting that she had sent 126 messages to the accused on 30.07.2013 and 160 messages on 31.07.2013.**

50. It has further been deposed by the prosecutrix that on one occasion, she had given to the accused Rs.500/- that she had taken out from the purse of her mother and on another occasion she had taken out Rs.700/- from the ATM of her mother and had handed over the same to the accused. **First and foremost, there is no cogent evidence to show that the prosecutrix had had handed over this money to the accused as there is no date, time or occasion that has been explained by the prosecutrix. Moreover, the prosecutrix has nowhere deposed that accused had been demanding money from her under the threat of exposing her nude pictures which he had allegedly taken in his mobile phone.** xxxxxxxx

51. xxxxxxxx

52. The prosecutrix in her testimony has merely deposed that while she was being taken to the guest house by the accused Feroz, he had made a phone call to one Karan. She, however, did not meet this Karan either in the Guest House or at any other point of time. She was unable to identify the accused Karan in Court. Except there being one line in her testimony that one call was made by accused Feroz to Karan and that Karan was a care taker in Jain Guest House, there is no other evidence against the accused Karan. As has already been discussed above, **there is no cogent evidence to show that the accused and prosecutrix ever visited the Guest House or that it was Karan who had facilitated their access to a room in the guest house for the purpose of rape. Except one bald statement of accused Feroz having made one call to one Karan, there is not a iota of evidence from where it could be inferred that Karan in any way facilitated the commission of the offence.**"

11. To examine the case of the prosecution, the trustworthiness of the testimony of the prosecutrix is to be analysed threadbare. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely

trustworthy, unblemished and should be of sterling quality. From the material on record, it emerges that the prosecutrix was about 17 years of age at the time of the alleged incident. The version of the prosecutrix that respondent No. 1 called her at Sarojini Nagar and thereafter took her to DG Park where he misbehaved with her and raped her and that on another occasion took her to Jain Guest House in Yusuf Sarai and committed rape under threat and took her nude photographs from his mobile, casts a serious doubt in the case of the prosecution as the alleged photographs of the prosecutrix were neither recovered nor made part of the record even though the mobile phone and memory card was recovered at the instance of respondent No. 1 and were sent to FSL for examination. The photographs which were generated do not show any obscene postures or nude pictures of the prosecutrix. Rather the prosecutrix sent 126 messages and 160 messages to respondent No. 1 on 30.07.2013 and 31.07.2013 respectively. The Prosecution also failed to show any entry in the Guest Register of Jain Guest House nor any witness was produced to corroborate the visits of the respondent No. 1 along with the prosecutrix to the Guest House. No evidence has emerged on record that the prosecutrix used the ATM of her mother and handed over money to the respondent No. 1. No evidence is forthcoming against respondent No. 2 from which it can be inferred that he in anyway facilitated and aided the offence of rape by respondent No.1. Even assuming that with the help of Karan, no entry was made in the

guest register and if the statement of the prosecutrix is to be believed that she was raped several times in the guest house, it is highly improbable that no employee of the guest house, waiter or anybody at the reception would have spotted the two persons present and testified accordingly.

12. The testimony of the prosecutrix is also not reliable with regard to the first incident of rape in the DG Park, Sarojini Nagar. The testimony of the prosecutrix would show that she had received a call from the accused to meet him at the park and she had told her mother that she was going to meet her friend and her mother may continue with her shopping. The prosecutrix thereafter goes on to testify how she was raped in the park. The Court cannot lose track of the fact that the incident took place in the month of April and it cannot be said that it was dark or the people in the locality would have been indoors on account of weather conditions between 7:00 to 8:00 p.m. After the incident, the prosecutrix claims to have gone to a friend's house and asked her mother to pick her from there, but she did not inform her mother about the rape. In her cross-examination, the prosecutrix had admitted that DG Park is a children's park which has swings and the main gate of the park is on a very wide road and opposite to the gate, there is a CNG pump station and a Primary School exists adjoining to the pump station. Besides, there are government quarters on two other sides of the park and on the fourth side there is a Community Hall. PW-13, SI Sandeep Kumar has also deposed on the similar lines with regard

to the surroundings of the park. Based on these depositions it would show that the DG Park exists right in the middle of the Sarojini Nagar Market and is surrounded by government houses and other public places. Although, the prosecutrix has explained that she could not shout as the accused had gagged her mouth with one hand, but in the same breath she had admitted that her mouth was open at the time of commission of the act, however, she did not shout as there was nobody present in the park.

13. We find this statement to be highly unreliable and untrustworthy, more particularly keeping in mind the month of the year, time of the day and place of the offence. Between 7:00 to 7:30 p.m. in the month of April, it is not dark. It cannot be believed that nobody was present at the children park and moreover in an open public place like a park would be difficult to believe that such an act was committed. We also find the conduct of the prosecutrix to be highly unusual that after the rape, she went to the house of her friend. She did not report the matter to her mother and how after such a trauma as claimed by her she did not report the matter either to her mother or confide to her friend. Thus, the testimony does not inspire confidence. Even after this incident, the prosecutrix continued her relationship with the respondent, which is also highly unusual as it is not the case of the prosecutrix that after the first incident of rape, the accused had taken her nude pictures and would have blackmailed her.

14. The law with regard to leave to appeal petition is well settled. The Apex Court in the case of *Ghurey Lal v. State of U.P. reported at 2008 (10) SCC 450*, has laid down the following principles before granting leave to appeal against an order of 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."

15. In the case of *State of Madhya Pradesh v. Dal Singh & Ors.*, reported at *JT 2013 (8) SC 625*, the Hon'ble Supreme Court has held that the appellate court while considering the appeal against the judgment of acquittal shall interfere only when there are compelling and substantial reasons for doing so and if the judgment is unreasonable and relevant materials have been unjustifiably ignored, it would be a compelling reason for interference.
16. In the absence of any cogent evidence to prove the visits of the prosecutrix and the respondent to the guest house, it cannot be held that there existed any opportunity for the respondent to have committed rape upon the prosecutrix. In the above background, the Trial Court has rightly acquitted the co-accused Karan, who had been charged under Section 17 of the POCSO Act, 2012 read with Section 109 of the Indian Penal Code. Moreover, the prosecutrix was even unable to identify the respondent Karan in the Court. Even otherwise except there being one line in her testimony that one call was made by Feroz to Karan and that Karan was a care taker in the guest house, there is no evidence against respondent Karan.

17. In the instant case, the evidence of the prosecutrix shows several lacunae which weakens the case of the prosecution and cannot be relied upon to hold the respondents guilty of the said offences.
18. Having regard to the principles laid down by the Apex Court in the case of *Ghurey Lal (supra)* and *State of Madhya Pradesh (supra)*, we do not find any compelling and substantial reasons to interfere with the findings of facts recorded by the Court below. The petition lacks merit and is accordingly dismissed.

SANGITA DHINGRA SEHGAL, J

G.S.SISTANI, J

JANUARY 12, 2016

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