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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL. L.P. 667/2016**

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Date of Judgment: 12th April, 2017

STATE OF NCT OF DELHI

..... Petitioner

Through : Ms. Radhika Kolluru, APP for the
State with SI Rameshwar Prasad, PS
Fatehpuri Beri, Delhi.

versus

MAHESH & ANR.

.... Respondents

Through : Mr. Surender Kumar Atri, Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. The present leave to appeal has been filed by the State under Section 378 (1) of the Code of Criminal Procedure, 1973 being aggrieved by the judgment dated 23.05.2015 passed by the Sessions Judge in Sessions Case No. 234/13 by virtue of which the respondent Mahesh was acquitted for the offence punishable under Section 67-A of the Information Technology Act, 2000 (hereinafter referred to as '*IT Act*').
2. At the oral request of learned APP for the State, the respondent no.2/Bijender @ Vijender s/o Kirpal is deleted from the array of parties as no charge was framed against him under Section 67-A of the IT Act.
3. In a nutshell, the case of the prosecution is that on 04.08.2013, the prosecutrix (PW1) came to the Police Station Fatehpur Beri and stated that she was married on 22.04.1996 and has two children out of the

said marriage. She alleged that about fifteen days ago, at about 12 noon, her *devrani* Sonwati, who had been living in front of her house, asked her to shift her fridge. When she went to the house of Sonwati and was shifting the fridge, Sonwati went out of the room and bolted door from outside. At this stage, the respondent Mahesh (brother-in-law of the prosecutrix), who was hiding in that room, revealed himself. He put a knife on the neck of the prosecutrix and asked her to remove her clothes. Thereafter, the respondent Mahesh committed sexual intercourse with her against her wishes. The respondent Mahesh also recorded the said incident in his mobile phone. It was further alleged by PW1 that the respondent Mahesh and Bijender threatened her to show the video to the public and also demanded Rs. 30,000/- or Rs. 50,000/- from her. PW1 specifically alleged that Bijender sold the said video in the village for Rs. 300 and Rs. 500/-.

4. On the complaint, a case was registered under Section 376(D)/384/120-B/34 of the Indian Penal Code (in short '*IPC*'). Subsequently, the accused Sonwati and Mahesh were arrested and Bijender surrendered in Court. After completion of the investigation, charge sheet was filed. On 05.10.2013, charge under Section 384/34 IPC was framed against the respondent Mahesh and Bijender; further charge under Section 376 (D) r/w Section 341/34 IPC and Section 67-A IT Act r/w Section 34 IPC was also framed against the respondent Mahesh and Sonwati. The statement of prosecutrix was recorded under Section 164 of the Code of Criminal Procedure.
5. To bring home the guilt of the respondents the prosecution had examined 13 witnesses in all. The statement of all the accused were recorded under section 313 of the Code of Criminal Procedure where

they pleaded not guilty and denied all the incriminating evidence against them. No witness was produced by the respondents in their defence. Evaluating the evidence, the Trial Court acquitted all the accused persons, including the respondent Mahesh.

6. Today, the State has approached this Court seeking leave to appeal from the order of acquittal in favour of respondent Mahesh, only under Section 67-A of the IT Act.
7. Ms. Radhika Kolluru, learned APP for the State submits that the trial Court has erred in disbelieving the testimony of the prosecutrix/PW1 to the extent that the respondent Mahesh had made a video and recorded the incident of rape. The counsel pointed out the cross-examination of PW1 wherein she categorically stated that the respondent Mahesh made a video holding his mobile in his right hand. To substantiate the argument with respect to Section 67-A IT Act, the counsel for the State has relied upon the testimonies of PW5 Ct. Pawan Kumar, PW6 Mahender Singh and PW7 Prasadi. The counsel for the State has further relied on the testimony of PW12 Santram (husband of the prosecutrix), who had categorically identified the voice of the respondent Mahesh in the said video.
8. Learned counsel for the State further submits that the trial Court has failed to appreciate the testimony of PW13 SI Surekha (Investigating Officer) who had tendered the FSL report with respect to the video clip, which is Ex.PW13/A and unequivocally points towards the guilt of the respondent Mahesh and cannot be brushed aside.
9. The counsel further submits that the trial Court has overlooked the testimonies relied by the prosecution and ignored the oral and documentary evidence which surfaced during the course of trial. The

findings of the Trial Court run contrary to the factual matrix of the case and the Court has committed a grave error in acquitting the respondent Mahesh and has even failed to record the reasons for acquittal under Section 67-A of the IT Act.

10. We have heard learned counsel for the State and have carefully examined the judgment of the Trial Court. We may profit with the findings of the Trial Court, the relevant portion of which reads as under:

“16. The instant video was played before me. I found the prosecutrix behaving quite normal during the incident. No inference can be drawn from that video that she was under threat or she was forced to have such relations with the person. It appears to be a consensual sex. The other person indulged in sexual intercourse with the prosecutrix is not visible in the video.”

17. It is noteworthy that the prosecutrix was quite old and matured. She would have reported the incident to her husband immediately after the incident. Rather testimony of PW 12 reveals that he came to know of the incident through someone. No plausible explanation came from the side of the prosecutrix as to why she kept quiet for about fifteen days when there was threat perception from the side of the accused persons.

18. PW 12 has stated that one [sic: someone] of his native village had told him the incident and thereafter, he asked his nephew Mahender to procure the said video since he could not procure the same. He also gave his mobile to Mahender to get the said video transferred in it. Mahender then transferred the video in his mobile, from where he saw the obscene video. He stated that police had seized his mobile phone vide memo Rx. PW 12/A, PW 6 Mahender has stated that he came to know of video from Manoj, who showed him the clip and thereafter, he informed PW 12. In this case, the prosecution did not examine Manoj, who had first informed PW 6 of the video. PW 6 could not answer

from where Manoj procured the video. The question now arises whether it was Mahender PW 6 who informed PW 12 about the video or the factum of video had already come in the notice of PW 12. In the absence of examination of Manoj, it remained a mystery as to who or how the video was circulated in the village. PW 8 has stated that he never saw the video. On being cross examined by Ld. Addl. PP, he denied that accused Virender [sic: Bijender] had shown him the video and asked Rs. 100 from him to see the video. He totally turned hostile and did not support the case of prosecution in any manner.

...

20. PW 12 has stated that the video contained the voice of Mahesh. In the instant case, prosecution did not collect the voice sample of accused Mahesh to match with the voice appearing in the audio video so it cannot be conclusively held that the audio video contains the voice of Mahesh. It is also to be noted that PW 13/ IO in her testimony has stated that the mobile phone recovered at the instance of accused Mahesh did not contain any obscene scene. The stand of the accused persons since beginning is that they have been falsely implicated in this case."

(Emphasis Supplied)

11. The present petition seeking leave is limited to the acquittal of respondent Mahesh under Section 67-A of the IT Act. Section 67-A reads as under:

"67A. Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form.— Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven

years and also with fine which may extend to ten lakh rupees.”

(Emphasis Supplied)

12. A bare reading of the provision would show that to bring home the guilt of an accused, the prosecution must prove that the accused had published or transmitted the material, containing sexually explicit act or conduct, or had caused the transmission of such material. As a logical consequence, the prosecution must prove that the accused had such material in his possession or control and he himself circulated/transmitted the same; or that the material was in the possession of some other person who circulated/transmitted at the instance of the accused. Unless either of the two is proved, the prosecution would have failed to discharge its burden.
13. In view of the same, we proceed to analyse the case before us. There is no doubt to the fact that the video clip recovered from the mobile (Ex.P2) of Sant Ram (PW 12) (husband of the prosecutrix) contained sexually explicit material. What the prosecution could not prove before the Trial Court was that the video was transmitted by or at the instance of the respondent Mahesh.
14. We proceed to analyse the testimonies of Ct.Pawan Kumar (PW 5), Mahender Singh (PW 6), Prasadi (PW 7), Sant Ram (PW 12), and SI Surekha (PW 13) as to the origin and circulation of the video clip (contained in CD- Ex. P3).
15. Ct.Pawan Kumar (PW 5) has testified that on 07.08.2013, he along with the IO and Ct.Hazari had recovered one white mobile phone (Ex. P1) from the house of the respondent Mahesh at his instance.

16. Mahender Singh (PW 6) has deposed that he had seen the video while sitting with his friends on the mobile phone of one Manoj. He had seen the video for a minute or two and after identifying the prosecutrix immediately informed Sant Ram (PW 12); who got the video transferred on his mobile from the mobile of Manoj.
17. Prasadi (PW 7) in her statement has deposed that on 04.08.2013, she saw 3-4 children watching something on a mobile. She also watched the video and saw the prosecutrix having sex with someone. She, thereafter, immediately informed Sant Ram (PW 12). During her cross-examination, she stated that the mobile was of the son of one Parmal of the same *mohalla*.
18. Sant Ram (PW 12) (husband of the prosecutrix/PW1) deposed in his testimony that on 04.08.2013, he was told by a native of the village that he had seen the blue film of his wife on someone's mobile and it had already been circulated in the village. He immediately went to his house and inquired from his wife and then she narrated the complete incident which occurred 15 days ago. Thereafter, PW12 requested his nephew Mahender (PW6) to procure the said video and gave his mobile to him as he was unable to procure it himself. Then Mahender (PW 6) got the video transferred on the mobile (Ex. P2) of Sant Ram (PW 12). Thereafter, he immediately went to Police Station along with the prosecutrix and got the FIR registered. It was in evidence that the CD (Ex. P3) was played before PW12 in Court and he had identified her wife in the clip. PW 12 also identified the voice of the respondent Mahesh in the said video.
19. In his cross-examination, PW 12 further stated that his statement was recorded on 04.08.2013 wherein he told the police that he had given

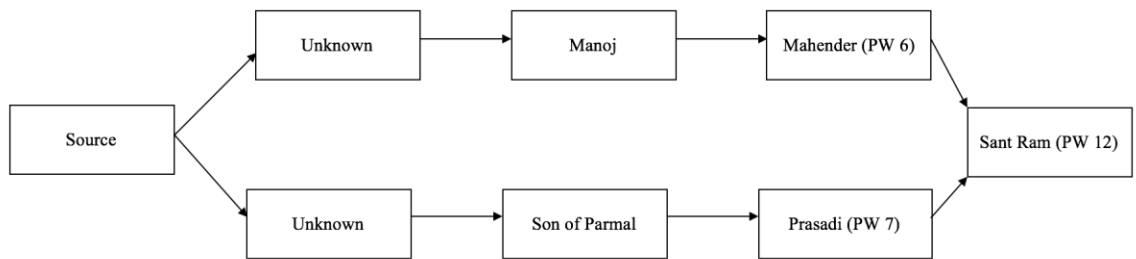
his mobile to his nephew to procure the said video. However, when he was confronted with his statement which is Ex.PW12/DA this fact was not so recorded. On the contrary, it was mentioned in the statement that his nephew had brought the said video and shown to him.

20. SI Surekha (PW 13) (IO of the case) has deposed that she collected the mobile (Ex. P2) of Sant Ram (husband of the prosecutrix) and recovered the mobile (Ex. P1) of respondent Mahesh from an *almirah* in his house. Both the mobiles (Ex. P1 and P2) were sent to the FSL, which has given its report (Ex. PW 13/D). The IO had also stated that she got a CD (Ex. P3) prepared of the video. Upon being cross-examined, she has deposed that the mobile of respondent Mahesh (Ex. P1) *“did not contain any obscene scenes.”* She further deposed as under:

“The scenes were deleted by the accused prior to seizing. I do not have scientific proof in this regard. What I have stated regarding deletion is the hearsay of the accused.”

21. The prosecutrix (PW1) deposed that respondent Mahesh while having sexual intercourse with her, had recorded the video on his mobile. She deposed that in the evening the respondent Mahesh demanded Rs. 50,000/- and started blackmailing her that he would make the video public in the village. He then sold the video to the village people for Rs. 500 or so. She further deposed that the respondent Bijender (her *dever*) distributed the video in the village for Rs. 300 to Rs. 500, which also reached to her husband Sant Ram (PW 12) and then she told him about the entire incident.

22. In the present criminal leave petition, the only allegation against the respondent Mahesh is merely that he was responsible for the recording and circulating the video clip in which the prosecutrix was found having intercourse with him. In this regard, we concur with the view taken by the Trial Court that the identity of the respondent Mahesh was not established in the video clip. This is as the face of the second person in the video clip is not visible; only Sant Ram (PW 12) has identified the voice in the video clip as that of respondent Mahesh; the voice sample of respondent Mahesh was not collected to match the voice in the video; and SI Surekha (PW 13) has in her testimony stated that the mobile of respondent Mahesh (Ex. P1) did not contain the obscene material. Consequently, the prosecution could not establish conclusively that the video was initially recorded and transmitted by respondent Mahesh.
23. So far as the circulation of the said video clip is concerned, there is no evidence to link it with the respondent Mahesh. The prosecution has neither proved that the video clip, at any point of time, was transmitted by the respondent Mahesh or that the respondent Mahesh had caused its circulation. Sant Ram (PW 12) got the video clip through Mahender (PW 6), who inturn has deposed that he got the same from one Manoj. Now the link breaks, Manoj was not examined as a witness nor is anything on record to show how the video reached Manoj. Even the other chain of circulation is inconclusive as it ends at Prasadi (PW 7) seeing the video on the mobile of the son of one Parmal. Now again, neither the son of Parmal has been examined or the origin of the video known. The circulation of the video can be represented by the following diagram:



24. Thus, the factum of circulation of the video either by or at the instance of the respondent Mahesh has not been established by the prosecution.
25. In view of the foregoing analysis and the testimonies discussed, we are of the considered opinion that the prosecution story with regard to involvement of the respondent Mahesh is doubtful and there was no evidence of the respondent Mahesh having transmitted or causing the transmission of the obscene video clip to anyone. Consequently, there are no grounds for proceeding against the respondent Mahesh with respect to the offence punishable under Section 67-A of the IT Act.
26. We may also note that it is a cardinal principle in criminal jurisprudence that presumption of innocence of the accused is reinforced by an order of acquittal.
27. In ***Tota Singh and Anr. v. State of Punjab***, AIR 1987 SC 108: (1987) 2 SCC 529, the Supreme Court made the following observation:

“6. ...The jurisdiction of the Appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of

the evidence adduced in the case and the Court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous.”

(Emphasis Supplied)

28. In *State of Rajasthan v. Raja Ram*, (2003) 8 SCC 180: AIR 2003 SC 3601 the Apex Court held as under:

*“7. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. 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 favourable 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. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappraise the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See *Bhagwan Singh v. State of M.P.* JT (2002) 3 SC 387) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* 1973 SCC (Cri) 1033, *Ramesh Babulal Doshi v. State of Gujarat* (1996) 9 SCC 225 and *Jaswant Singh v. State of Haryana* JT (2000) 4 SC 114.”*

(Emphasis Supplied)

29. A Division Bench of the Supreme Court in ***Chandrappa v. State of Karnataka***, (2007) 4 SCC 415, the general principles regarding the power of the appellate court while dealing with an order of acquittal were summarized as under:

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

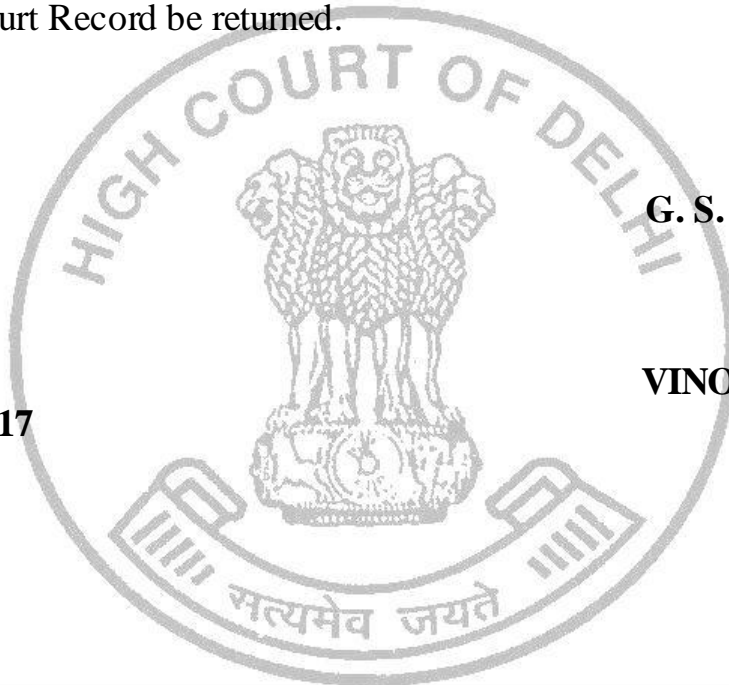
(3) Various expressions, such as, “substantial and compelling reasons”, “good and sufficient grounds”, “very strong circumstances”, “distorted conclusions”, “glaring mistakes”, etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of “flourishes of language” to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

(Emphasis Supplied)

30. Accordingly, keeping in view the foregoing principles of law, we find no illegality or infirmity in the judgment of the Trial Court warranting interference.
31. Thus, the leave to appeal is dismissed.
32. Trial Court Record be returned.



G. S. SISTANI, J.

VINOD GOEL, J.

APRIL 12, 2017

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