Delhi High Court
Abdul Salam vs State on 24 March, 2005
Equivalent citations: 120 (2005) DLT 336, 2005 (81) DRJ 379
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Bench: M Goel
JUDGMENT Manju Goel, J

1. This revision petition is directed against the judgment of the court of Additional Sessions Judge in an appeal from the judgment of conviction dated 5.2.2002 in the case of State v. Abdul Salam FIR No. 659/2001 of P.S. Hauz Khas under Sections 377/506 IPC. The facts leading to the present revision petition in brief are as under:

On 20.8.2001 on receipt of a PCR call the police officers of P.S. Hauz Khas reached the Madarsa of village Adchini where Mohd. Wasil, a boy aged 11 years, made a statement that he had been staying at the Madarsa for studying Urdu and on 15.8.2001 his teacher, namely, Abdul Salam (petitioner herein), called him to his room at around 5 p.m. and asked him to press his legs and thereafter closed the door and bolted the same from inside. The statement given by the boy further says that the petitioner thereafter lay down on the floor and forced him to lie by his side and asked him not to raise any noise. Thereafter, the boy stated that the petitioner removed his (Mohd. Wasil's) lungi and forced him to lie down by his abdomen and thereafter he also removed his own lungi and committed anal intercourse. The boy further stated that two of his fellow students, namely, Mohd. Nasir and Mohd. Manzar, saw the unnatural act being done from the window of the same room. He also says that his mouth was closed by the petitioner to prevent him from crying in pain. Mohd. Wasil was thereafter threatened of dire consequences if he disclosed the facts to anyone else. Mohd. Wasil concluded saying that he did not tell the fact to anyone but when his uncle Mohd. Rahman came to Madarsa he told everything to him who thereafter called the police. The petitioner was challaned and tried. During trial Mohd. Wasil deposed against the petitioner. The two boys who allegedly saw the offence being committed, namely, Mohd. Nasir and Mohd. Manzar, were produced as PW-1 & PW-2 and they both denied having seen anything. The uncle of Mohd. Wasil, PW-3, Mohd. Rahman, deposed that on his visit to Madarsa, Mohd. Wasil told him about the offence on which he telephoned the police. PW-4, Dr. Samuel Sarkar, who had examined the victim deposed that he did not find any injury on the anus of the victim and that in case an intercourse had taken place five days before the examination, there should have been some mark of healed injury which he did not find. He also deposed in cross-examination that injury was likely to be caused in this case since the boy was of tender age. PW-7, Dr. Arun Kumar Agnihotri, who had examined the petitioner deposed that the petitioner was capable of performing the sexual act and that on his examination of the petitioner on 20.8.2001 he did not find any mark of injury on the penis of the accused. Mohd. Wasil himself supported the prosecution case. Apart from deposing as per his earlier statement, he stated that after the offence he and the petitioner both took bath before going to namas, that two boys who had seen the offence told some persons of the adjoining settlement and one of those persons took from him the telephone number of his uncle, Mohd. Rahman, who was called by that neighbour. In cross-examination, he deposed, inter alia, that the petitioner was in the habit of beating up the students and had also beaten him up on certain occasions. To a question from the court he stated that he did not receive any injury on account of the offence and that there was no bleeding.

2. The learned Magistrate found that although the other witnesses had turned hostile, Mohd. Wasil, himself was a truthful witness and had narrated all the facts correctly. The Magistrate reconciled the fact of the commission of the offence and the absence of injury by saying that the accused despite his effort could not insert his organ into the anus of the child because of the great disproportion in the size between the anal orifice of the victim and the virile member of the accused. He convicted the petitioner for the offence of attempt of commission of sodomy under section 377/511 IPC. In appeal the learned court of Additional Sessions Judge agreed with the Metropolitan Magistrate and upheld the conviction. It has, inter alia, observed that corroboration is required only as a matter of caution and prudence but not as a rule of law and that the corroborative witnesses being also students of the petitioner were obviously under fear of authority and could not depose in favor of the prosecution. The delay in lodging the FIR was found to be natural.

3. What is contended before this court is that the finding of the Metropolitan Magistrate was not supported by any evidence and was, therefore, perverse requiring interference by this court in exercise of the revisional power. I have, therefore, examined the evidence of the prosecution in this case and have carefully considered and weighed the same.

4. It is important to see that in this case there is no evidence except that of Mohd. Wasil, the victim. It cannot be denied that conviction can be based on the sole testimony of one witness provided however the testimony of this witness inspires sufficient confidence in the mind of the Judge. In the present case an inconsistency between the statement of the witness and the medical witness is very clear. PW-4 has stated that in view of the tender age of the victim it was very likely that there would be some injury in the anus of the boy and that even if he had examined the child five days after the incident some mark of injury would have been found by him. The Metropolitan Magistrate also holds that actually no anal intercourse had taken place. He proceeds to convict the petitioner for the offence of an attempt to commit unnatural act. For this, however, there is no evidence on the record. The Magistrate has disbelieved Mohd. Wasil on his statement that an anal intercourse had taken place. Mohd. Wasil does not say that the petitioner merely made an attempt but did not succeed. Mohd. Wasil in fact says that he suffered pain but was prevented from shouting. There was nothing on the record on the basis of which such a finding could be registered by the learned trial court.

5. It is further to be seen that the prosecution case was severely damaged by PW-1 & PW-2 who were named in the FIR itself as eye witnesses to the incident. Both the witnesses said that they had not seen anything at all. The medical evidence is also against the prosecution case. In this situation it is very unsafe to record a finding of guilt against the petitioner.

6. I am conscious of the fact that the two courts below have given concurrent finding of facts and that this court should not interfere with such finding ordinarily. Interference is however warranted if the courts below have committed manifest error in law, or in appreciation of evidence or have caused miscarriage of justice. As pointed out both the courts below have arrived at a finding for which there was no evidence on record and, therefore, the finding was perverse. Such a finding, viz., of offence u/s 377/511 IPC has caused manifest miscarriage of justice calling for interference.

7. I allow the revision petition and accordingly set aside the conviction recorded by the court of Metropolitan Magistrate and that of the Addl. Sessions Judge and acquit the petitioner.