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IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl.L.P.No.309/2012

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Date of decision: 13th July, 2012

STATE

..... Petitioner

Through : Mr.Pawan Sharma, Standing
Counsel.

versus

BABLOO

..... Respondent

Through : None.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

Crl.7847/2012

Heard. For the reasons stated in the application, the delay in filing the petition is condoned.

The application stands disposed of.

CRL.L.P. 309/2012

1. The record has been received from the Trial Court and has been perused.
2. We have also heard learned Standing Counsel for the State who has filed the present petition seeking leave to appeal under Section 378(1) of the Cr.P.C against the judgment dated 7th September, 2011 passed by Dr. Sudhir Kumar Jain, ASJ-01.

3. The instant case relates to an alleged incident which occurred on 29.4.2010. The prosecution commenced on the complaint made by Mohd. Shoaib a resident at House No.B-4/12, Swarn Jayanti Vihar, Tikri Khurd, Delhi. It was complained that 'S' is one of the daughters of Mohd. Shoaib who was a student of class IX in Government Sarvodaya Co-Ed. Senior Secondary School, Tikri Khurd; and that her date of birth was 14.3.1994. It was further alleged that on 29.4.2010, 'S' had gone to the market with her sister-in-law in the evening. There Babloo met 'S' and forced her to sit in a bus at bus stop Tikri Khurd. Thereafter 'S' was taken to Bareilly. When 'S' did not return home, Mohd. Shoaib lodged the complaint with the police naming Babloo as the suspect who had removed his daughter. The information was recorded as DD No.39A by the police.

4. Mohd. Shoiab made a further statement on 4.5.2010 whereupon the FIR no.135/2010 under Section 363 IPC was registered. Babloo and 'S' were apprehended on 18.5.2010 pursuant to information in this behalf. Thereafter Babloo was arrested. Babloo and 'S' were also sent for medical examinations. It is important to note that 'S' refused to undergo a gynaecological examination. A statement of 'S' was recorded under Section 164 Cr.P.C. by Ms.Aparna Swamy, the

concerned Metropolitan Magistrate, who was examined as PW13 in the Court.

5. On completion of investigation, the police filed the challan for commission of offences punishable under sections 363/366/376 IPC against Babloo.

6. It was alleged that Babloo had confined 'S' in a house situated at Bareilly where he committed rape on her many times against her wishes and consent. Babloo also threatened to kill 'S' if she disclosed the fact of rape to anyone.

Charges were framed under Section 363/366/376 IPC against the accused vide order dated 15.12.2011 to which the accused had pleaded not guilty and claimed trial.

7. The prosecution examined 15 witnesses in support of its case before the learned trial court. After a careful reading of the evidence, the learned trial judge passed a judgment dated 07.09.2011 holding that the respondent was not guilty of commission of the offences with which he was charged. Aggrieved thereby the present appeal has been filed.

8. A perusal of the impugned judgment would show that the learned trial court has rejected the prosecution case that 'S' was born on 14.3.1994 inasmuch as 'S's date of birth was not supported by any contemporaneous evidence in the nature of a birth certificate. The only record produced in the Court as

date of birth was the school certificate where 'S' was studying.

9. The learned trial Judge had found that the school certificate in which her date of birth was mentioned as 14.3.1994, was prepared without the assistance of any certificate issued by the competent authority and that it appeared to be based on estimation and as such was not as authentic document of the date of birth. The learned trial judge therefore, concluded that the prosecution had failed to prove that the prosecutrix was less than 18 years of age at the time of the incident beyond reasonable doubt.

10. Our attention has also been drawn to the deposition of 'S' in court where she has supported the prosecution case. We find, however, that 'S' was examined on oath under Section 164 Cr.P.C. by the concerned Metropolitan Magistrate on 19.5.2010 soon after she was apprehended.

11. In this statement, 'S' had deposed that she had married Babloo, the respondent herein, in the court at Bidayuin, U.P.; that when her affair with the respondent became public, she ran away with Babloo; that her mother was opposed to her marriage with Babloo on account of his belonging to a different religion. She categorically denied that Babloo had established relationship with her forcibly. In her statement on oath, she had stated that she did not wish to return to her parents

because they were pressurizing her.

This statement of 'S' was exhibited as EX.PW-13/B in the evidence of the learned Metropolitan Magistrate. EX.PW-13/B bears the certificate by the learned Metropolitan Magistrate to the effect that this statement was made by the petitioner voluntarily without any pressure or coercion and nothing had been added, subtracted or altered in the statement.

12. The statement Ex.PW13/B is supported by the conduct of 'S', who consciently refused the gynaecological examination as has been endorsed in her MLC Ex.PW15/A.

13. The learned trial Judge has observed that in the event of forcible sexual relationship, the medical opinion pertaining to sexual intercourse would be a very vital piece of evidence to support the case of the prosecution. The refusal for the gynaecological examination was without any justification and it establishes that 'S' was clearly about 16 years of age.

14. We have also found that the learned trial Judge had considered the evidence of 'S' examined as PW-7. It has been observed that according to PW-7, she had travelled by bus for 3/4 days with the respondent and that during the journey, the respondent had provided food to her from local dhabas. PW7 had also deposed that she had eased herself at places when the bus had halted during the journey.

15. It is thus apparent that 'S' had several opportunities to protest, seek assistance or inform her family. There is evidence of the presence of many passengers in the bus besides the driver and the conductor. There is no evidence that 'S' raised any protest or any alarm regarding her having been enticed from the custody of her family or lawful guardian, or her having been kidnapped or taken from their possession. No alarm was raised when the accused had allegedly committed rape on her. No medical evidence of force or rape was brought on record. In this background, the learned trial judge has correctly observed that 'S' was a consenting party to the alleged actions. The testimony of PW7 is clearly demolished the statement made by the statement made by PW7 under Section 164 of the Cr.P.C. on 19.5.2010, which was soon after the accused Babloo and she were apprehended. It is noteworthy that 'S' was in the company of the respondent from the evening of 19.4.2010 till 18.5.2010.

In this background, the observations and the findings of the trial Judge are factually and legally sound and cannot be faulted with on any legally tenable grounds.

We, therefore, find no merit in the petition seeking leave to appeal. The leave petition stands dismissed.

GITA MITTAL, J

J.R. MIDHA, J

JULY 13, 2012
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