

\$~7

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of hearing and decision: 19.08.2013

+

CRL.L.P. 317/2012
STATE

..... Petitioner

Through: Mr. Sunil Sharma, Additional Public
Prosecutor for the State with
Inspector Kamal Kishor, Sub-
Inspector Girraj Singh, Police Station
Badarpur, Delhi

versus

VIRENDER

..... Respondent

Through: Mr. Asit Kumar Roy, Advocate

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR
HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER
19.08.2013

%

1. By this petition filed under Section 378 (3) of Cr.P.C., the petitioner is seeking leave to appeal against the judgment/order dated 21st October 2011 passed by learned Additional Sessions Judge, thereby acquitting the respondent-accused from the charges framed under Section 366/376 of IPC.
2. Arguing the present application seeking leave to appeal, Mr. Sunil

Sharma, Additional Public Prosecutor for the State submits that the prosecutrix was around 15 years of age on the date of incident and this factum is duly supported by the School Leaving Certificate proved on record by the prosecution and also by the deposition of the prosecutrix in particular. Learned Additional Public Prosecutor further submits that this important aspect was not taken into consideration by the learned trial court which has resulted in grave miscarriage of justice in the present case. Learned Additional Public Prosecutor further submits that during the course of making her statement, prosecutrix had also deposed that she was under constant intimidation from the accused and she got married to the accused only under pressure. Learned Additional Public Prosecutor further submits that the alleged consensual sex had also taken place prior to the solemnisation of the alleged marriage of the prosecutrix with the accused.

3. We have heard learned Additional Public Prosecutor for State as well as counsel appearing on behalf of the respondent and also given our thoughtful consideration to the arguments advanced by them. We have also perused the impugned judgment and the trial court record.

4. As per the case set up by the prosecution in the charge sheet, the prosecutrix was kidnapped by the appellant from the lawful guardianship of

her parents and was repeatedly raped by the appellant between 25th January 2011 to 5th March 2011. As per the prosecution, the age of the proxecutrix as on the date of incident was 15 years 4 months and 20 days.

5. During the trial of this case, prosecution had examined seven witnesses. Statement of the accused under Section 313 of Cr.P.C was also recorded wherein the accused had pleaded his innocence by completely denying the case of the prosecution. After critical analysis of the evidence on record, the learned trial court did not find any evidence against the accused for the offence punishable under Section 366 and 376 of IPC and accordingly acquitted the accused under the said sections. Learned trial court, however, convicted the appellant for the offence punishable under Section 363 of IPC and awarded him simple imprisonment for the period already undergone by him. The relevant portion of the judgment is reproduced below:

"15. Considering the testimony of PW-2 Miss X in totality , this court is of the view that it was a consensual act. She was not intoxicated or assault by the accused. Testimony of PW 2 , Miss X is not trustworthy and doubt is being raised. Benefit of doubt is given to the accused. There is no evidence against the accused Virender for the offence punishable under Section 376 IPC as it was a consensual act. However, record clearly shows that PW-2 Miss X was recovered from the company of the accused Virender. She was taken away from

the lawful guardianship of her father Mr. Prem Kumar. As regards offence under Section 366 IPC is concerned, there is no evidence that accused compelled her for marriage. Therefore prosecution has failed to prove its case against the accused for the offence punishable under Section 366/ 367 IPC.

16. Accordingly, accused Virender is convicted for an offence punishable under section 363 IPC and he is acquitted for the offence punishable under Section 366/ 376 IPC in this case FIR No. 58/ 2011, P.S. Badarpur."

6. The crucial issues for consideration before this court are:- (i) what was the age of the proxecutrix as on the date of commission of the offence; if she was below 16 years of age? and (ii) whether she was raped by the accused between 25th January 2011 to 5th March 2011 or both of them had consensual sex during that period.

7. So far as the issue of age is concerned, the prosecution has placed on record the School Leaving Certificate which records the date of birth of the prosecutrix as 04.07.1996 and as per this date of birth, the age of the prosecutrix comes to 14 years 6 months as on the date of incident. The credibility of this School Leaving Certificate gets shaken from the testimonies of PW-6 (Mother of the proxecutrix) and the deposition of the prosecutrix itself, recorded under Section 164 of Cr.P.C. PW-6 in her deposition had stated that she told the date of birth of her daughter based on guess work and the same was an incorrect one. The prosecutrix disclosed

her age as 19 years as on the date of recording of her statement under Section 164 of Cr.PC. The prosecutrix also categorically stated that she was born sometime in the year 1992. PW-6 in her deposition also stated that she got married at the age of 18 years and her eldest daughter (prosecutrix) was born after five years of her marriage. With the aforesaid fact, the age of the prosecutrix comes to about 13 years as on the date of court deposition of PW-6. Therefore, there exists total inconsistency in the stand taken by the prosecutrix and her mother (PW-6). Undeniably, the date of birth as recorded in the School Leaving Certificate would have been of vital significance but due to the inconsistency in the statements of PW-6 and PW-2, enough suspicion has been created to accept the genuineness of the said date of birth as recorded in the School Leaving Certificate, benefit of which must go to the accused. No Ossification test of the prosecutrix was carried out to clear the doubts and therefore, in such a given scenario, we do not find any illegality in the reasoning of the learned trial court accepting the age of the prosecutrix as more than seventeen years however less than eighteen years.

8. On the second issue whether the prosecutrix was a consenting party to the alleged consensual sex that happened between 25th January 2011 to 5th

March 2011, we concur with the reasoning given by the learned trial court. The prosecutrix had ample opportunity to raise alarm when she was taken from Molarband in the TSR to Anand Vihar bus stand and also when she was taken from Anand Vihar to Dadri and then from Dadri to Shahjahanpur. Not only that, she did not make any effort to find an escape. She did not even make any complaint when she was made to sign the marriage papers. In the MLC Report placed on record as Ex.PW1/A, there also the prosecutrix disclosed to the attending doctor that she ran away from her home on 25th January 2011 and married a boy named Virender on 28th February 2011.

9. It cannot be lost sight of the fact that the proxecutrix had married the accused before SDM, Shahjanpur, the prosecutrix got pregnant though later she got the child aborted. The prosecutrix had taken a total somersault in her court deposition, however previous statement recorded under Section 164 of the Code of Criminal Procedure, 1973, she clearly stated that she had married the accused who resides in the upper portion of her house and the accused had not exercised any kind of force upon her to agree for the said marriage. She also stated that she became pregnant on the date of the said marriage and she wanted to live with that accused. She had also stated that

her parents were not happy with the said marriage and therefore, they had lodged a false report and even got the School records fabricated. The silence of the prosecutrix during that period of stay with the accused, when she had ample opportunities to raise her voice and rescue herself from the clutches of the accused, and also the fact that she disclosed to the doctor at the time of her abortion that she had married the accused out of her own free will are certain conspicuous facts which cannot be snubbed while deciding the present leave to appeal application. Court deposition of the prosecutrix also does not find any support from the other important chain of events which *inter alia* includes the prosecutrix marrying the accused out of her own free will, becoming pregnant from the accused, aborting the child, staying with the accused at various places and at no stage raising any alarm. These events definitely put a question mark on the genuineness of the allegations advanced by the prosecutrix. The totality of these circumstances clearly demonstrates that the intimacy shared between the two was of consensual nature. In view of the aforesaid factual matrix we are inclined to accept the reasoning given by the trial court so far the acquittal of the accused under section 376 IPC is concerned.

10. It is not a case of substantial improvement in the court deposition but

is total change in the stand, completely contrary to the earlier stand taken in the statement under Section 164 of Cr.P.C. and therefore, the court deposition has to be viewed with greater care and caution taking into account the totality of facts and circumstances of the case.

11. In the light of the above discussion, we do not find any illegality or perversity in the order passed by the learned trial court. Finding no merit in the present petition, this court is not inclined to grant leave to appeal to the appellant – State, to challenge the impugned judgment. Accordingly this petition for seeking leave to appeal is dismissed.

KAILASH GAMBHIR, J

PRATIBHA RANI, J

AUGUST 19, 2013

pkb