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

+ **CRL.L.P. 189/2015**

% ***Judgment dated 24.03.2015***

STATE

..... Petitioner

Through : Ms.Rajdipa Behura, ASC for the State
along with ASI Jai Prakash, P.S. S.P.
Badli.

versus

ARVIND KUMAR

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G.S.SISTANI, J (ORAL)

CRL.M.A. 4408/2015

1. Exemption allowed subject to all just exceptions.
2. Application stands disposed of.

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3. Present leave to appeal petition has been filed by the State/appellant under Section 378(1) of the Code of Criminal Procedure against the judgment passed by the learned trial Court dated 24.12.2014 in case FIR No.54/2011 registered at Police Station S.P. Badli, by which the respondent has been acquitted for the charges framed under Sections 363/365/376(2)(F)/366-A of the Indian Penal Code.
4. Undoubtedly, this is a very unfortunate case where a mentally challenged minor girl was kidnapped and then raped.
5. Learned counsel for the State submits that the trial court has erred in disbelieving the depositions of PW-1 paternal aunt (mausi/chachi) of the victim; PW-2, father of the victim; PW-3, uncle (chacha) of the victim;

PW-12, Head Constable attached with Police Station Safdarjang, District Barabanki, Uttar Pradesh; and PW-16, Pradhan of the Village Saidullapur. Counsel further submits that the trial court has failed to appreciate the fact that the victim was recovered from outside the house of the respondent from a Village in Uttar Pradesh in the presence of PW-12 and PW-13 and there is nothing on record to suggest that PW-12 and PW-13 have deposed falsely. It is further submitted that the trial Court has erred in not relying on the testimony of the victim, CW-1, who has pointed out to the respondent as the person, who had taken her away and raped her. Counsel also contends that the trial Court has erred in relying on the report of the medical board of IHBAS, Exhibit PW-11/A, as per which the victim was suffering from severe mental retardation with seizure disorder and hence she was not in a position to relate experiences or to remember facts pertaining to her experiences. Counsel further contends that despite the report of IHBAS, the trial Court directed to examine the victim, CW-1, and her gestures were interpreted by her aunt, PW-1 (Mausi/Chachi). It is also submitted that in the testimony of the child, she pointed out by way of signs and gestures that she was sexually assaulted by the respondent; he was the one, who had kidnapped her and had taken her away. Counsel also submits that the learned trial court erred in not believing the medical evidence and concluding that the MLC, Ex.PW-6/A, and subsequent opinion, Ex.PW-14/13 do not show that it was the respondent who had sexually assaulted the victim, as alleged. It is also submitted that the prosecution had successfully proved that victim was aged about 11 years, which makes respondent also guilty of offence of taking victim away from lawful guardianship of her parents. In the light of the above, learned counsel for the State submits that it is a fit case for grant of leave to appeal.

6. In this case, as per the case of the prosecution before the trial court, an eleven year old went missing from her house on 16.2.2011. PW-2, her father, registered a complaint with the Police on 17.2.2011 vide DD No.22A, pursuant to which FIR No.54/11 was registered under Section 363 of the Indian Penal Code. On receipt of secret information a raid was conducted by the Investigating Officer at the native place of the respondent on 22.2.2011 with the help of local police of Police Station Safdargunj, U.P., and the child was recovered. The respondent was arrested from his residence. Both, the victim and respondent were brought to Delhi.
7. We have heard learned counsel for the State and carefully examined the judgment passed by learned trial court and the testimonies of the witnesses. From the testimonies of the witnesses it is clear that none of the witnesses have testified that the victim was last seen in the company of the respondent either on 16.2.2011, the date from when the child went missing, prior thereto or subsequent thereto.
8. Having perused the testimonies, we find that the child was not recovered from the respondent. Further neither the child was found from the jhuggi of the respondent nor was the respondent present at the spot when the child was recovered, in fact the child was playing with other children between a cluster of jhuggies, of which respondent's jhuggi was a part of. The testimony of the witnesses would further show that there is nothing on record to show that the jhuggi exclusively belonged to the respondent. The trial court has also considered the fact that merely because the child was playing outside the jhuggi of the respondent, the respondent in the absence of any other evidence cannot be convicted on this ground alone. We also examined the evidence of the witnesses and find that not even a single testimony of any witness such as any of the

neighbour, the jhuggi dwellers, the Pradhan of the village or any other member of the public with regard to the fact that the child was ever seen in the company of the respondent or that she was staying with the respondent except the testimony of the Sarpanch of the Village, who has testified that the brother and bhabhi of the respondent had told him that the respondent had brought his friend's child to the village. We may also notice that the statements of brother and bhabhi of the accused were neither recorded under the Section 161 of the Code of Criminal Procedure nor the said persons testified in Court.

9. Learned counsel for the State has submitted that the gestures of the child were interpreted by her chachi which point to the guilt of the respondent. As far as the evidence of the child witness, CW-1, is concerned, it may be noticed that PW-11, Dr.Paramjeet Singh, Assistant Professor Psychiatrist, IHBAS hospital, who appeared as a witness on behalf of Dr.Deepak Kumar, Vice-Chairman - Associated Professor and HOD Psychiatrist; Dr.U.K. Sinha, Member – Additional Professor of Clinical Psychology; Dr.Rajesh Kumar, Member – Associate Professor of Psychiatrist and Dr.Suman Khushwaha, Member – Associate Professor of Neurology, has testified that the report of the medical board, Ex.PW-11/A, bears the signatures of Dr.Deepak Kumar, Dr.U.K. Sinha, Dr.Rajesh Kumar and Dr.Suman Khushwaha at points A to D respectively. He has also testified that he had interacted with the patient (victim), when she was admitted in IHBAS for her assessment and he was well conversant with her history and assessment based on which report Ex.PW-11/A was given. He further deposed that the patient was suffering from severe mental retardation with seizure disorder, she cannot relate experiences or remember facts pertaining to her experiences including traumatic experiences and as per the opinion of

the medical board she was not a competent witness to depose before the Court. In the light of the testimony of PW-11 and taking into consideration that even in case by gestures and making sounds the victim had conveyed her experiences to her Mausi/Chachi, we find it unusual that the Mausi/Chachi did not ask the child to give her experiences at the first opportunity available.

10. In the light of the facts that the child was never in the company of the respondent; the victim not having been recovered from the jhuggi of the respondent; in the absence of any evidence to show that the respondent was exclusive owner of the jhuggi in question; in the absence of any independent witness with regard to the fact that victim was ever in the company of the respondent; in the light of the report of the IHBAS with regard to the mental capability of the victim, having regard to the fact that the child was found playing with other children amongst a cluster of jhuggis of which respondent's jhuggi was a part of; and having regard to the testimonies of PW-11, we are of the view that there is no infirmity in the judgement rendered by the learned trial court.
11. The Apex Court in the case of ***Ghurey Lal vs. 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.”

12. Having regard to the principles laid down by the Apex Court in the case of ***Ghurey Lal*** (supra), we do not find that there is any infirmity in the impugned judgment. Accordingly, no grounds are made out to interfere in the impugned judgment passed by learned trial court and the leave to appeal petition is dismissed.

G.S.SISTANI, J

SANGITA DHINGRA SEHGAL, J

MARCH 24, 2015 msr