



* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 17.11.2021

Date of decision: -01.02.2022

+ BAIL APPLN. 3215/2021

VISHAL TYAGI

..... Petitioner

Through: Ms. Priya Kumari, Mr.
Shubham Nagpal & Mr. K.S.
Yadav, Advocates.

Versus

STATE

..... Respondent

Through: Ms. Asha Tiwari, APP for State
with SI Satender Singh, PS
Burari.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J

1. The applicant vide the present application seeks the grant of bail in relation to FIR No.487/2017, Police Station Burari under Sections 366/354/354A/354B/376/506/392/411/323/341 of the Indian Penal Code, 1860 and Sections 4/8 of the POCSO Act, 2012 submitting inter alia to the effect that the applicant has been falsely implicated in the instant case; that there are contradictions and variations in the complaint made by the prosecutrix and her statement under Section



164 of the Cr.P.C., 1973 and her deposition before the Court which contradictions are material in nature; that the applicant has been incarcerated for more than two years.

2. Notice of the application was issued to the State and to the prosecutrix through the Investigating Officer of the case. The prosecutrix put in appearance through video conferencing on 28.9.2021 and stated that she has now become a graduate and is currently working in retail banking and in reply to a specific Court query as to whether she opposes the bail application of the applicant or not, submitted that she opposed the same.

3. During the course of submissions that were made on the bail application on 28/9/2021, the learned counsel for the applicant/petitioner submitted to the effect that the age of the petitioner on the date of the alleged commission of the offence was less than 18 years in as much as the progress report of the petitioner as issued by the Chhotu Ram Public School, Bakhtawarpur, Delhi, showed his date of birth to be 30.10.1999. The State in reply to a specific Court query stated that in Column No. 11A in the charge sheet, the age of the applicant had been put forth as 18 years and thus



vide order dated 28.9.2021 the Investigating Officer of the case was directed to make an endeavour to collect the birth certificate of the applicant and to verify the same from his school records and the Investigating Officer was also directed to conduct a verification in relation the progress report submitted by the petitioner. The State submitted the status report in relation to the progress report of the applicant.

4. The status report dated 05.10.2021 submitted under the signatures of Inspector Suresh Kumar, SHO Burari indicates to the effect that on verification of the alleged progress report of the applicant/accused Vishal Tyagi wherein his date of birth was mentioned as 30.10.1999, it was informed by the concerned school authorities that the said date of birth was a clerical mistake and that as per the undertaking declaring the date of birth of the applicant as given by his guardian Virender Singh, the real uncle of the applicant, the date of birth of birth of the applicant is 30.10.1998 which is also as per the school records and the copy of the age proof document supplied by the school were annexed with the status report.



5. The letter dated 01.10.2021 of the Principal of the Chhotu Ram Public School, Senior Secondary Bakhtawarpur, Delhi is categorical to the effect:-

“The date of birth mentioned as 30-10-99 in the Progress Report is a clerical mistake and cannot be relied upon without any other proof. The copies of following documents are enclosed herewith as evidence to establish the correctness of his date of birth as 30-10-1998:

1. Admission Form duly signed by the guardian on 10-04-2007.

2. An Undertaking given by the guardian at the time of admission on 10-04-2007 declaring date of birth of Vishal Tyagi as 30-10-1998.

3. Photocopy of Admission & Withdrawal Register.

4. Photocopy of School Leaving Certificate of Vishal Tyagi issued on 02-04-2011.”

6. The copy of the admission document form annexed to this letter from the Principal of the Chhotu Ram Public School, Senior Secondary Bakhtawarpur, Delhi also shows that the admission form dated 10.04.2007 also gives the date of birth of the child admitted Vishal Tyagi S/o Parveen Tyagi to be 30.10.1998. To similar effect is the date of birth of the applicant in the undertaking dated 10.04.2007 submitted by the Guardian of the applicant i.e. Mr.Virender. Further, the transfer/school leaving certificate dated 02.04.2011 which indicates that the applicant left the Chhotu Ram Public School, Senior



Secondary Bakhtawarpur, Delhi on 31.03.2011 whilst he had passed Standard VI and promotion had been granted to Class VII showed his date of birth to be 30.10.1998 according to the admission register.

7. In view of this status report dated 05.10.2021 submitted by the State, further submissions were addressed on behalf of the applicant by learned counsel for the applicant submitting to the effect that the date of birth of the applicant is in fact correctly recorded as 30.10.1999 i.e. in the progress report and placed reliance on a catena of verdicts and the rules framed under the Juvenile Justice (Care and Protection of Children) Act, 2000 as since amended.

8. Learned counsel for the applicant on 08.10.2021 also sought to place on record the birth certificate of the applicant after receiving it from the MCD and the same was allowed to be placed on record by the applicant with an affidavit of the authorized representative of the applicant before the next date of hearing.

9. On behalf of the applicant, however thereafter, the affidavit of his father Mr.Parveen Tyagi dated 22.10.2021 was submitted submitting to the effect that he did not have the birth certificate of his son, that he and his wife both have not received any formal education



and they are illiterate and that till the date 22.10.2021, he had not got his son's birth certificate issued from any competent authority and that the same could not be issued from the MCD without the physical presence of the applicant as the procedural formalities could not be completed as the applicant is in judicial custody since 03.09.2017.

10. The State was directed vide order dated 25.10.2021 to place on record the testimony of the prosecutrix recorded during trial. Vide the status report dated 22.10.2021, the State has placed on record the statement of the prosecutrix recorded in camera proceedings on oath dated 27.02.2019 and the continuation of the testimony recorded on 20.07.2019, 28.09.2019 and 21.12.2019.

11. Written submissions were submitted on behalf of the applicant on 15.11.2021 through which it was sought to be submitted on behalf of the applicant that there were inherent contradictions in the statement under Section 161 of the Cr.P.C. of the prosecutrix, her statement under Section 164 of the Cr.P.C. as well as her testimony before the Court, that there were contradictions also in the testimony of the mother of the prosecutrix from the prosecution version put forth, that there was no injury, no sign of semen ejaculation, the



hymen was intact and there was no urethral and rectal injury as per the MLC which negated the alleged commission of rape by the applicant on the prosecutrix.

12. It was further submitted on behalf of the applicant that the charges in the matter have been framed on 09.01.2018 and there are 34 witnesses cited by the prosecution of which only three (3) witnesses have been examined, that the case of the prosecution is full of patent absurdities, inherent infirmities, improbabilities and is highly doubtful and that the foundational facts in the instant case have not been proved beyond a reasonable doubt and that the applicant has been incarcerated since 03.09.2017 for more than 4 years and 3 months on a false accusation of the prosecutrix and her friend; that the trial would take a long time due to the present pandemic scenario, that the prosecutrix and all material witnesses have also been examined and all relevant material of the prosecution is on the record and there is no scope of the applicant tampering with the evidence or interfering in the trial or fleeing from justice. *Inter alia* it was submitted on behalf of the applicant that the applicant is only 22 years of age, and he deserves a chance to be out of prison to prepare his defence and to face the trial.



13. On behalf of the applicant, it was further reiterated that the applicant was a minor on the date of the alleged commission of the offence and that the prosecution had failed to take any step to determine the age of the applicant and was solely relying on the admission register of the school and that the date of birth of the applicant was entered on the basis of an undertaking given by the relative of the applicant which could not be relied upon and was not sufficient without any other age proof. *Inter alia* it was submitted on behalf of the applicant that it is common in our country to furnish the incorrect date of birth to the school authorities to secure admission.

14. The applicant has further submitted that the procedure laid down under Section 12(3) of the JJ Rules, 2007 for determining the age was not followed nor was any inquiry made from the parents to confirm his age and that no birth certificate of the applicant had been issued by any competent authority, in the absence of which, the benefit of doubt necessarily needs to be accorded to the applicant.

15. Reliance was placed on behalf of the applicant on the verdict of the Hon'ble Supreme Court in ***“Umesh Chandra Vs. State of Rajasthan” AIR 1982 SC 1057*** to contend to the effect that often



parents gave the incorrect date of birth to the school authorities to make up the age in order to secure admission for their children. *Inter alia* the applicant submits that in terms of the verdict of the Hon'ble Supreme Court in **"GOPI NATH GHOSE VS STATE OF W.B." (1984) Supp SC 228** and **"Hariram Vs. State of Rajasthan" (2009) 13 SCC 211**, it has been categorically laid down that the plea of juvenility can be raised at any stage and even after completion of trial.

16. On behalf of the State, this contention raised on behalf of the applicant claiming juvenility was vehemently opposed submitting to the effect that the date of birth of the applicant as per the school records through the letter dated 01.10.2021 of the Principal of the Chhotu Ram Public School, Senior Secondary Bakhtawarpur, Delhi where the applicant was admittedly admitted on 10.04.2007 on the basis of the admission form duly signed by his guardian Mr.Virender, indicated that it had been declared that his date of birth was **30.10.1998** and that the recording of his date of birth as being **30.10.1999 in the progress report of Class 5B of the applicant was clearly only a clerical mistake.**



17. In view of the claim of juvenility raised by the applicant, it is essential to determine the same at the outset before proceeding further.

18. In as much as, the offence is alleged to have been committed on 02.09.2017, it is the provision and procedure of the Juvenile Justice (Care and Protection of Children) Act, 2015 which came into force on 15.01.2016, which shall apply in the instant case.

19. Section 9(2) of the said enactment provides to the effect:-

“9. Procedure to be followed by a Magistrate who has not been empowered under this Act.—

(1)

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence, the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.”

and Section 94 of the said enactment provides to the effect:-



“94. Presumption and determination of age.—(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under Section 14 or Section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.”

20. The principles to examine the aspect of juvenility claimed on a cumulative consideration of a catena of verdicts have been detailed



vide paragraph 29 of the verdict of the Hon'ble Supreme Court in ***“Rishipal Singh Solanki Vs. State of Uttar Pradesh and others.”*** a judgment dated 18.11.2021 in CRL.A.1240/2021 which reads to the effect:-

“29. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

(i) A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

(ii) An application claiming juvenility could be made either before the Court or the JJ Board.

(iia) When the issue of juvenility arises before a Court, it would be under sub-section (2) and (3) of section 9 of the JJ Act, 2015 but when a person is brought before a Committee or JJ Board, section 94 of the JJ Act, 2015 applies.

(iib) If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

(iic) When an application claiming juvenility is made under section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated under section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding



whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide section 9 of the JJ Act, 2015).

(iii) That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

(iv) The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

(v) That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of section 94 of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the



determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

(vii) This Court has observed that a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

(viii) If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

(ix) That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

(x) Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions.

(xi) Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age



of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015.”

21. The said principles when applied to the instant case, make it apparent that the school records of the Chhotu Ram Public School, Senior Secondary Bakhtawarpur, Delhi i.e. the admission form signed by the guardian of the applicant, the undertaking given by the guardian of the applicant at the time of admission on 10.04.2007, the photocopy of admission and withdrawal register of the applicant's school, the school leaving certificate of the applicant, all make it apparent that even though there is no matriculation certificate issued by the school nor is there a birth certificate from any competent authority on the record, the school records of the school where the applicant studied, clearly bring forth his date of birth to be 30.10.1998 and where the Principal of the school of the applicant where the applicant had studied has categorically stated to the effect that the date of birth mentioned in the progress report of the applicant of Standard 5B as 30.10.1999 is clearly a clerical mistake and that the correct date of birth of the applicant is 30.10.1998, there is no ostensible reason to



disbelieve the same and in the circumstances no ossification test of the applicant is required to be conducted to ascertain his age.

22. Merely because the admission of the applicant was got done on the basis of the declaration and undertaking given by the uncle of the applicant, is no ground to disbelieve the same specially when the parents of the applicant are illiterate as has been submitted through the affidavit of Mr.Parveen Tyagi, the father of the applicant. The date of birth of the applicant in the instant case is thus, held to be 30.10.1998 and the date of the alleged commission of the offence in the instant case being 02.09.2017 and thus, the claim of juvenility raised in the instant case is rejected as there is no reason to disbelieve the records produced by the Chhotu Ram Public School, Senior Secondary Bakhtawarpur, Delhi where the applicant studied, in as much as they have been maintained in the ordinary course of business to which there is a presumption raised of these being correct in terms of Section 35 of the Indian Evidence Act, 1872.

23. Through the FIR lodged on the complaint of the prosecutrix who at that time was 17 years of age on the date 02.09.2017, it was stated to the effect that on that date she along with her friend Akash



was going on the scooty of Akash Verma on the Pushta Road and whilst they were roaming, they reached at the Jeevan Jyoti Church and were standing over there and were talking and in the meantime, at 7 .30 PM, a boy of 18-20 years of age, came along with his Bullet Motor Cycle, whose last number was 1422, and he came close to them and started abusing Akash and on coming took out the keys of their scooty and scared them and made them sit on his motorcycle and took them directly to the fields at a lonely place and at that place, the said person made the prosecutrix get down and went away with Akash Vajpayee. The prosecutrix stated through her complaint that she had become very nervous and frightened and was not able to understand as to where she had to go and then the person came back to her and started beating her and he dragged her inside the room constructed within the fields and forcibly committed a wrong act with her and on her resistance he kept beating her regularly and after committing the wrong act, he started saying that she would not return back alive from there and that he would kill her and then he left her there and went away. Through this FIR, it was further stated by the prosecutrix that with great difficulty she came outside on to the road, where she met a



man and sought help from him and in the meantime her three friends came over there, who were Akash Verma, Jatin and Ashish and they all took her to her house and she informed the entire episode to her mother, who took her to the hospital, where she was got treated. The prosecutrix through the FIR had stated that she would recognize that boy, if brought before her.

24. As per the FIR that has been registered, SI Alina Minz, PS Burari on receipt of DD No.3A dated 03.09.2017 had gone along with Constable Sachin 2747/N to the Ganga Ram Hospital where she had obtained the MLC of the prosecutrix on which it was recorded by the doctor ‘alleged history of physical assault at the above mentioned time and place as narrated by the patient herself’ and in as much as the sexual assault evidence collection kit was not available with the Ganga Ram Hospital, the prosecutrix was referred to the Lady Harding Medical College where doctor mentioned “no marks of injury, hymen intact, no internal injury.”

25. The counselling of the victim was conducted thereafter by the DCW Member and in view of her statement and report obtained, the FIR was thereafter registered as per the statement, the circumstances



of the case and the MLC, under Sections 363/376/323/341/392/506 of the Indian Penal Code, 1860 and Section 8 of the POCSO Act, 2012.

26. Through her statement under Section 164 of the Cr.P.C., 1973, the prosecutrix had stated to the effect:-

"My name is 'A', my age is 17 years, I am studying through Correspondence, B.Com. Presently I am in 1st year. In my family, there are my mother and father and a younger brother. My father is doing private job and my mother is housewife. My brother studies in 11th standard. In the evening of 02.09.2017 at about 6.30-7 .00 PM, I was going to the house of my nearby friend. In the meantime, in the way, my friend Akash met me. He was on his scooty, as such, we normally went for roaming through his scooty. Our scooty was running slowly, in the meantime, a boy came on his Bullet Motorcycle and he stopped his bullet in front of our scooty. I do not know that boy. I had never seen him before. That boy started hurling abuses to us. He took out the keys of the scooty and said to accompany him to the police station. That boy had taken the mobilephone of mine and that of Akash also. Akash objected him that we will not accompany him, but he gave beating to Akash. Thereafter, he told us to sit on his Bullet for going to Police Station. Then he forcibly, by threatening us, got us sittted on the bullet and took us to a lonely place. I don't know as to which was that place, there was only Jungle around us. Thereafter he stopped the bullet at a lonely place. and started abusing us. Aakash told him to go for police station, as you were taking us to police station. Then, the said boy gave beating to both of us. Then he left me and took Akash with him, by saying that he was taking him to police station. Then after 10-15 minutes, the said boy of Bullet returned back and told me that he had killed Akash and now he will kill me also. I was crying, then he



closed my mouth and thrown me down on earth and squeezed my throat. He squeezed my throat with force for long time. Initially I was throwing my hand and legs, but thereafter my strength started loosing. There was a room nearby to it and then the said boy dragged me to that room and he started misbehaving with me and started touching on my body. I was trying to save myself upon which he gave me merciless beating to me. He slapped me, with the result, my face stuck against the stone, due to which I sustained multiple injuries. The he forcibly started getting down my clothes and his clothes and after getting down my all clothes he laid down me there in the room and he started touching me everywhere. He laid upon me and he inserted his organ of toilet into my organ of toilet. Then he pressed my throat and stated that you will be killed here itself. I was not having any consciousness, I became unconscious. When I regained consciousness, the said boy was not there. Thereafter I dressed myself and tried to come out. Then after coming out therefrom I came out on road. I was feeling difficulty in walking, I was getting giddiness. With great difficulty I came outside, where an uncle met me, who on seeing me, stopped his bike and asked me as to what happened. I was very much terrified. I requested the said uncle for dropping me to my house. In the meantime, my three school friends Akash Verma, Jatin and Ashish were passing through their Scooty from that place. They took me to my house. (This is Akash Verma while the earlier friend was Akash, both of them are separate persons). On reaching home, I informed everything to my mother. I do not want to say anything more."

27. Through her statement before the learned Trial Court, the prosecutrix who was examined as PW-2 in her testimony dated 27.02.2019 had stated to the effect:-

“



.....

Q.1 Can you tell what had happened with you?

Ans. On 2 09.2017 at about 6.30/7 PM I was going to friend's home and on the way I met my school friend Aakash some distance away from my home. He was having scooty and I and he started roaming on the scooty and reached at 'Pushta' near Baba Colony. The scooty was being driven by Aakash slowly then at about 7.30 PM Vishal came on Bullet and stopped his bullet in front of our scooty. He raised objection against our roaming on the scooty and threatened that that he would take them to the police. The number of the bullet might be 2214, however, I do not exactly remember the same. Aakash has raised the objection saying that we did not know him. However, he started threatening me that he would call some persons and would take them to the police. He had also snatched our mobile phones. Thereafter he told that he would take us to the police and I and Aakash set on his bullet. He has snatched the key of the scooty. Thereafter he took us into the 'Jungle' towards the side of Hiranki village and stopped the bullet at some place and he started quarreling with Aakash. When I said something to Vishal, he slapped me. He was calling some persons with their name but no body came. Vishal left me there and took Aakash by stating that he was taking him to the police. Thereafter he stated that he would bring Aakash back in 5-10 minutes. Thereafter he came after 10-15 minutes by some other side and told me that he had killed Aakash. Thereafter he dragged me by my legs towards a room. While dragging me towards the stairs, my head stroked with a stone I suffered a cut on my lips. He took me inside the room and forcefully trying to rape me. Thereafter he gave me beatings several times and also throttled me.

Q.2. What else was done by accused Vishal?

Ans. He attempted to kill me and also attempted to rape me.

Q.3. What happened thereafter?



Ans. He throttled me by neck and I felt unconscious and he went from there. When I regained consciousness I tried to leave the said place, however, I was not knowing the ways to come out of the said place. Thereafter I reached a road where I met with an uncle and asked him to leave me at my home. The said uncle asked me what happened with me. Thereafter, I saw my school friends on scooty and they brought me to my home.

Q4: Can you tell the number and names of friends you have seen?

Ans. They were three in number and their names are Jatin Rawat, Aakash Verma and Ashish. Ashish is not my classmate. Ashish is my bhaiya, who resides near my house.

Q5: What happened thereafter?

Ans. Thereafter, when I reached my house along with my friends, my mother took me to hospital. However, the said hospital refused to admit me. Then, my cousin took me to Ganga Ram Hospital where I was treated medically. There my cousin might have complained to the police and thereafter, police reached there.

Q6: What did police do thereafter?

Ans. Police recorded my statement which was signed by me.

At this stage, complaint is shown to the witness and asked to identify her signatures which she identifies at point A on the complaint which is now marked as Ex. PW2/A.

Q7: What did police do thereafter?

Ans. Police after recording my statement, also recorded the statements of other persons namely Jatin Rawat, Aakash Verma and Ashish. However their statements were not recorded in my presence. Thereafter, I along with my mother and Bua was taken by the police at about 5-6 AM on 03.09.2017 to the spot. Police seized the bullet of Vishal and thereafter, took my friend Aakash on round and thereafter,



police arrested Vishal. Thereafter I do not know what did the police do.

Q8: *Whether you were taken by the police to any other place?*

Ans. *The police had not taken me anywhere else.*

Q9: *What did doctors do with you at the time of your medical examination?*

Ans. *They had conducted various tests and also had done dressing on my injuries.*

Q10: *Were you produced before any Magistrate?*

Ans. *Yes. I was produced before one Judge and my statement was recorded by the Magistrate and I signed on the said statement. At this stage, one envelope is taken out from the court file which is sealed with seal of 'RN'. On opening the same the statement of witness u/s 164 Cr.PC is taken out and shown to her on which she identifies her signatures at points A. The said statement is Ex.PW2/B.*

Q11: *Can you tell the make of your mobile phone and mobile phone of Aakash?*

Ans. *My mobile phone was of Lenovo. However, I do not know the make of mobile phone of Aakash.*

Q12: *Can you identify accused Vishal on seeing him?*

Ans. *Yes. I can identify him.*

At this stage, the window of room where the accused Vishal is sitting is slided. The camera is focused on accused Vishal and witness has correctly identified him.

Q13: *Can you tell from where have you purchased your mobile phone?*

Ans. *I purchased the said mobile online.*

Q14: *Can you produce the original bill of the mobile phone?*



Ans. Yes. Police had also taken the photocopy of the bill of mobile phone.

At this stage, witness is shown the seizure memo of bill of said mobile phone and asked to identify her signatures on the same. She has identify her signatures on the seizure memo at point A. The said seizure memo is now Ex. PW2/C. The photocopy of bill of mobile phone has also been identified by the witness and the same is now Ex. PW2/D. [Genuineness of the said bill is not disputed by Ld. Defense Counsel].

.....”

28. The testimony of the prosecutrix dated 20.07.2019 before the learned ASJ-05 (Central), THC, Delhi reads to the effect:-

“

.....

Q3A: *Did you visit the place of occurrence with the IO on 03.09.2017?*

Ans. Yes.

Q4 : *What proceedings were conducted there ?*

Ans. I had pointed out the place of occurrence and had shown the room to the IO. At that time, my one chappal was also found lying there. I do not know as to what happened with the said chappal. I was not made to sign on any paper by the IO at that time.

Q.5 *Did you identify the accused before the police, if so on which date?*

Ans. I was not shown the accused by the police on any date.

At this stage, Ld. APP for State submits that she wants to cross-examine the witness as she is resiling from her previous statements.



Heard. Allowed.

XXX By Ld. APP for State.

Q.A. Did the accused commit rape upon you on the day of incident?

Ans. Yes, he committed rape upon me on the day of incident.

Q.B On the previous date of hearing you deposed that accused forcefully tried to rape you and today you are deposing that he committed rape upon you. Which of the aforesaid statements is true?

Ans. My today's statement is correct. I could not understand the difference between the rape and attempt to rape on the previous date of hearing.

Q-C Did IO record your statement on 03.09.2017 ?

Ans. I do not remember. However , my statement was recorded by the IO.

Q.D Can you tell if you mentioned in your statement that IO had prepared the site plan of the place of occurrence and got it inspected by crime team.

Ans. Yes, I have mentioned so.

Q.E I put it to you that in your statement you had also stated that on your pointing out IO had seized your chappal and got your signature on the seizure memo. What do you have to say?

Ans. I do not remember.

Q.F Why you have stated in your examination in chief that the registration number of bullet motorcycle might be 2214 but the photographs the registration number of the motorcycle is 1422.



Ans. The motorcycle shown in the photograph is the same motorcycle used by the accused at the time of incident. On the previous date of hearing, I was sure about the digits of the registration number of motorcycle, however I was not sure about the sequence of the same.

At this stage, it is submitted by Ld. APP that the mobile phone of the victim and her chappal are to be shown to the witness for their identification.

Further examination of chief is deferred as MHC(M) has not produced the complete case property."

29. The continuation of cross-examination of the prosecutrix as conducted on behalf of the applicant/ accused before the learned Trial Court dated 21.12.2019 reads to the effect:-

“

.....

Q. In your complaint Ex.PW2/A, you have stated that "02.09.2017, apne dost Aakash Vajpai ke sath Aakash Verma ki scooty laykar Burari pushta road par jarahe the ghumte ghumte jeewan jyoti chruch ke samane baatchit karne lage isi dauran 07:30 pm par ek ladka umar karib 19-20 saal apni bullet motorcycle jiska akehari number 1422 tha hum dono ke pass aaya aur Aakash se galigaloch karne laga. Usne aate hi humari scooty ki chabi nikali aur hum dono ke mobile chhin liye" while in your statement u/s 164 Cr.P.C., you have stated that "02.09.2017 ko shyamko karib 06:30-07:00 ke karib pass mein rahnewali apni friend ke ghar jarahi thi tabi raste mein mujhe mera friend akash mil gaya. Uske pass scooty thi to hum aise hi scooty par gumne chalay gaye. Humari scooty dheere dheere chal rahi thi tabi vha ek ladka apni bullet motorcycle par aaya aur usne apni bullet humari scooty ke aage rokdi". Which of your statement is correct?



Ans. My second statement recorded u/s 164 Cr.P.C is correct.

Q. Can you tell at whose instance, you gave your first statement in Ex.PW2/A?

Ans. On my own.

Q. Can you tell at whose instance, you gave your second statement in Ex.PW2/B?

Ans. On my own.

Q. Can you tell as to whether you told the Doctor at the time of your medical examination at Lady Harding Hospital (Ld. Defence has referred to the MLC of LHMC OPD card and the same is marked as Mark IA) that you went to a friend place (Aakash) on scooty and he dropped you on the way and left. Then he came back with another unknown person who assaulted you at 08:30 pm?

Ans. I do not remember.

Q. I put it to you that no such incident has ever happened that is why you gave three different statement at three different occasions?

Ans. It is incorrect.

Q. For how long did you stay in front of chruch?

Ans. I stayed there for about 10-15 minutes.

Q. Is it correct that there are shops near the chruch and people roam around the area?

Ans. There were no shops near the said chruch, however, people used to roam round.

Q. Had you made hue and cry at the time the key of the scooty and mobile phones were snatched?

Ans. No.



Q. I put it to you that you had not made hue and cry as no such incident took place?

Ans. It is incorrect.

Q. Is it correct that at the time motorcycle of accused came in front of your scooty had hit the motorcycle of the accused and a quarrel took place between you and Aakash with the accused?

Ans. It is incorrect.

Q. I put it to you that you lodged a false case as you and Aakash have received injuries during the quarrel?

Ans. It is incorrect.

Q. Who accompanied you at the time you made your statement Ex.PW2/A to the police?

Ans. I and my bua were there.

Q. Was Aakash with you at that time?

Ans. No.

Q. For how long you remained at jungle before return of accused?

Ans. 10-15 minutes.

Q. Did you try to run away from the jungle during the said period?

Ans. I remained standing there as I was not knowing the way to come out from the jungle.

Q. After how much time of reaching in the jungle, Aakash and his friend came to the jungle?

Ans. Aakash Verma did not reach there. However, Aakash Verma and his two friends came there after half an hour of my reaching to jungle.



Q. Whether your bua who was with you at the time of recording of your statement Ex.PW2/A is employed in Ganga Ram Hospital?

Ans. The friend of my brother is employed in Ganga Ram Hospital.

Q. I put it to you that you lodged a false case and due to this reason your medical document do not support your version?

Ans. It is incorrect.”

30. Through the submissions that have been made on behalf of the applicant, it has been submitted that there are variations in relation to the time and place of the incident as contended through the written submissions to the effect that in the complaint, the complainant/prosecutrix had mentioned that the applicant had abused her and her friend in front of the "Jeevan Jyoti" church at 7.30 PM and in her statement u/s 161 of the Cr.P.C also she had stated the same thing but no time was mentioned but that in her statement u/s 164 of the Cr.P.C., 1973, there was no mention of any "Church" as place of incident. The applicant has further submitted through his written submissions that the complainant had also stated that when she was roaming with her friend on a scooty, he, the applicant herein stopped them and started abusing them for no reason which was suspicious as



they had no previous acquaintance with the applicant and she has further stated in her alleged history of offence narrated to the medical examiner of the Lady Harding Hospital that "she went to a friend's place with friend Akash on scooty who dropped her on the way and came back with another unknown person who assaulted her" which was in complete contradiction with her prior statements. The applicant has further submitted through his written submissions that the mother of the prosecutrix had deposed in her chief and cross examination that the prosecutrix went to a friend named Ananya's birthday party of which there was no mention by the prosecutrix, and submitted that it was also pertinent to note that she went to a birthday party wearing Pajama- T-shirt and Chappal.

31. It has further been submitted on behalf of the petitioner that there was no eye witness put forth, no alarm raised for any help nor any attempt to run or to resist made by the prosecutrix which made the entire prosecution version wholly improbable. *Inter alia* it has been submitted on behalf of the petitioner that there is a discrepancy in the examination in chief of the prosecutrix, wherein she stated on 27.02.2019, that the applicant was forcibly trying to rape her and that



she also stated on that date that the applicant had attempted to kill her and attempted to rape her and at that time the prosecutrix was studying in B.Com, 2nd year and it was difficult to accept that she did not know the difference between rape and attempt to rape and that it is only subsequently that she stated that she had been raped by the applicant herein.

32. It has further been submitted on behalf of the applicant/petitioner that there is a variation in relation to the aspect of the snatching of the mobile phone of the prosecutrix and her friends by the applicant, in as much as, the mother of the prosecutrix had stated that when the prosecutrix returned home, she had her mobile phone with her. *Inter alia*, on behalf of the applicant, it has been submitted that there are contradictions qua the time and alleged incident to the knowledge of the prosecutrix and that the MLC of the prosecutrix does not bring forth any injury or any sign of semen ejaculation or any urethral and rectal injury on the complainant and her hymen was found to be intact.

33. On behalf of the State, the learned APP for the State has vehemently opposed the prayer made by the applicant submitting to



the effect that the variations in the testimony of the prosecutrix and the statement under Section 164 of the Cr.P.C., 1973 and the FIR, are not in relation to material particulars and the said variations do not detract from the allegations levelled against the petitioner of the alleged commission of rape on the prosecutrix. It has thus been submitted on behalf of the State that the prosecutrix was a minor at the time of the alleged commission of the offence and that there is no ground whatsoever that the applicant be released on bail.

34. *Inter alia* the State has placed reliance on the FSL result dated 09.02.2018 and the DNA Analysis made and the conclusion drawn therein which reads to the effect:-

“Results of DNA analysis

- 1. Female DNA profile generated from source of exhibits '1j1', '1j2', '1j3' & '1k' (Blood stains from microslides/swabs of victim) and '2b' (Blood stains from shirt of victim).*
- 2. Male DNA profile was generated from source of exhibits '1j1', '1j2', '1j3' & '1k' (Semen stains from microslides/swabs of victim), '1m' (Washing from Vagina of victim), '2a' (Pajama of victim), '2b' (Semen stains from Shirt of victim) & '4c' (Underwear of accused).*
- 3. DNA profile was generated from the source of exhibits '1p1' (Blood sample of victim & '3' (Blood sample of accused).*

Conclusion :- DNA profiling (STR analysis) performed on the source of exhibits '1j1', '1j2', '1j3', '1k', '1m' '1p1',



'2a', '3' & '4c' is sufficient to conclude that DNA profile generated from the source of exhibit '3' (Blood sample of accused) is similar with the DNA profile generated from the source of exhibit '1j1', '1j2', '1j3' & (Semen stains from microslides/swabs of victim), '1m' (Washing from vagina of victim), '2a' (Pajama of victim), '2b' (Semen stainss from Shirt of victim) & '4c' (Underwear of accused).

Also, DNA profile generated from the source of exhibit '1p1' (Blood sample of victim) is similar with the DNA profile generated from the source of exhibits '1j1', '1j2', '1j3' & '1k' (Blood stains from microslides/swabs of victim) and '2b' (Blood stains from shirt of victim)."

35. Without any observations on the merits or demerits of the trial that is in progress, taking into account that the prosecutrix is consistent in relation to the alleged commission of rape on her by the applicant, coupled with the factum that the prosecutrix was a minor at the time of the alleged commission of the offence, taking also into account the result of the DNA Analysis of the semen stains from the microslides/swabs of the prosecutrix and the washes from the vagina of the prosecutrix and the pajama of the prosecutrix as well as the semen stains from the shirt of the victim and underwear of the accused with similar DNA profile, with also a similar DNA profile generated from the blood sample of the accused, in the facts and circumstances



of the instant case, this Court is of the considered view that there is no ground whatsoever for grant of bail to the applicant.

36. The BAIL APPL. No.3215/2021 is declined.

ANU MALHOTRA, J.

FEBRUARY 01, 2022

NC

