

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

% *Date of Judgment :21.07.2015*

+ CRL.REV.P. 266/2014 & Crl. M.A. No.7352/2014
STATE NCT OF DELHI

..... Petitioner

Through Ms. Aashaa Tiwari, APP for the
State.

versus

UMESH

..... Respondent

Through None.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 This revision petition is directed against the impugned order dated 25.10.2013 wherein the respondent stood discharged.

2 Charge-sheet had been filed under Sections 363/376 of the IPC as also Section 4 of the Protection of Children from Sexual Offences Act, 2012 (in short POCSO Act'). At the stage of hearing arguments on charges, the Court noting the evidence collected by the prosecution, noting the version of the prosecutrix recorded under Sections 161 & 164 of the Cr.PC had noted that not even a prima-facie case is made out against the accused. He accordingly stood discharged.

3 The relevant extract of the impugned order reads herein as under:-

“During the course of investigation, child victim was recovered and her statement under Section 164 Cr.P.C. was recorded wherein she has stated that she had voluntarily gone out of the lawful guardianship of her parents and thereafter, she had met the accused and got married with him. It is further submitted that in the said statement, child victim has given reason for leaving her parents as being beaten by her parents regularly. It is further submitted by counsel for accused that even statement recorded of witnesses under Section 161 Cr.P.C, there is no prima facie material to frame charge against accused. Accordingly, it is prayed that accused be discharged in this case.

Ld. Addl. PP has opposed the plea of discharge of accused on the ground, that there is sufficient material on record to frame charge against accused.

I have considered the rival submission of counsel for accused and Ld. Addl. PP for state and have perused the record.

In the statement of child victim under Section 164 Cr.P.C, there is no allegation against present accused of taking her away by enticement from the lawful guardianship of her father. Even the allegations of sexual relations are missing in her statement under Section 164 Cr.P.C. Further, as per statement of child victim recorded under Section 161 Cr.P.C, whatever sexual relations were established by accused with her, they were pursuant to marriage. Further, as per statement of one independent witness Rahila under Section 161 Cr.P.C, she had found child victim near Shyam Mandir on 04.07.2013 and since she was hungry, she had brought her to her house where she had met the present accused and thereafter, present accused and child victim started living together.

In these circumstances, having regard to the statement of child victim under Section 164 Cr.P.C, under Section 161 Cr.P.C. and statement of Rahila under

Section 161 Cr.P.C, prima facie there is no allegation on record to show that accused had kidnapped the child victim out of lawful guardianship of her parents.

Further, there is also no material on record to show that accused committed rape upon child victim as it has come on record that whatever sexual relations were developed between child victim and accused were pursuant to marriage.

In the facts, accused stands discharged for the offence under Section 363/376 IPC and under Section 4 of POCSO Act, 2012. ”

4 Learned Public Prosecutor points out that there is patent error in this order as the victim was a minor and in this view of the matter, there could have been no consent in the eye of the law. To support this submission, reliance has been placed upon a judgment of the Apex Court reported as 193 (2012) DLT 619 Court on its own motion (Lajja Devi); Laxmi Devi & Anr; Devender @ Babli Vs. State wherein the Court had noted that the law itself envisages that the consent of a minor cannot be termed as a valid consent.

5 The statement of the victim recorded under Sections 161 & 164 of the Cr.PC de-hors the argument on age of the victim clearly establish that the victim on her own had accompanied the accused. She had not been removed from her lawful guardianship. She had married the accused. She had established physical relations with him on her own.

She had lived with him voluntarily. Her reason for leaving the home was that her parents used to beat her.

6 The first question put to the learned Public Prosecutor is about the evidence which the prosecution has collected about the age of the victim. The charge-sheet shows that there were 15 witnesses which had been cited of whom witness No. 6 namely Indu Yadav, Principal of Nagar Nigam Primary School, Dwarka was the relevant witness qua the age proof. The document relied upon by the prosecution was the admission and withdrawal register of Nagar Nigam Vidyalaya reflecting that the victim 'P's date of birth was 08.10.2001.

7 The Juvenile Justice (Care and Protection of Children) Act, 2000 has laid down the guidelines to arrive at a finding about the age of a juvenile. These are contained in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007. The procedure to be followed in the determination of the age is contained therein. The Supreme Court in 2013 11 SCC 637 Mahadeo Vs. State of Maharashtra & Anr. has held that this procedure will also apply for determination of age of a rape victim. Rule 12 (3) clearly states that the age inquiry would be

conducted by the Court by obtaining matriculation or equivalent certificate in the absence of which the date of birth certificate from the school first attended or the next option being the birth certificate issued by the municipal authorities be obtained. Documents relied upon by the prosecution to establish that the victim was born on 08.10.2001 does not fit into any of the aforementioned category. In such an anomaly, Rule 12 states that a Medical Board will be constituted to determine the age of a victim. This would only be a relevant fact and needless to state, would not be a conclusive evidence about the age of the victim.

8 The police file has also been perused by this Court. The seizure memo about the age of the victim shows that the date of 08.10.2001 is mentioned. It merely records the date of birth of the victim 'P' of the year 2001. This is based on the Adhar Card of the victim. This is in addition to the document discussed supra. In her statement under Section 164 of the Cr.Pc, the prosecutrix has given her age as 15 years. She has reiterated this on a specific query put to her about her age.

9 It was in these circumstances that the impugned order was passed. It is based on the cogent evidence collected by the prosecution. The

stand of the prosecution that the victim was a minor and aged 12 years is not established by the documents relied upon by the prosecution. In terms of Rule 12 if the first three parameters contained in Rule 12 (3) are not made available, the next step would be to subject the victim to an ossification test. This as noted supra would not be the conclusive piece of evidence. This has to be coupled with the fact that the victim in her statement recorded under Section 164 of the Cr.PC has clearly stated that she was 15 years of age on the date of the incident. This is clearly a case where even if the accused is put to trial, the result is already pre-known; it would result in an acquittal. This is clear in view of the statement given by the victim, both under Sections 161 & 164 of the Cr.PC coupled with the fact that there is no conclusive proof with the prosecution about the victim being a minor. This Court is of the view that the order suffers from no infirmity.

10 Revision petition is without any merit. Dismissed.

INDERMEET KAUR, J

JULY 21, 2015

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