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

+ CRL.L.P. 461/2015

% ***Judgment dated 27.05.2015***

STATE

..... Petitioner

Through : Mr.Sunil Sharma, APP for the State.

versus

MUKESH

..... 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. 8120/2015.**

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

**CRL.M.A. 8121/2015.**

3. This is an application filed by appellant/State seeking condonation of 48 days' delay in filing the present leave to appeal petition.
4. Having regard to the submissions made and in the interest of justice, present application is allowed. Delay in filing the present leave to appeal petition is condoned. Let leave to appeal petition be taken on record.
5. Application stands disposed of.

**CRL.L.P. 461/2015**

6. Present leave to appeal petition has been filed by petitioner/State under Section 378(1) of the Code of Criminal Procedure seeking to assail the judgment dated 12.12.2014 passed by learned Additional Sessions Judge (North-West)-01, by which the respondent herein has been acquitted of the charges framed under Sections 363/366-A/376/506 IPC and Section

4 of POCSO Act with respect to FIR No.171/2013 registered at Police Station Aman Vihar.

7. Learned counsel for the petitioner/State submits that the judgment passed by learned trial court is bad in law. The trial court has failed to take into consideration the age certificate produced by the school teacher. Counsel further submits that the trial court has also failed to rely on the evidence of PW-8, the victim, who had narrated the incident in great detail. Counsel further contends that the victim was apprehended by her Chachi (aunt) at the Patna Railway Station and thereafter taken to the hospital for medical examination. It is further submitted that in the statements recorded under Sections 161 and 164 of the Code of Criminal Procedure the victim was consistent that the respondent had allured her and after kidnapping her raped her under the promise of marriage.
8. In this case, as per the case of the prosecution, since the victim was missing from her house from 26.4.2013 the matter was reported to the Police vide DD No.55-A dated 26.4.2013, wherein it was recorded that “*H.No. 384, Gali No.11, Phase III, Prem Nagar, Kirari, Padosi Ka ladka ladki ko bhagakar le gaya hai*”. DD No.55-A was assigned to PW-16, SI Bhupesh, who reached house no.384 and met complainant, Bharat Pandit, and recorded his statement Ex.PW-9/A, wherein the complainant alleged that accused Mukesh, his neighbour, has enticed and kidnapped, his daughter, aged about 16 years. On the basis of the said complaint, Ex.-PW-9/A, a case under Section 363 of the Indian Penal Code was registered against the respondent and investigation was assigned to SI Bhupesh. During the course of investigation, SI Bhupesh learnt that the appellant was taken by the prosecutrix to his village in Bihar via train. On receiving this information, SI Bhupesh reached GRP Patna Junction, Bihar, along with Constable Naveen and apprehended the appellant and

the prosecutrix with the help of Smt.Sunita, chachi (aunt) of the prosecutrix. The appellant was arrested. Thereafter the appellant and the prosecutrix were brought to Delhi and they were medically examined. The victim refused her gynaecological examination. The Investigation Officer recorded the statement of the victim under Section 164 of the Code of Criminal Procedure and thereafter produced her before the concerned CWC for counselling. Thereafter the victim was handed over to her parents. Provisions of Section 376 of the Indian Penal Code were invoked by the Investigation Officer. During the course of investigation, the Investigation Officer obtained the age proof of the victim from her school as per particulars given by her parents. In the school records, the date of birth of the victim was found to be mentioned as 9.7.2013 and thus provisions of POCSO Act were added. On 9.7.2013 the Investigation Officer got the respondent medically examined again with the permission of the concerned court for obtaining regarding his sexual potency. After completing investigation, the Investigation Officer prepared the charge sheet and filed the same in the trial court.

9. We have heard learned counsel for the State and carefully examined the judgment passed by learned trial court and the testimonies of the witnesses. The trial court in the impugned judgment has held that a doubt has been created regarding the age of the prosecutrix.
10. Having perused the testimonies, we find that PW-2, Ms.Seema Rani, the school teacher, had produced record from Nigam Pratibha Balika Vidhyalaya, Prem Nagar-1, (First Shift), Kirari, Delhi, where the victim was admitted in Class I and proved copies of admission form, affidavit submitted by the mother of the child, original certificate issued by Principal of the school and relevant entry in admission register qua the victim, being Exhibits PW-2/A to PW-2/D, respectively, but it has not

been proved that the school certificate was based on a formal birth certificate. In fact, during cross-examination this witness has admitted that no independent enquiry was conducted by the school to verify whether the date of birth of the victim was correct or not. The school certificate was prepared on the estimated age given by the parents of the victim. It may also be noticed that in her testimony, PW-6, Smt.Sunita, mother of the victim, has testified the age of the victim to be 16 years on the date of offence.

11. During cross-examination, PW-6, mother of the prosecutrix, has shown her lack of knowledge about age, at which she had got prosecutrix admitted in school. This witness has further testified that she had not got the date of birth of the prosecutrix registered with MCD and she did not give any birth certificate of prosecutrix to the Police. She has admitted that she herself had got the prosecutrix admitted in school and that she had mentioned the date of birth of prosecutrix by approximation at the time of her admission in the school. She has also showed her lack of knowledge about the date of birth of her two elder daughters, who were born in village, and stated that she only remembered the date of birth of her youngest daughter, who was born on 25.5.2005 and there was a difference of two years each between her daughters. She admitted that accused was residing in premises opposite to her house and she had caught the prosecutrix speaking to the accused on one occasion prior to the present case. She has also testified that she came to know after prosecutrix went missing that she used to meet accused and they used to go out together. This witness has denied that her daughter was having an affair with the accused or that her daughter had voluntarily left her house to marry the accused or that she was above 18 years of age at the time of incident.

12. The testimony of the prosecution witness, PW-8, has been examined by the trial court as under:

*“The victim was examined as PW-8. She deposed that she knew accused Mukesh as he was residing in her neighbourhood and that accused used to give smiles to her as she went to and fro from her home to school and that when, she asked about the reason of his smiling at her, accused told her that he loved PW-8. The PW-8 further deposed that after some time, accused brought a mobile phone for her and that she used to talk to him on the said mobile phone. The PW-8 further deposed that later on, when wife of accused namely Kajal came to live with him, she (PW-8) came to know that the accused was already married and that accused promised to marry PW-8 and to leave his wife Kajal. The PW-8 also stated that both her parents were working in factories and that sometimes accused used to come to her house, in the absence of her family members and that at that time, accused not only talked to her, but also touched her body parts and that one such occasion i.e. four/five months prior to 26.04.2013, accused committed rape upon her forcibly. The PW-8 has further deposed that on 26.04.2013, accused took her along with him to Patna in a train, on the pretext of marrying her, and that at the Patna Railway Station, her paternal aunty (chachi)/PW-17 Sunita saw her and apprehended her (victim) as well as the accused and produced them before Patna Police, at the Railway Station. She further deposed that thereafter, police officials from Delhi also reached there and prepared some documents regarding her recovery. The witness proved her signatures on the recovery memo Ex.PW-4/C.*

*PW-8 further testified that thereafter, the accused was arrested and that she as well as accused were brought back to Delhi by Delhi Police. She then deposed that she was taken to SGM Hospital for her medical examination and that her mother had also accompanied her for the same and that the PW-8 refused for her gynaecological examination vide her statement recorded on the MLC Ex. PW-8/A. PW-8 further deposed about giving her statement u/s 164 Cr.P.C. to learned M.M. and proved the same as Ex. PW-7/A. She also deposed that she had not disclosed about the factum of physical relation between her and the accused either to the Police or to the Doctor, since at that time accused had*

*threatened her not to disclose about this fact to any one and that she (PW-8) got opportunity to state this fact at the time of recording of her statement u/s 164 Cr.P.C. before learned M.M. and thereafter her mother (mother of PW-8) also came to know about it.*

*During her cross-examination by learned amicus curiae, several modifications/improvements made by the witness in her testimony before the Court, over and above her statement u/s 164 Cr.P.C. made before learned M.M., were brought out, inasmuch as the witness has not stated in her statement Ex.PW-7/A that on 26.04.2013 accused had taken her with him to Patna in a train on the pretext of marrying her and had further not stated that accused had established physical relations with her many times, as and when he got an opportunity.*

*The witness also did not disclose in her statement, Ex. PW-7/A that her paternal aunt Sunita had apprehended her and the accused at Patna Railway Station, PW-8 termed it correct that accused Mukesh had been residing in a house, opposite to her house, since last about 2/3 years. She also termed it correct that she had never seen Kajal, wife of accused, during said 2/3 years and that she could also not state as to when the accused had got married with Kajal. The witness admitted that she had come to know 2/3 months prior to 26.04.2013, that accused Mukesh was already married. The witness denied that she had voluntarily accompanied the accused to Patna in order to marry him. ”*

13. With regard to the age of the prosecutrix, her father, PW-9, has testified during his cross-examination by learned Amicus Curiae, that his daughter was born at his native village in Bihar. He has further deposed that he had not got registered the birth of his daughter with any authority either in Bihar or in Delhi and thus he did not have any proof of birth of his daughter. He has further stated that he did not get his daughter admitted in school, however, he volunteered to state that his wife had got her (victim A) admitted in school, therefore, she must have told about the age of his daughter at that time.

14. PW-16, SI Bhupesh, Investigation Officer of the case, has testified that on 26.4.2013 he met PW-9, Bharat Pandit, and recorded his statement regarding his daughter, who was about 16 years of age and was missing. Based on his statement a Rukka was prepared. This witness also deposed that on 27.4.2013 he received an information from the complainant that he had received a phone call from his daughter from an unknown number and his daughter told him that she was with accused Mukesh. This witness has further deposed that on being contacted on the said mobile number, he came to know that the accused and the prosecutrix were proceedings towards Patna in a train. It has further been deposed that he asked the complainant to send his relative to Patna Railway Station and accordingly complainant informed his relative at Patna and that on the same day, this witness along with PW-4, Ct.Naveen Kumar, left for Patna and reached there on 28.4.2013, where they met PW-17, Sunita, who had apprehended the accused and the prosecutrix at Patna railway station with the help of GRP officials.
15. This witness has also deposed that on return to Delhi, the prosecutrix was sent for medical examination, however, she refused her internal examination. Statement of the prosecutrix was recorded under Section 164 of the Code of Criminal Procedure and the victim was handed over to her parents.
16. During cross-examination, PW-16 has admitted that the accused Mukesh was residing in the neighbourhood of the victim child at Delhi. He has further stated that he did not make any enquiry from the person, from whose mobile phone the prosecutrix had made a call to her father.
17. Taking into consideration the testimony of the parents of the victim and the testimony of Ms.Seema Rani, teacher of the school, where the victim was admitted, a serious doubt was created regarding the date of birth of

the prosecutrix and, thus, we are of the view that the trial court has rightly reached the conclusion that the prosecution has failed to prove that the victim was a child less than eighteen years of age, at the time of commission of the offence.

18. Para 29 of the judgment passed by the trial court reads as under:

“29. The PW-9, Sh.Bharat Pandit, is the father of victim A and he too has not given any specific date of birth of victim A. During his cross-examination, PW-9 stated that his marriage (marriage of PW-9) was solemnized in the year 1990 and that victim A, his eldest daughter was born after six years of his marriage. If the statement of PW-9 is taken to be correct, then the year of birth of victim A would be 1996. It is possible that in order to conceal the correct age of victim A, her mother Smt. Sunita mentioned the age of A on lower side at the time of admission of A in the school. Since, PW-6 Smt. Sunita had admitted that she had mentioned the date of birth of victim A by approximation at the time of her admission in the school, a doubt is created regarding the entry of date of birth of victim A mentioned in the school record. In the case of **Birdi Mal Singhavi vs. Anand Purohit, 1988 Supp. SCC 601** that no evidentiary value can be given to Date of Birth entry in absence of material on which entry is made. Since the prosecution has failed to prove that the victim A was a “child” less than 18 years of age at the time of commission of offence, the provisions of POCSO Act are not applicable in the facts and circumstances of the present case.”

19. After the statement recorded under Section 161 of the Code of Criminal Procedure, the statement of the victim was recorded under Section 164 of the Code of Criminal Procedure, in which considerable improvements were made by her including that the respondent, who was residing in her neighbourhood, had raped her four months ago and threatened her not to tell this to anyone. She has further stated that the respondent would call her to his house, sometimes come to her house when her parents were away and used to establish physical relations with her forcibly. No

mention was made in this statement with regard to her going to Patna and her being apprehended by her aunt. In the statement recorded before the Court, the stand of the prosecutrix was shifting and additions and improvements were also made. The trial court has analysed the testimony of the victim threadbare and rightly reached the conclusion that the respondent had neither kidnapped the prosecutrix or committed any penetrative sexual assault on her.

20. We may also notice that in the statement recorded under Section 161 of the Code of Criminal Procedure the victim, PW-8, had not alleged rape by the respondent. During her cross-examination, the victim has testified that she had not told the Doctor that the respondent had committed sexual assault upon her and in fact had told the Doctor that neither sexual assault nor physical assault was committed upon her by the respondent. It may also be noticed that the victim had refused her medical examination. The testimony of the victim would also show that she was not kidnapped by the respondent and in fact she had left her house with the respondent as he had promised to marry her. She has also testified that her chachi (aunt) had seen her at the railway station and apprehended her and the respondent. Thus, it is not a case where seeing the chachi the victim has testified that she left the clutches of the respondent and went to her chachi.
21. The law with regard to dealing with leave to appeal petition is well settled. 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."*

22. It is a settled law that while deciding a leave to appeal petition filed by the State, in case two views are possible, the High Court must not grant leave if the trial court has taken one of the plausible views, in contrast thereto in an appeal filed against acquittal. Upon re-appraisal of evidence and relevant material placed on record, in case the High Court reaches a

conclusion that another view can reasonably be taken, then the view which favours the accused should be adopted. Unless the High Court arrives at a definite conclusion that the findings recorded by the trial court are perverse, the High Court would not substitute its own views on a totally different perspective.

23. In the case of *State of Madhya Pradesh Vs. Dal Singh & Ors.*, reported at JT 2013 (8) SC 625, the Supreme Court has held that the appellate court while considering the appeal against the judgment of acquittal shall interfere only when there are compelling and substantial reasons for doing so and if the judgment is unreasonable and relevant material have been unjustifiably ignored, it would be a compelling reason for interference. In the case of *Rukia Begum Vs. State of Karnataka* AIR 2011 SC 1585 the Apex Court has held that in case two views are possible and the trial court has taken the view favouring acquittal, the High Court should not disturb the finding.
24. Having regard to the principles laid down by the Apex Court in the case of *Ghurey Lal* (supra), *State of Madhya Pradesh* (supra) and *Rukia Begum* (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**

**MAY 27, 2015**

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