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

% Date of Decision: 21st December, 2015

+ **CRL.P. 409/2015 & CrI.M.A. 7212/2015**

STATE Appellant

Through: Ms. Aasha Tiwari, APP

versus

MOHIT Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.K.GAUBA

SANJIV KHANNA, J (ORAL)

1. This leave to appeal by the State is belated and an application for condoning delay of 14 days in filing has been moved. However, before issuing notice on the said application, we have deemed it appropriate to examine the impugned judgment on merits.

2. The judgment under challenge dated 12.12.2014 passed by Ms. Illa Rawat, Additional Sessions Judge, North-West-1, Rohini, Delhi, acquits the respondent Mohit from the charges under Sections 366/376(i)/506 of the Indian Penal Code, 1860 ("IPC" for short) and Section 4 of Protection of Children from Sexual Offences Act, 2012.

3. On the question of age of the prosecutrix, the prosecution had relied upon the school records, Ex.PW-3/A to Ex.PW-3/D, of the Nigam Pratibha Vidyalaya, Prem Nagar, Delhi. As per the said records, the date of birth of the prosecutrix is 21.10.1997. Thus, the plea that on the date

of occurrence in May, 2013, the prosecutrix was a minor being 17 years of age, or was certainly less than 18 years. The impugned judgment does not rely upon the said records for several reasons', including the admitted fact that the prosecutrix was admitted to the said school in Class III and certificate of the school first attended was not adduced and produced by the prosecution. Ossification tests were not undertaken and no report was submitted.

4. Mother of the prosecutrix, Smt. Sunita (PW-4) has professed being illiterate and that they did not get the birth of her daughter registered. The prosecutrix was born in her native place in a village in District Danbhangha, Bihar. In her cross-examination, PW-4 had accepted as under:

“I am permanent resident of District Danbhangha, Bihar and I came to Delhi about 12-13 years back from today. I got married at my native State of Bihar. My daughter i.e. prosecutrix is my eldest child. I came to Delhi when my daughter i.e. the prosecutrix was about 7–8 years old. My daughter was born at my in-laws house in our home. I had not got registered the birth of my daughter either with any Municipal authority or even with village chowkidar. It is wrong to suggest that my daughter used to attend school at our native place at Bihar. It is correct that my marriage took place about 21-22 years back. My daughter i.e. the prosecutrix was born 2-3 years after my marriage. I only came with my daughter to Delhi”.

The aforesaid statement expositis that the date mentioned in the school records was a mere guess and was given as a matter of convenience. It was not the actual age or reflective as to the correct date of birth. PW-4, affirmed that she had got married about 21-22 years back and her

daughter, i.e. the prosecutrix, was the first child to be born after 2-3 years of her marriage. This would mean that the prosecutrix was about 20 years of age on 22.10.2013 *i.e.* the date on which the testimony of PW-4 was recorded in the Court. Prosecutrix's age again would be around 20 years, if we go by the earlier portion of the aforesaid deposition wherein PW-4 has stated that she has come to Delhi about 12-13 years back and at that time the prosecutrix was about 7-8 years of age. Thus, the trial court has rightly held that the exact and correct age of PW-5 has not been established and proved by the prosecution. Benefit of doubt would go to the respondent.

5. On the question of involvement and *actus* of the appellant, the trial court has noticed and highlighted discrepancies in the statement of the prosecutrix, i.e. PW-5. As per PW-5, Mohit used to follow her along with his friends while she used to go to and return from school. Once when PW-5 was returning home from her school, Mohit met her and had forcibly taken her to a friend's restaurant. The said restaurant had a room constructed on one side, where the respondent had sexually assaulted and committed rape on PW-5. She affirmed having not informed her mother or anyone else about the said occurrence, due to fear. She has deposed of a second incident about at 2-2.30 a.m., when the respondent Mohit had come to their house and had forcibly taken her to bathroom and committed rape. The first or the earliest occurrence in point of time was in a park at about 5 p.m. In her cross-examination several inconsistencies and contrarities are brought out. The trial court in the impugned judgment has referred to the version given by the prosecutrix in her statement under Section 164 of the Code of Criminal Procedure, 1973

(Ex.PW-2/B) and has highlighted the divergence on certain important aspects. The judgment also refers to the stand of the respondent. The respondent was a young boy, aged about 20 years when his statement under Section 313 Cr.P.C. was recorded. As per the said statement, the respondent and the prosecutrix used to like each other but there was a resistance and objection from her family. Noticeably, on 06.05.2013 as per Sunita (PW-4) and the prosecutrix (PW-5), the respondent had met both of them while they were walking on the Sahni Bazar road and had caught hold of the hand of PW-5. Thereafter on the same day at about 5 p.m., the respondent had come to PW-4's house and had expressed his desire to marry the prosecutrix. Both, PW-4 and PW-5 professed that respondent had shown a knife during the confrontation they had in the afternoon on the street. The trial Court judgment records that this assertion and allegation, was not mentioned in the statement of Sunita (PW-4) under Section 161 Cr.P.C (Ex.PW-4/DA) or in the statement of PW-5 (Ex.PW-5/A) under Section 164 Cr.P.C. This finding, it is accepted is factually correct.

6. It has also come on record that the park in question was frequented by general public and was a well-known park and was not located in an isolated or secluded area. The prosecutrix's version in Ex.PW-5/A about the second occurrence was that respondent had come to their house after midnight at 2.30 a.m. and had committed the offence of rape. Apparently, and as per the prosecution case, no one had noticed the respondent's entry and his presence in the house. In her court deposition, PW-5 proclaimed that she was taken to their bathroom. In her cross-examination, PW-5 has accepted that no one could have entered their

house or bathroom once the main door of the house was bolted from inside. She has also accepted that they used to sleep after bolting the main door of the house.

7. The last occurrence is also doubtful. Imtiyaz Khan (PW-13) has stated that the respondent Mohit was working as an employee with his brother at their chicken shop. On one occasion, the respondent had brought a girl with him to their hotel at 1.30- 2.00 p.m. to have lunch inside the "hotel". PW-13's has not deposed that the respondent and the girl had gone to a room. As per PW-13 version, the respondent and the girl had lunch together. SI Neeraj (PW-14) the investigating officer has referred to and identified the aforesaid place which had a dining hall. She has not deposed on presence of a room. The cooking was done outside the *dhaba*. The site plan of the *dhaba* was not prepared and is not placed on record. It is apparent, that the said dining area did not have any living rooms which could be were given on hire/rent or could be used for night stays or residence. SI Neeraj (PW-14) was also cross-examined on whether there was frequent exchange of phone calls and SMSs from the mobile used by PW-5 to the respondent and she professed ignorance claiming she had not made any such inquiries and did not know. It is difficult to accept and believe the said narration. It was normal and natural for PW-5 to have examined and verified the said aspect. Noticeably, PW-4 and PW-5 were specifically cross-examined regarding phone calls/SMS. The MLC marked Ex.PW4/A of PW-5 recorded on 7.5.2013 at 12:30 AM mentions that the mother of the patient had informed the doctors on duty that her daughter had been subjected to sexual assault about seven days back. Name of the respondent was

mentioned and taken by her. The said MLC (Ex.PW-4/A) is recorded by two different sets of doctors who had examined PW-5. Both doctors have opined that no fresh external injury was visible at the time of examination. Strangely but significantly, the doctors did not attribute any version or statement to the patient i.e. PW-5.

8. Having gone through the record and the judgment, we are of the considered opinion that the finding of acquittal in the facts of the present case is credible and takes a reasonable version of the evidence on record. The trial court has pointed out and highlighted various discrepancies as to why it was inclined to acquit the respondent from the charges which have not been proved beyond reasonable doubt. Accordingly and as a sequitur, we do not see any reason to issue notice on the application for condonation of delay and the said application and the petition for leave to appeal are dismissed.

SANJIV KHANNA
(JUDGE)

R.K. GAUBA
(JUDGE)

DECEMBER 21, 2015/nk