

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

RESERVED ON : 23rd FEBRUARY, 2016

DECIDED ON : 17th MARCH, 2016

+ CRL.A.355/2015

STATE (GOVT. OF NCT OF DELHI) Appellant

Through : Mr.Amit Gupta, APP.

VERSUS

HASAN KHAN & ORS. Respondents

Through : Mr.Sameer Kumar, Advocate for
respondents No.1 & 2.

Mr.Manish Kumar Singh,
Advocate with Ms.Nusrat Hussain,
Advocate for respondent No.3.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present appeal has been preferred by the State to challenge the legality and correctness of a judgment dated 15.12.2011 of learned Addl. Sessions Judge in Sessions Case No.33/10 arising out of FIR No.368/09 PS Burari by which the respondents were acquitted of the charges. Appeal is contested by the respondents.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 14.08.2009 at around 06.00 a.m. the prosecutrix

‘X’ (changed name) left her home without informing her mother – Mahalakshmi Devi. She searched her here and there but to no effect. She lodged missing person report vide Daily Diary (DD) No.17 (Ex.PW-18/A) on 16.08.2009 without suspecting the involvement of any individual. She had promised to return soon in a telephonic conversation with her. On 25.11.2009 after recording statement of victim’s mother (Ex.PW-18/A) the Investigating Officer lodged First Information Report. On 17.01.2010 ‘X’ was recovered while she was in the company of the respondents. She was medically examined; she recorded her 164 Cr.P.C. statement (Ex.PW-7/A). Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Central Forensic Science Laboratory for examination. Respondent Nos.1 to 3 were arrested. Upon completion of investigation, a charge-sheet was filed against them for committing various offences. In order to establish its case, the prosecution examined 23 witnesses. In 313 Cr.P.C. statements the accused persons denied their involvement in the crime and pleaded false implication. DW-1 (Amrish Kumar) appeared in defence. After considering the rival contentions of the parties and on appreciation of the evidence, the Trial Court, by the impugned judgment acquitted all the

respondents of the charges. Being aggrieved and dissatisfied, the State has filed the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. Learned Addl. Public Prosecutor emphasized that since the prosecutrix was below 18 years of age on the day of occurrence, her consent to have physical relations with respondent No.1 was of no relevance. There were no valid reasons for the Trial Court to suspect the genuineness and authenticity of the date of birth as described in the school record. He further urged that the prosecutrix being under threat and pressure had not divulged true and correct facts before various authorities earlier. Learned counsel for the respondents urged that the Trial Court has elaborately discussed all the aspects and no sound reasons exist to interfere in the acquittal recorded by the Trial Court.

4. It was claimed that the prosecutrix was aged around 14 ½ years on the day of occurrence and her date of birth as recorded in school record was 12.04.1995. The prosecution examined PW-1 (A.K.Kashyap) who proved the relevant records and deposed that Transfer Certificate (Ex.PW-1/B) was issued and the date of birth recorded in the school register at the time of her admission on 24.06.2003 was 12.04.1995. The Trial Court has minutely dealt with this aspect in the impugned judgment.

PW-1 (A.K.Kashyap) admitted in the cross-examination that date of birth in the school record came into existence on the basis of declaration made by the 'person' who had accompanied the child to the school for seeking admission; it was not based upon any birth certificate. Nothing has come on record to show as to on the basis of what material, this date of birth 12.04.1995 came to be recorded in the school record at the time of X's admission. PW-18 (Mahalakshmi Devi), victim's mother, did not elaborate as to who had got 'X' admitted in the school and how her date of birth 12.04.1995 came into existence. She did not produce any birth certificate of the child. No other cogent document showing her date of birth was produced. It was not revealed as to at which particular place the child was born. In the cross-examination, it was informed that she was born in a private hospital at Lahoria Sarai. However, no such record from the said hospital was summoned. Ossification test of the prosecutrix was conducted by a Medical Board. As per documents marks 'D1' and 'D2' (pages 61 & 62 of Ex.5/A1 to Ex.5/A93) the Medical Board opined her age in between 18 – 18 ½ years. This ossification report was never challenged. The Trial Court has also referred to various documents where conflicting dates of birth were given by the prosecutrix herself before various authorities. The prosecutrix and respondent No.1 had filed a Writ

Petition before this Court vide documents collectively exhibited as Ex.PW-5/A1 to Ex.PW-5/A93 where she had claimed herself to be 'major'. Statement of the prosecutrix was recorded under Sections 164 Cr.P.C. in case FIR No.146/09 by the police of PS Tazpur, Distt. Samastipur, Patna. In the document (mark 'D3'), the victim disclosed her age as 20 years. In her complaint (Ex.PW-5/DA), the complainant / victim had claimed herself to be 'major'. In Writ Petition (Crl.) No.1241/09 in the order dated 09.12.2009, this Court recorded that the prosecutrix had stated her date of birth as 30.09.1990. She had also disclosed about her marriage with respondent No.1 on 06.01.2009 when she had attained the age of more than 18 years. The impugned judgment further refers to an affidavit (mark 'DA') sworn before Executive Magistrate Ist Class, Howrah (Calcutta) where the prosecutrix had disclosed her age 19 years. Marriage certificate mark 'DB' contains her age 19 years. Apparently, the victim has given divergent and conflicting dates of birth at various stages before various authorities. No cogent and clinching evidence recording her exact date of birth has emerged on record. Under these circumstances, benefit is to go to the respondents and it cannot be concluded with certitude that the prosecutrix was below 18

years of age on the date of occurrence. The findings of the Trial Court on that score cannot be faulted.

5. The learned Presiding Officer was of the view that the prosecutrix was a consenting party throughout. The said conclusion is based upon the fair and proper appreciation of the evidence on record. Admittedly, the prosecutrix and her mother were familiar with respondent No.1. 'X' had eloped with respondent No.1 without informing her mother. When she gave a call to her mother, she did not complain if she was kidnapped or abducted against her wishes. She promised to return soon. It has come on record that the prosecutrix and the victim had lived together for sufficient duration. At no stage, the prosecutrix raised hue and cry to allege her forcible kidnapping. Physical relations took place between the two during this period. However, nothing has come on record to show if the prosecutrix suffered any bodily injury to infer forcible rape. She admitted that photographs (marks 'A1' to 'A15') were hers with respondent No.1. In these photos, both appear to be in intimate relationship. The Trial Court had further noted that the victim had visited Delhi High Court on number of dates and had filed petition for seeking protection from her mother who was a party to the litigation. This Court had made enquiries from the victim and had recorded her statement. She

had not alleged kidnapping and rape against respondent No.1 that time. She was taken by respondent No.1 to Pune in a marriage function. She admitted her presence in the CDs of marriage (marks 'X1' and 'X2') along with respondent No.1 and his family members. The Trial Court further noted that respondent No.1 had taken her to his house after return from Calcutta. Her mother was also with her at that time. 'X' did not go to her mother's house but lived with respondent No.1 at his house at Tazpur, Distt. Samastipur, Patna. She did not make complaint regarding her forcible stay with the accused to anyone. She did not make any complaint during her stay with her mother in Bihar. In Delhi, respondent No.1 had taken her from her house in a four wheeler scooter but she did not raise any hue and cry that time. She was taken to lawyers at Delhi High Court. She never claimed herself to be under threat. 'X' had appeared before various Courts in Delhi, Patna and Bihar where her statements were recorded. She had all opportunities to disclose the correct facts but nothing was done. Under these circumstances, the findings of the Trial Court that the prosecutrix was a consenting party cannot be disturbed.

6. The principles which would govern and regulate the hearing of appeal by this Court against an order of acquittal passed by the Trial

Court have been succinctly explained by the Apex Court in a catena of evidence. In ‘*State of Goa vs. Sanjay Thakran & Anr.*’, (2007) 3 SCC 75, it was held :

“16. From the aforesaid decisions, it is apparent that while exercising the powers in appeal against the order of acquittal the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the appellate court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the appellate court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime he is charged with.”

7. Similar principle has been laid down by the Apex Court in the cases of ‘*State of Uttar Pradesh vs. Ram Veer Singh and Ors.*’, AIR 2007 SCW 5553 and in ‘*Girja Prasad (Dead) by LRs vs. State of M.P.*’,

AIR 2007 SCW 5589. Thus, the powers which this Court may exercise against an order of acquittal are well settled.

“It is also a settled legal position that in acquittal appeal, the appellate court is not required to re-write the judgment or to give fresh reasonings, when the reasons assigned by the Court below are found to be just and proper.”

8. In the light of above discussion, the appeal lacks merit and is dismissed. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

MARCH 17, 2016 / tr