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

+ **CRL.A. 101/2016**

BRAHAMA DEVI

..... Appellant

Represented by: Mr.Ajay Kumar, Adv.

versus

STATE OF NCT OF DELHI AND ANR

..... Respondent

Represented by: Mr.Varun Goswami, APP for
State with Insp.Krishan Kumar,
PS Sultan Puri.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

29.01.2016

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Crl.M.As.1543-1544/2016

1. For the reasons stated in the applications the delay of 10 days in filing and 6 days in re-filing the appeal is condoned.
2. Applications are disposed of.

CRL.A. 101/2016

1. The present appeal by the mother of the prosecutrix lays a challenge to the judgment passed by the learned Additional Sessions Judge in case FIR No.363/2012 under Sections 363/376 IPC registered at PS Sultan Puri acquitting Rakesh Malik, the respondent of all the charges.
2. Prosecutrix before the trial Court was examined as PW-2 and the relevant portion of her testimony has been noted by the learned ASJ and we also reproduce:

“I know accused Rakesh Malik, as he is friend of my brother Pankaj and he was on visiting terms to our house. He had also

installed RO (water purifying machine) in our house and so I knew him. One week before the incident, accused came to reside in our house as tenant. Thereafter he and I became friends with each other. We started having an affair. My family members came to know about my affair with the accused. Accused was asked to leave the tenanted premises. Even after accused left the said premises, we used to keep in touch telephonically. I used to talk to him from mobile phone of my father or my brother. My family put lot of restrictions on me. They did not allow me to go out of the house except when I used to go to school. I was irritated by their behaviour and I asked accused to take me away.

On 17.08.2012 I went to school at usual time of 7.00 AM. I asked accused to meet me outside the school gate when I talked to him on 16.08.2012 during evening time. After the school got over at about 2.00 PM in the afternoon, I came out of the school and went with the accused to Agra. Accused took a room on rent in Agra and he also purchased day to day articles of our need there. After 4-5 days accused received a phone call on his mobile phone and the caller asked him about his mobile phone and the caller asked him about his whereabouts and also asked about me. After the call was over, I and accused left Agra leaving behind all our articles there. We went to Bhopal and stayed in a hotel there. Accused tried to search for a job but without any success. We stayed at Bhopal for one day and then we came to Sonapat. We took a room on rent in Sonapat and stayed there for 2-3 days. Accused tried to search for job at Sonapat but there also he was not successful in getting a job. Since accused hails from Haryana, we were apprehensive that he may be caught by Haryana Police. We decided to go to Dehradun. There we stayed in a hotel for one day. We also kept moving from one place to another in Dehradun and then we decided to go to Uttarakhand. While we were roaming around in Uttarakhand, we were apprehended by the local Police there.”

3. In her statement under Section 164 Cr.P.C. also the version of the

prosecutrix was that she had gone of her own free will with Rakesh Malik. In her cross-examination the prosecutrix reiterated correctness of her version in the statement made under Section 164 Cr.P.C. before the learned Metropolitan Magistrate i.e. Ex.PW-2/A and that Rakesh Malik has not committed any wrong act with her. In reply to Court questions she informed that her date of birth was August 11, 1996 though the date of birth mentioned in school record was December 16, 1996.

4. The father of the prosecutrix PW-6 deposed about the missing of prosecutrix that on August 17, 2012 after she left for the school as usual, she had not returned. They made search and since he suspected Rakesh in the missing of the prosecutrix, FIR was lodged and investigation was carried out to trace the prosecutrix and Rakesh. From the search made pursuant to a surveillance of the mobile phone, prosecutrix and Rakesh were apprehended in Uttarakhand near the border of Nepal from where they were brought to Delhi.

5. Admittedly no gynaecological examination of the prosecutrix was got conducted. The explanation of PW-6 in this regard was that the examination was not got done to save the honour of the prosecutrix and the family.

6. For the offence of kidnapping punishable under Section 363 IPC the learned ASJ relied upon the decision of the Supreme Court reported as AIR 1965 SC 942 S.Vardarajan vs. State of Madras wherein distinction was drawn between “taking” and “allowing a minor to accompany”. From the statement of the prosecutrix it is amply clear that Rakesh Malik had not taken her rather being irritated by the restrictions imposed by her family, on August 16, 2012 she asked Rakesh to meet her outside the school gate and after the school was got over on August 17, 2012 she went with him to Agra.

Thus the learned ASJ rightly acquitted Rakesh Malik for the offence of kidnapping for marriage or for forcible intercourse with her.

7. As regards finding on the age of the prosecutrix is concerned Ex.PW-6/B on which the prosecution relied was a Grade Sheet-cum-Certificate of Performance of the prosecutrix wherein her date of birth was mentioned as December 16, 1996. No witness was examined as to how this date was entered or what was the date of birth in the school record or the school first attended or the documentary evidence on the basis of which this date of birth was entered. The father of the prosecutrix PW-6 Virender Singh admitted that the date given at the time of admission was based on his affidavit and that the birth of none of his children was registered with the office of Registrar of Birth. The learned ASJ relying upon the decision of Supreme Court in 1988 Supp.SCC 601 Birad Mal Singhvi vs. Anand Purohit came to the conclusion that the prosecution has not been able to prove that the prosecutrix was born on December 16, 1996.

8. Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules 2007 (in short the JJ Rules) provides that in every case concerning a child the age determination enquiry shall be conducted by the Court by seeking evidence by obtaining; the matriculation or equivalent certificate if available, in the absence whereof the date of birth certificate from the school first attended, in the absence whereof the birth certificate given by corporation or a municipal authority or a panchayat, and in the absence of either of these three certificates the medical opinion from a duly constituted Medical Board. As noted above in the present case the certificate exhibited vide Ex.PW-6/B does not fall in any of the three categories and there is no opinion of the Medical Board with regard to age as well. Even treating the

grade sheet-cum-certificate of performance to be a mark sheet and valid certificate however the same is based on the affidavit of the father. The Supreme Court in the decision reported as (2012) 9 SCC 750 Ashwani Kumar Saxena vs. State of Madhya Pradesh emphasised that the evidence necessary for the purpose of determining the age should be more than an affidavit. In the present case as noted above the entry in the grade sheet was based on the affidavit of the father and thus it can be safely held that the prosecution failed to prove that the prosecutrix was a child below the age of 16 years on the date of alleged offence.

9. As regards the offence punishable under Section 376 IPC admittedly no gynaecological examination was conducted to ascertain whether the prosecutrix was subjected to sexual intercourse. Thus in the absence of any sexual intercourse having been committed and the age of the prosecutrix having not proved to be below 16 years, the learned ASJ rightly acquitted Rakesh Malik for the charge under Section 376 IPC and we concur with the said finding.

10. The appeal filed by Brahama Devi against acquittal of Rajesh Malik is dismissed.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

JANUARY 29, 2016
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