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

+ **CRL.L.P. 7/2017**

STATE OF NCT OF DELHI

..... Petitioner

Through: Mr.Avi Singh, ASC for the State.

Versus

PURAN

..... Respondent

Through: Mr.K.Singhal, Advocate (DHCLSC).

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE I.S. MEHTA**

ORDER

18.12.2017

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Crl. M.A. No.201/2017 (delay of 187 days in filing)

1. For the reasons stated therein, this application is allowed. The delay of 187 days in filing the petition is condoned.

Crl. L.P. 7/2017

2. The Petitioner, State, seeks leave to appeal against the impugned judgement dated 29th March 2016 passed by the learned Additional Sessions Judge ('ASJ'), Karkardooma Court acquitting the Respondent, Puran, for the offences under Sections 363, 366, 376 of the Indian Penal Code (IPC) in Session Case No. 44312 of 2015 arising out of FIR No. 476 of 2011 registered at Police Station (PS) Seemapuri.

3. Monika, the Complainant (PW-1), mother of the victim girl (PW-3), lodged the complaint on 24th December 2011 with the aforementioned PS

stating that on 12th December 2011 PW-3 left her house at about 3 pm in order to visit the house of her friend. PW-3 did not turn up thereafter. PW-1 mentioned in the complaint that PW-3 was mentally retarded. On the basis of the above complaint, the aforementioned FIR was first registered under Section 363 IPC.

4. PW-1 stated that on 25th January 2012, slightly over a month after she had left home, PW-3 had called on the mobile phone of her father stating that she was well and she would be visiting them on the following day. When she asked PW-3 as to where she was and with whom, PW-3 did not disclose anything but cut off the conversation. On 26th January 2017 PW-3 had at around 9 pm again called the mother. PW-3 had asked PW-1 to come with PW-3's clothes at a place near Jyoti Nagar. PW-1 along with her elder daughter reached and found PW-3 present wearing *chutki/bichhia*. PW-3 disclosed PW-1 that she had married the Respondent. According to PW-1, she showed the public gathered there a family photograph which had PW-3 in it. PW-1 then called the police. According to PW-1, Sub Inspector (SI) Manoj (PW-13) stated that it was Republic Day and that she should produce PW-3 at the PS on the following day.

5. PW-1 produced PW-3 in the PS on 27th January 2012. There, PW-13 recorded the statement of PW-3 under Section 161 of the Code of Criminal Procedure 1973 ('Cr PC'). In her statement, PW-3 stated that she knew the Respondent who was a three-wheeler scooter rickshaw ('TSR') driver and sometimes he used to meet her at Seemapuri stand. On 12th December 2011 she had gone to meet her friend and she had got late. She met the

Respondent at the 70 feet road and he had offered to marry her and reside separately. She stated that she got enticed and went away with the Respondent and then got married with him. She also stated that they got the documents prepared in the Court regarding the marriage and thereafter the Respondent had sexual intercourse with her. She had called her house on 26th January 2012; she was caught by her mother at Nathu Colony Chowk and produced before the police.

6. The statement of PW-3 under Section 164 Cr PC was got recorded on the following day, i.e., 28th January 2012 before the learned Metropolitan Magistrate ('MM'). In the preliminary question put to her by the learned MM about her age, PW-3 stated that "I am 18 years". In the statement, she stated that on 12th December she had gone to visit her friend and had got late. She then decided to go her aunt's place, but had forgotten the way. Her purse was stolen and therefore, she could not pay the auto driver. She then asked the auto driver to drop her back at the same place from where she was picked up. Further, auto 'bhaiya' told her that since she was late in the night he could not leave her as such and therefore, he took her to his house. She then stated that in the evening the mother of the auto driver had asked her if she would marry the auto driver. On this, PW-3 informed the auto driver's mother that she would have to ask her (PW-3's) mother. Thereafter PW-3 got married to the auto driver in a temple. A court marriage also took place. and she started living with the auto driver. After one month she called her mother. Her mother came to know of her whereabouts through the call. PW-3 also mentioned that prior thereto her operation had taken place at the mental hospital. Her mother then took PW-3 away. PW-3 disclosed before

the learned MM that she wished to return to her in-laws and did not wish to return to her mother because she would get beaten by her mother.

7. In her deposition in Court, PW-1 disclosed that PW-3 told her “she had gone with the accused Puran and that the accused had married her.” It was also disclosed by PW-1 that PW-3 had told her that the accused had committed sexual intercourse several times with her like a husband and wife. She " had also told me that the accused had also committed sexual intercourse with her forcibly.” PW-1 was not cross-examined by counsel for the accused.

8. PW-3 was first called for cross-examination on 12th December 2013. She again stated that since it was late in the night when she had visited to her friend, she decided to go to her aunt as she apprehended that her mother would scold her for coming late. She stated that she did not have any money with her because her purse had been stolen. She then asked the Respondent who driving the TSR to leave her at the same place from where she had been picked up . When asked by the Court, from where she had come in the TSR, she stated that “I do not know the place from where I had come in TSR but it was before Ashok Nagar.”

9. PW-3 further deposed in the Court that the Respondent had suggested to her that “it was late night hence he cannot leave me alone on the way and that since I was not having money to pay the fare for TSR hence he was not willing to leave me. Thereafter, he took me to his house with the assurance that he would leave me at my place in the morning.” PW-3 further continued without indicating the date and time that “ mother of accused had

asked me if I would marry with accused. I had replied that firstly I would think and then would reply. Thereafter, I had said yes I would marry him. Thereafter, marriage between me and accused was performed in a temple with the help of mother of accused. Thereafter, I started to live at the house of accused Puran as his wife.”

10. PW-3 stated that since the brother of the accused started quarrelling she decided to shift to the house of sister of accused, Sunita, at Ashok Nagar. She then stated that “I had lived with the accused hardly for about 2 months. Again said for about 1 year.” In the cross-examination by learned APP, PW-3 stated that “it is correct that when accused had met me in the night time he had asked me that we would marry and would live at some other place; that due to this reason, I had accompanied accused Puran to his house. It is correct that the accused had committed sexual intercourse with me after marriage; and that he had made physical relations with me on many occasions.”

11. In the cross-examination by learned counsel for the Respondent, PW-3 disclosed that she had stated to Pooran that “there was no one in my life but I stated this out of fear. I was also under fear that I was outside my house in late night and that my mother would scold me for this. I had not asked Pooran to make me have a conversation with my family members because I had already stated to him that there was none in my family except a Mausai.” She confirmed that “the marriage was solemnized in the house of Pooran itself and it was in presence of his sister and Bhabhi. I had not disclosed my age to Pooran at that time. Even today I cannot tell date of birth.”

12. PW-3 had also stated that “I had not disclosed to any of the neighbours that I have my parents.” Further, she stated that “it is correct that when Pooran was released from jail I left Snehalaya (Shelter home) without intimating to its administration to meet Pooran. I had resided with Pooran for about 3-4 days.” She added “it is correct that while I was residing with Pooran after marriage, Pooran used to leave for his work in the morning and used to come in the evening or sometimes in the night.”

13. For some reason, the Police did not make any enquiry from either mother of the Respondent or sister, Sunita, both of whom was specifically mentioned by PW-3. There is no rational explanation for this lapse.

14. Secondly, although in her complaint PW-1 had disclosed that PW-3 was mentally retarded and PW-3 also in her statement under Section 164 Cr PC alluded to her being treated at a mental hospital, the police did not elicit any information regarding such treatment.

15. The prosecution examined PW-10, Ram Tek Assistant Health Inspector, East Delhi Municipal Corporation (EDMC), Shahdara, North Zone, Delhi to prove that as per the original birth certificate of PW-3, her date of birth was recorded as 23rd December 1996. Dr. Vijender Singh, Associate Professor Psychiatry, IHBAS, Delhi was examined as PW-12. He stated that on 21st May 2012, i.e., around four months after returning home PW-3 was produced before him by PW-1. Yet he examined PW-3 and found that “there was mental retardation (IQ-50) and the mental disability was 50 per cent.”

He issued a disability certificate (Ex.PW-7/A). PW-12 was not cross-examined by learned counsel for the Respondent.

16. The trial Court, on the basis of the above evidence, first held that PW-3 was consistent in her statements about having left home of her own will and having got married to the Respondent of her own accord. The trial Court observed that PW-3 was neither enticed nor forcibly abducted by the Respondent but taken her to his house to ensure her safety. If PW-3 had suppressed material the facts from the Respondent, the Respondent could not be faulted. The trial Court further observed that “as per the MLC of PW-3, her physical appearance was that of a mature girl and it was not a folly on the part of the accused to have considered her to be a major.” According to the trial Court, the Respondent could not be faulted for not taking PW-3 to the nearest PS that he had acted in a manner “which was best in his opinion”. Further, it was clear that PW-3 never objected to her marriage and did not state that it was performed against her wishes or forcibly. Further, even according to PW-3, the Respondent had sexual intercourse only after marriage and therefore, it was done so “under the belief that PW-3 was his wife.”

17. The trial Court noted that the incident was prior to the amendment to the IPC by the Criminal Law Amendment Act of 2013 which became effective from 3rd February 2013. The exception to Section 375 prior to such amendment was to the effect that “sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape”.

18. The trial Court rejected the plea of the learned Additional APP for the State that since PW-3 was less than 16 years of age when she went with the Respondent, she had not attained the age of giving consent, even as per the law, as it stood prior to the above amendment. The trial Court observed that the Respondent had no means to ascertain the age of PW-3 or that she was of an unsound mind. The accused appeared to have acted only in good faith and the conduct of PW-3 also showed that she was quite happy with him. The fact that she fled away from Snehalaya to meet the Respondent and decided to live for 3-4 days showed that she had a lot of affection for the Respondent.

19. As regards the plea that PW-3 was mentally retarded and therefore, was in no position to have given any valid consent, the trial Court observed that the statement recorded of PW-3 nowhere reflected that she was incapable of understanding the nature or consequences of her acts. Further, the certificate issued by PW-12 did not state that she was incapable of understanding the nature or consequences of whatever happened with her. There was no observation by the learned MM who recorded her statement under Section 164 Cr PC that she was incoherent or unable to depose with clarity. Even in her deposition in the Court there was no observation by the trial Court that she suffered from any incapacity of mind and or inability unable to depose in a coherent manner.

20. For all the aforementioned reasons, the benefit of doubt was granted to the Respondent.

21. This Court has heard the submissions of Mr. Avi Singh, learned

Additional Standing counsel for the Petitioner, State and Mr. K. Singhal, Advocate on behalf of Delhi High Court Legal Services Committee who was appointed as Amicus Curiae.

22. It was urged by Mr. Avi Singh, that the trial Court failed to note that PW-3 was less than 16 years when she left her house and at the time of marriage which took place immediately thereafter, she was still below 16 years. Therefore, even as per the law as it stood prior to the Cr PC Amendment 2013, the Respondent could not take advantage of the exception to Section 375 IPC.

23. The Court is unable to agree with the above submissions. A careful perusal of the deposition and the statement made by PW-3 shows that there was a gap between the time she was taken by the Respondent to his house and the time when she got married to him. It is not at all clear from her depositions that the marriage with the Respondent took place on the date immediately after she left her house, i.e., the marriage took place prior to 23rd December 2016 when she completed 15 years. This was a crucial piece of evidence which was not gathered by the prosecution despite there being adequate opportunity to do so. In particular, neither was the mother of the Respondent nor his sister examined. Further, apart from the fact that, according to PW-3, they got married in a temple, they also got married in Court. The papers in that regard were not collected by the prosecution.

24. With, therefore, there being no clinching evidence that PW-3 was less than 15 years when she got married to the Respondent, it is not possible to agree with the submission of Mr. Avi Singh that the Respondent cannot be

permitted to take shelter under the Exception to Section 375 IPC as stood prior to the 2013 Amendment. This is also significant because PW-3 was consistent in all statements to the effect that the Respondent had sexual intercourse with her only after marriage, and not prior thereto. Although PW-1 states that PW-3 told her that the Respondent had forcible sexual intercourse with PW-3, there is no such statement to that effect anywhere by PW-3, either in her statement under Section 161 CrPC, or in her statement under Section 164 Cr PC before the MM or even in the Court.

25. Mr. Avi Singh submitted that the certificate issued by PW-12 clearly showed that PW-3 suffered 50% mental retardation and that being the position she could never have validly consented to her marriage with the Respondent, much less to the sexual intercourse with him. The difficulty with this submission, as noticed by the trial Court, is that the prosecution appears to have made no effort to determine whether prior to leaving her house PW-3 was indeed taking any treatment for mental retardation. Further, PW-12 was not asked to specifically state whether the mental retardation was of such nature that it would not be possible for PW-3 to understand the nature and consequences of the acts performed after she left her house.

26. Indeed, it is a matter of expert opinion whether the mental capacity of a person is such as to enable her to give a valid consent. It would be not safe to rely upon only medical literature in this regard. Therefore, the approach of the trial Court in this regard cannot be faulted.

27. Reliance was placed by Mr. Avi on the decision in *Tulsidas Kanolkar v. State of Goa (2003) 8 SCC 590* to urge that PW-3 who was 50% mentally

retarded cannot possibly give any consent for any sexual intercourse. Having perused the said decision, the Court is satisfied that on facts, it is distinguishable. That clearly was not a case where the victim had, as in the present case, entered into a marriage with the accused. Further it was not a case where the accused could not have known that the victim was suffering from mental retardation or was below the age of consent.

28. Under Section 79 IPC an act done by a person under a mistake of fact, believing, himself to be justified by law in doing it, cannot be considered to be an offence. In the present case, the prosecution has not been able to show that the Respondent either knew that PW-3 was less than 16 years of age or that she was mentally retarded. If this was not discernible, then, as pointed out by the trial Court, the Respondent cannot be faulted for acting *bonafide* and doing what he thought to be in the best interests of PW-3. Further under Section 92 IPC, the Respondent was led to believe that PW-3 did not have any guardian and therefore, obtaining consent of such guardian was, from the point of view of the Respondent, not plausible.

29. Mr. Avi relied upon the decision of the Supreme Court in ***State of Haryana v. Raja Ram (1973) 1 SCC 544*** to submit that for the purpose of Section 366 IPC, the mere enticing of the Respondent would be sufficient to attract the offence. It was submitted that PW-3 being less than 16 years of age, her consent to going away with the Respondent is wholly immaterial.

30. The Court finds that under Section 361 IPC, the offence of kidnapping requires taking away of a person under 18 years of age from “lawful

guardian of such minor” or “without the consent of such guardian”. The words “lawful guardianship” envisages a person “lawfully entrusted with the care and custody of such minor or other person”. For the purposes of Section 361 read with Section 363 of IPC, it was important for prosecution to show that the Respondent knew that PW-3 had a guardian whose consent he had to obtain. However, from the evidence of PW-3 it is plain that she led the Respondent to believe that she was an orphan. Further, she only stated that she wished to go to her aunt's place. She did not tell the Respondent that her aunt was her guardian (which in fact she was not).

31. For the aforesaid reasons, the Court is of the view that no ground has been made out for grant of leave to appeal. The petition is dismissed.

S. MURALIDHAR, J.

I.S. MEHTA, J.

DECEMBER 18, 2017

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