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

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Judgment dated: 15th May, 2017

+ **Crl. L.P. 39/2017 & Crl. M.A. No. 1280/2017**

STATE

..... Petitioner

Through: Ms. Radhika Kolluru, APP for the
State

Versus

ABHINANDAN KUMAR

..... Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE REKHA PALLI

G.S.SISTANI, J. (ORAL)

CRL.M.A.1280/2017(delay)

1. This is an application seeking condonation of 76 days delay in filing the present leave to appeal.
2. For the reasons stated in the application and since we have considered the leave to appeal on merits, the delay in filing the leave to appeal is condoned.
3. The application stands disposed of.

CRL.L.P.39/2017

4. Present leave to appeal has been filed under Section 378 (1) of the Code of Criminal Procedure praying for leave to assail the judgment dated 03.08.2016 whereby the Trial Court has acquitted the

respondent for commission of the offence by which he was charged in a case being SC No. 44562/2015 arising from FIR No. 37/2013 registered by the PS Sonia Vihar under Section 376 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 4/8 of Prevention of Children from Sexual Offences Act (hereinafter referred to as 'POCSO')

5. An FIR was registered on the basis of a complaint made by the prosecutrix (PW2) alleging that she developed friendship with the respondent Abhinandan who was residing on the ground floor of the same building wherein she was residing on the top floor, and about two months ago the respondent Abhinandan expressed love before her and offered to marry her. She further alleged that about one and half months before the day of incident, when she was alone in her room, the respondent came there and made physical relations with her forcibly and without her consent.
6. Further she alleged that on 15.02.2013, the respondent came to her and tried to make physical relations with her forcibly but was intervened by her younger brother Raj Kumar (PW4) who had informed her mother (PW1) on phone.
7. After completion of investigation, charge-sheet was filed against the respondent under Section 376 of IPC. Vide order dated 13.02.2014, a charge under Section 376 of IPC was framed against the respondent. On 04.09.2014, an alternate charge under Section 6 of POSCO Act was framed against the respondent. The respondent pleaded not guilty and claimed to be tried.

8. To bring home the guilt of the respondent, the prosecution examined 13 witnesses in all. Statement under Section 313 of the Code of Criminal Procedure was recorded wherein he stated that the mother of the victim wanted to marry her daughter with him as she was aware about his properties at his village but he refused the offer. He further stated that the father of the victim had failed to repay the loan amount of Rs. 1 lakh to him which he borrowed and has falsely implicated in the present case. The respondent produced 2 defence witnesses in his defence namely DW1 Pankaj Kumar (TSR driver, who is residing with the respondent) and DW2 ASI Yogesh, who proved the PCR form dated 15.02.2013 wherein the respondent had informed that his neighbour was accusing him of rape. The Trial Court acquitted the respondent, which has led to the filing of the present petition seeking leave to appeal.
9. It was observed by the Trial Court that since the prosecutrix (PW-2) was a major at the time of the alleged incident and was having intimate relations with the respondent, she may be a consenting party. The relevant paras read as under:

“17. The crux of the statements of the victim as reproduced above would show that she was having an affair with the accused who was living downstairs. The other evidence which has come on record would show that the accused and the father of the victim were both TSR drivers and both the families had quite intimate relations. As already observed, the victim was major at the time of incident and therefore, even if they both had any physical relations at any point of time, the possibility of the victim being a consenting party cannot be ruled out. It must be for that reason that she never made any complaint against the accused to her

parents or her family members about the alleged rape before 15.02.2013 and she made the complaint on that day only when she was seen in the company of the accused by her brother.

18. It is pertinent to mention that during her medical examination, no external injury was seen. On her local examination, there were no signs of perennial injury though hymen was not found to be intact but it admitted one finger only. She refused for her per speculam and per vaginal examination for the reasons best known to her. The FSL result also does not find anything inculpatory as against the accused. That can be understood as the alleged incident of rape was more than two months old when the samples of the accused and the victim were collected. Apart from that, it is to be observed that there is no date of the alleged incident of rape and it is only by approximation that the victim has told or deposed the period when she was allegedly raped.

.....

21. The defence examined by the accused, DW-1 further deposed that the accused had been helping the family, particularly the father of the victim, financially and otherwise. He repaid the loan of Rs. 16,000/- to the TSR owner whose TSR victim's father had been driving and got back his badge and driving license from him. He further deposed that the mother of the accused took the victim and PW-1 to her native village where they stayed for 7-10 days and 7-8 months thereafter, the marriage proposal was floated by the mother of the victim for marriage of the accused and the victim but since there was objection over the caste of the two families, it was dropped.

22. DW-2 (wrongly numbered as DW-1) had proved the PCR record, dated 15.02.2013 recorded at 05.04 pm. The said call was got recorded by the accused himself and the PCR form Ex.DW1/A records that the informant i.e. the

accused had informed the PCR that his neighbour was accusing him of rape. It shows that the accused, at first given opportunity had taken an action against false and implication and shows his innocence.

23. The sum and substance of the above discussion is that on one hand the victim was major at the time of alleged incident and secondly, she was having intimate relations and was in love with the accused and therefore, a reasonable doubt is created that she was a consenting party. Furthermore, it has also come on record that the accused did wanted to marry the victim and a marriage proposal for both of them was also floated but because they both belonged to different castes, it could not materialize. Hence, it cannot be said that accused made any false promise of marriage.

24. As already observed, POCSO Act has no application to the facts of the present case as the victim was major at the time of the alleged incident and now it is also observed that the allegations of rape could also not be proved beyond reasonable doubt.”

10. Ms. Radhika Kolluru, learned APP for the State submits that the impugned judgment is manifestly wrong, illegal and against the facts on record and thus, warrants interference by this Court.
11. Learned counsel for the State submits that the Trial Court has failed to appreciate the testimony of the victim and has overlooked the act of the respondent which was being done under the misconception of the marriage. The act clearly shows the mala-fide intention of the respondent and since she was a minor, the Trial Court has erred in acquitting the respondent.

12. It was contended by the counsel for the State that the case of the prosecution is based on the direct evidence of the victim, whose testimony remained consistent in all material particulars. There is ample evidence available on record to convict the respondent for the offence punishable under Section 376 of IPC and Section 6 of POCSO Act.
13. We have heard learned APP for the State and carefully examined the testimony of the witnesses and the impugned judgment rendered by the Trial Court.
14. The question which arises for our consideration is as to whether the Trial Court has erred in not relying upon the statement of the prosecutrix to convict the respondent?
15. To deal with the submissions of the counsel for the State, it would be relevant to analyse the testimony of the victim (PW2).
16. The victim was examined in the Court as PW2 wherein she deposed in her examination-in-chief that she became friendly with the respondent who used to say that he loved her and wanted to marry her. She further deposed that about 1 ½ months prior to the her complaint to the police, when she was cooking food, the respondent came to her room and despite her protest he committed rape upon her against her will and consent. Thereafter, on the occasion of Saraswati Pooja, the respondent gave her a letter. At that time, her mother was planning to send her to her native village to arrange her marriage after two days. She further deposed that the respondent started teasing her and was trying to make physical relations with her forcibly but in the meanwhile her brother Raj Kumar (PW4) came inside the room and

saw them and called her mother on phone. The mother of the victim reached the house and called one Anmol uncle and also went to Mahila Samiti and thereafter on the asking of Anmol uncle, police was informed.

17. However, in her cross-examination, she was confronted with her statement under Section 164 of the Code of Criminal Procedure wherein she stated that she was having friendship with the respondent two months prior to the day of incident and he had promised to marry her and had made physical relations with her but later he had refused to marry her. The victim further stated that the brother of the respondent namely Sanjay also used to stay with him and then volunteered that initially the respondent was willing to marry her but when his brother came to Delhi, he threatened the respondent and out of his fear the respondent refused to marry her. She further admitted that she was in love with the respondent and they both wanted to marry each other. She also admitted that her family had good relations with the respondent. She also deposed that her mother had only once stated to her that she would marry the victim with the respondent but in a light tone.
18. PW1 Geeta Devi (mother of the victim) deposed with respect to the incident of 15.02.2013 only and denied certain facts which were admitted by PW4 Raj Kumar (younger brother of the victim) in his testimony. Reading of their testimonies would show that the two families were very close to each other. In her cross-examination, PW1 denied that the respondent gave driving lessons to her husband; denied that respondent used to take meals at her house sometimes; denied that

her son Raj Kumar used to visit the respondent at his room; denied that the victim was once mentally disturbed and was taken to a Tantrik at Sonia Vihar in the TSR of the respondent who used to accompany them; denied that mother of the respondent used to visit their house; denied that she along with the victim and the mother of the respondent visited the village of the respondent. On the contrary, all the suggestions were duly admitted by PW4 in his testimony. PW4 deposed that the respondent had arranged for a TSR on hire for his father. PW4 further deposed that his mother and the victim had gone to Bihar and that the respondent used to address his father and mother as uncle and aunt and used to stay with them like a family member. PW4 also deposed that the respondent offered to marry the victim after the incident.

19. With regard to the age of the victim, the case of the prosecution is based on the ossification test report which was proved by PW5 Dr. Mohd. Irfan Ahmed who deposed that the age of the victim falls between 18 to 20 years at the time of the incident. There is no other document produced by the prosecution to prove the age of the victim. In the absence of any other document which would show that the victim was minor on the day of incident. No case under POCSO Act is made out.
20. Undoubtedly, conviction can be based on the sole testimony of the victim provided that it is trustworthy. However, in case the Court has reason not to accept the version of victim on its face value, it may look for corroboration. The evidence has to be read in its totality. In the present case, the victim had not deposed anything which goes against

the respondent. The prosecution has to prove its case beyond reasonable doubt. There must be proper evidence and material on record to record the conviction of the respondent.

21. It is also settled proposition of law that in case evidence read in its totality and the story projected by the prosecutrix is found to be improbable, her version is liable to be rejected. The Apex Court in ***Narender Kumar versus State (NCT of Delhi)***, reported at (2012) 7 SCC 171, has held as under:

"20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

*21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: **Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr.**, (2003) 3 SCC*

175; and **Vishnu v. State of Maharashtra**, (2006) 1 SCC 283.

22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: **Suresh N. Bhusare & Ors. v. State of Maharashtra**,: (1999) 1 SCC 220.

23. In **Jai Krishna Mandal & Anr. v. State of Jharkhand**, (2010) 14 SCC 534, this Court while dealing with the issue held:

"4.....the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

24. In **Rajoo & Ors. v. State of Madhya Pradesh**, (2008) 15 SCC 133, this Court held:

"10.....that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary."

The court however, further observed:

"11.....It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is

no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

25. In ***Tameezuddin @ Tammu v. State (NCT of Delhi)***, (2009) 15 SCC 566, this Court held as under:

"9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

22. The Hon'ble Supreme Court in ***State of Rajasthan v. Babu Meena*** reported at (2013) 4 SCC 206 has observed as under:

"9. We do not have the slightest hesitation in accepting the broad submission of Mr Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused."

23. While deciding the present leave to appeal, the aforesaid principles culled out by the Apex Court are to be kept in view. In the present case, the following circumstances stand proved:

- i) The victim was in love with the respondent and they both wanted to marry each other.
- ii) The respondent and the family of the victim enjoyed friendly relations.
- iii) There is no medical evidence to connect the respondent with the offence of rape.

24. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are of the considered view that the testimony of the victim is not reliable to bring home the guilt of the respondent. We are satisfied that given the evidence led by the prosecution during the trial, the findings of the Trial Court cannot be assailed on the grounds raised by the counsel for the State. As far as the contention of Ms. Kolluru regarding the victim being under the misconception of marriage is concerned, again reliance is made on the testimony of the victim, which we have already held cannot be relied upon in the absence of supporting evidence. Additionally, it has come on record that the respondent wanted to marry the victim and a marriage proposal for both of them was also floated but because they both belonged to different castes, it could not materialize. Therefore, it cannot be said that the respondent made any false promise of marriage. Hence, the contention of misconception of marriage is rejected. We find no infirmity in the findings and conclusion of the Trial Court.

25. Even otherwise, it is settled law that the appellate court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so [See *Sheo Swarup v. King-Emperor*,

AIR 1934 PC 227 (2); *M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200 (paragraph 16 and 17); *Tota Singh and Anr. v. State of Punjab*, AIR 1987 SC 108: (1987) 2 SCC 529 (paragraph 6); *State of Rajasthan v. Raja Ram*, (2003) 8 SCC 180 (paragraph 7); and *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 (paragraph 42)].

26. The leave to appeal is accordingly dismissed.



G. S. SISTANI, J.

REKHA PALLI, J.

MAY 15, 2017
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