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

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Judgment dated: 8th May, 2017

+ **Crl. L.P. 270/2017**

STATE GNCT OF DELHI

..... Petitioner

Through: Ms. Radhika Kolluru, APP for the
State along with Insp. Harish Kumar
& ASI Puran Singh, PS Gokal Puri

Versus

GUDDU @ HASEEN BABU

..... Respondent

Through: None

CORAM:

**HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MR. JUSTICE VINOD GOEL**

G.S.SISTANI, J. (ORAL)

CRL.M.A.7577/2017 (Exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

CRL.M.A. 7576/2017 (delay)

3. This is an application seeking condonation of 103 days delay in filing the present leave to appeal.
4. 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.

5. The application stands disposed of.

CRL.L.P. 270/2017

6. Present leave to appeal has been filed under Section 378 (3) of the Code of Criminal Procedure praying for leave to assail the judgment dated 18.10.2016 whereby the Trial Court has acquitted the respondent for commission of the offence by which he was charged in a case being SC No. 45008/2015 arising from FIR No. 331/2013 registered by the PS Gokalpuri under Sections 363/366/376(i)/506/419/420/494 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 4/8, 9 of Prevention of Children from Sexual Offences Act (hereinafter referred to as 'POCSO').
7. On 01.08.2013, a complaint was lodged by Shamshuddin stating missing of his sister/victim, a minor girl, aged about 15 years from the school namely Tentwala school, Old Mustafabad. As per the missing report she left for the school at about 7.00 am but did not return back to her home. An FIR was registered on the basis of the missing report under Section 363 of IPC.
8. Thereafter, being dissatisfied by the investigation, he filed a complaint to the DCP office, North East stating that on 01.08.2013, while her sister was returning from school his younger brother saw that his neighbour Guddu (respondent herein) had forcibly put the victim in a Maruti Van with the help of 3-4 persons and fled away. The complainant Shamshuddin further alleged that on 07.08.2013, he received a phone call from the respondent wherein he informed him

that the dead body of the victim would reach his home by the next day.

9. On 19.08.2013, the victim reached the Police Station and stated to the Investigating Officer that on 01.08.2013, her brother Rashid had given beatings to her on some domestic issue and out of anger she had gone with her friend Gulafsha to her native village Sambhal, U.P. and stayed there. The victim made no allegations of any kidnapping or abduction against anyone and said that she had gone out of her own free will and returned likewise. On the same day, her statement under Section 164 of the Code of Criminal Procedure was recorded wherein she had repeated the same. On 19.08.2016 itself, the statement of the mother of the victim was also recorded under Section 161 of the Code of Criminal Procedure wherein she reiterated similar facts as stated by the victim. On the basis of these statements, a cancellation report was prepared by the Investigating Officer.
10. Thereafter, on the complaint made by the complainant to the DCP, the matter was transferred to PG cell and was re-investigated and the statement of the victim was again recorded under Section 164 of the Code of Criminal Procedure on 18.10.2014 i.e. after more than one year and two months from the day of incident. In her statement, victim alleged that the respondent had forcibly married her and took her to Sambhalpur where he threatened to kill her and her brother Rashid and also made physical relations with her without her consent. She further alleged that she was kept under fear by the respondent and she had not submitted herself for medical examination.

11. After completion of the investigation, charge-sheet was filed against the respondent. On 08.04.2015, charge under Sections 363/366-A/506/476 of IPC and Section 6 of POCSO was framed against the respondent to which the respondent pleaded not guilty and claimed to be tried.
12. To bring home the guilt of the respondent, the prosecution examined 20 witnesses in all. Statement under Section 313 of the Code of Criminal Procedure was recorded wherein he claimed that about 2-3 days prior to the incident, a quarrel had taken place between the victim and her brother Rashid who gave her merciless beatings on which she left her house with her friend Gulafsha and after some days she returned to her home. He further stated that he got married on 25.08.2013. The victim was in love with him and when he got married, she lost her hope of getting married with him and had falsely implicated him in the present case. The respondent examined no witness in his defence and denied all the allegations against him.
13. Ms. Radhika Kolluru, learned counsel for the State submits that the impugned judgment is based on conjectures and surmises and is against the facts and law and thus, liable to be set-aside. It was further submitted that the testimony of the victim suffer from minor contradictions which should not be a ground alone for the acquittal.
14. It was also contended by the counsel for the State that Trial Court has wrongly disbelieved the date of birth of the victim which was duly proved by PW19 Doly Goyal (teacher from the school of the victim, who proved her school admission record). As per evidence on record, the victim was born on 22.07.1998 and was a minor on 01.08.2013.

The counsel further submits that the Trial Court has erred in not relying upon the school records including admission register and SLC (School Leaving Certificate issued by the previous school) to show that the victim was minor on the day of incident.

15. We have heard learned counsel for the State and carefully examined the testimony of the witnesses and the impugned judgment rendered by the Trial Court. The learned Sessions judge while acquitting the respondent observed as under:
 - (1) the case of the prosecution is full of improbabilities and the material witnesses have made numerous improvements of material facts, more particularly, the victim herself;
 - (2) there was unexplained delay in filing the FIR;
 - (3) the allegation made against the respondent that she was forced to enter into marriage by him was not proved and also the said nikah between them could not be proved;
 - (4) the evidence of all the persons who had witnessed the alleged nikah between the victim and the respondent turned hostile and even failed to identify the respondent in Court.
 - (5) the fact that the victim was a minor could not be proved.
16. The questions which arise for our consideration is as to whether the Trial Court has erred in acquitting the respondent on the basis of contradictions made by the victim in her statement and whether the Trial Court was correct in reaching to this conclusion that the victim was major on the day of incident.
17. To deal with the issue in hand, it would be necessary to analyse the testimony of the victim (PW1). The victim testified in Court that on

01.08.2013 after her school was over at about 12.30 pm, she was returning to her home alone, when she reached the corner of Gali No. 6, she met the respondent Guddu (who was known to her) who was accompanied by 4-5 other boys. She further deposed that a black colour van was standing nearby in which the respondent pulled her inside while putting a handkerchief on her mouth. She further deposed that the incident was witnessed by her younger brother Amish (PW5) though he could not be seen by her. Thereafter, she became unconscious and does not know what happened next. After she gained consciousness she found herself in a house at Sambhal. On 02.08.2013, the respondent forced her into a marriage accompanied by a Maulvi in the same house. She further deposed that she was kept in the same house for about 20 days and during this period the respondent repeatedly performed intercourse with her against her wishes. She was brought to Delhi in a bus and was taken to the house of maternal uncle of the respondent. On the next day, she was dropped outside PS Gokal Puri. She also deposed that she had refused her internal medical examination as she was instructed by the mother of the respondent for the same.

18. In her cross-examination, she was confronted with her previous statements which clearly show her improvements made during her depositions. In her Court testimony, she deposed that the respondent had forcibly married her. She was beaten by him and after the alleged nikah, the respondent had sexual intercourse with her against her wishes. However, when she was confronted with her statement under

Section 161 of the Code of Criminal Procedure it was recorded that after nikah they resided as husband and wife.

19. Further, in her cross-examination she admitted that she had called the respondent on his mobile phone on the day of incident fifteen times. Upon being asked the reason for the same, she stated that since she used to generally talk to the respondent, she called him. Later, she also admitted that she was in love with the respondent.
20. Thus, evidently it can be concluded that the testimony of the victim was coloured with contradictions and improvements. Therefore, it can be reasonably culled out that these material improvements make her testimony doubtful.
21. With regard to the age of the victim, the case of the prosecution is based on the School Leaving Certificate as proved by PW19 Doly Goyal wherein her date of birth was entered as 22.07.1998, which was further recorded on the basis of the School Leaving Certificate of the previous school. However, this certificate was declared to be forged as per the deposition made by PW8 Dhanpat (record keeper from the Office of Registrar, Births and Deaths) wherein he deposed that the certificate placed on record though bears stamp of his office but it was a fake certificate and its record was not available in their office. Thus the presumption would go in favour of the respondent that the victim was a major on the day of incident.
22. Undoubtedly, conviction can be based on the sole testimony of the victim provided that it is trustworthy. However, in case the Court has reasons 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 made material improvement which makes the case of the prosecution doubtful. Undoubtedly, 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.

23. 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. In the case of ***Sadashiv Ramrao Hadbe v. State of Maharashtra & Anr.*** reported at **2006 (10) SCC 92**, the Apex Court while reiterating that in a rape case, the accused can be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring the confidence in the mind of the Court. The relevant para 8 reads as under:

“8. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

(Emphasis Supplied)

24. In the case of ***Abbas Ahmed Choudhury v. State of Assam*** reported at **(2010) 12 SCC 115**, the Hon'ble Supreme Court observed that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix

would always tell the entire story truthfully. The relevant para read as under:

"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1."

(Emphasis Supplied)

25. The Hon'ble Supreme Court in ***State of Rajasthan v. Babu Meena*** reported at **(2013) 4 SCC 206** held that the conviction can be based on the sole testimony of the prosecutrix if it is reliable and worthy of credence. The relevant para 9 reads 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."

(Emphasis Supplied)

26. The Apex Court in *Mohd. Ali v. State of U.P.* reported at (2015) 7 SCC 272 dealt with the similar issue and held as under:

"29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon.

30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unimpeachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony

does not inspire confidence, and the circumstantial evidence remotely does not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the appellant-accused for the alleged offences and the High Court has fallen into error, without reappreciating the material on record, by giving the stamp of approval to the same."

(Emphasis Supplied)

27. The learned Trial Court considered the story of abduction of the victim as highly improbable as she claimed to have been abducted by the respondent on 01.08.2013 whereas she admitted that she had called the respondent fifteen times on the day of the incident and was in love with him. Further, it is evident from the examination-in-chief of PW5 that he informed his mother and brother about the incident, same day at about 1.30 pm. However, PW4 (his brother) deposed that he was informed by PW5 about one or two days after the incident. This makes the testimony of PW5 not reliable as it is highly unbelievable that after being informed about the name of the respondent, the parents would not have informed the police immediately. Additionally, the FIR was lodged at 09.35 pm i.e. after about nine hours of the incident. It is further evident from the cross-examination of her brother Amish (PW5) wherein he admitted that he was carrying a mobile phone at the time of incident but he did not inform the police or to his elder brother (PW4 Shamshuddin). PW5 further stated that the place where the incident took place was situated at about a distance of 100-150 meters from the school gate which is again not believable that the respondent would dare to commit such an act in the presence of large number of students accompanied by their guardians who come to pick up their

wards. PW5 had duly informed the name of the respondent as abductor to his mother and brother but despite this they chose to remain silent for the reasons best known to them. Furthermore, the victim (PW1) was examined by Dr. Sushama (PW6) on 19.08.2013 and the victim made absolutely no allegations before her and only history available with PW6 was that the victim was missing since 01.08.2013 and found on 19.08.2013.

28. While deciding the present leave to appeal, the aforestated principles culled out by the Apex Court are to be kept in view. In the present case, the following circumstances stands proved:
- i) The victim was in love with the respondent;
 - ii) The respondent had never abducted the victim;
 - iii) The age of the victim could not be proved that she was a minor on the day of incident;
 - iv) The factum of marriage between the respondent and the victim could not be proved;
 - v) There is no medical evidence to connect the respondent with the offence of rape.
29. 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. We find no infirmity in the findings and conclusion of the Trial Court.

30. 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)].
31. The leave to appeal is accordingly dismissed.

G. S. SISTANI, J.

VINOD GOEL, J.

MAY 08, 2017

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