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

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Judgment delivered on: 26.09.2017

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CRL.L.P. 315/2017 & Crl. M.A. No.8536/2017

STATE OF NCT OF DELHI

..... Petitioner

Through: Mr. Ravi Nayak, Additional Public
Prosecutor for the State with
IO/Inspector Amita Sharma and ASI
Baljeet Singh, P.S. Aman Vihar.

Versus

RADHEY SHYAM ETC.

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. The present leave petition under Section 378(1) of Cr.P.C. impugns the judgment dated 17th May, 2016, rendered by the Additional Sessions Judge, (North- West), Rohini Courts, New Delhi, thereby acquitting the respondent in case titled "*State vs. Radhey Shyam*"; arising out of FIR No. 260/2011 under Sections 363/376/392/506/366/34 IPC and Section 12 of POCSO Act.

2. The case is that the prosecutrix Ms. S., a minor had been misled as well as confined in the second floor of the tenanted house of the respondents for about 8 months, and in this duration the respondent brothers, Nilesh and Avinash, sexually assaulted her.

3. In order to prove its case, the prosecution examined a total of 30 witnesses, including the prosecutrix (PW-16). Subsequently, statements of incriminating material was put before the respondents and later the statement of the respondents under Section 313 Cr.P.C. was recorded. The respondents denied all the allegations leveled against them and refused to lead any evidence.

4. The Trial Court after hearing the learned counsel for the parties and a proper examination of the evidence on record, acquitted the respondents of the charges framed against them. This was so done while taking into consideration the statements of the prosecutrix recorded under Section 161 and 164 Cr.P.C., as well as her deposition in Court, which according to the Trial Court indicated that she left her house, got “married” to the respondent Nilesh and started residing with him voluntarily, without any coercion, threat, pressure or enticement whatsoever, and consented to have sexual intercourse with him.

5. On the issue of whether the consent of the victim to have sexual intercourse with the respondent No.2 was validly given, the Trial Court reasoned as follows:

"40. The prosecution has proved the age of prosecutrix through her school record. The said record was produced in court by PW-4. As per the said record the prosecutrix was admitted to school in 5th class on 19.07.2005 on the basis of admission form and an undertaking furnished by her mother without there being any document with regard to her age issued by either hospital or municipality or any other statutory authority. The possibility of the age of the prosecutrix having,

*been understated at the time of her admission cannot be ruled out for want of the documents on the basis of which her date of birth as 14.08.1994 (Fourteen August Nineteen Ninety Four) was got recorded in school recorded. In the case of **Bird Mai Singhavi vs. Anand Purohit, 1988 Supp. SCC 601**, it has been held that no evidentiary value can be attached to Date of Birth entry in absence of material on the basis of which, same was made."*

6. Apropos the charge punishable under Section 363 IPC, the Trial Court observed as follows:

"51. I have considered the evidence of prosecutrix in the light of the evidence of the above mentioned witnesses and I do not find the prosecutrix to be a trustworthy witness at all.. It is clearly evident that the prosecutrix had got married with accused Nilesh of her free will and she had stayed in the house of accused persons without having any restrictions upon her. It appears that the prosecutrix had some temperamental difference with her husband i.e. accused Nilesh which might have prompted her to go to her parent's house, however the parents thereafter made her to level all sorts of allegations against the accused persons for the reasons best know to them. Thereafter like an obedient child the prosecutrix might have concocted allegations of kidnapping by making her unconscious, getting her marriage performed in unconscious state and commission of sexual assault upon her by accused Nilesh and Avinash. From bare perusal of photographs mark A-1 to A-4 and Ex. DW 4/A1 to Ex. DW 4/A5 it is apparent that the prosecutrix had happily married accused Nilesh. She was in a healthy state of mind and had participated in the marriage in a jovial mood."

7. This case pertains to the year 2011 when section 375 IPC provided for the age of consent as 16 years. After amendment to said section, the age was increased to 18 years with effect from 02.02.2013.

8. A perusal of the record would show that as of the date of the alleged incident, the prosecutrix, on the basis of school records, was more than 16 years and 10 months old i.e. at the time of having sexual intercourse with respondent no. 2 whom she had apparently “married, she had attained the age of consent. Therefore, under section 12 of the POCSO Act, no offence is made out since she was already 16 years of age. Apropos the alleged confinement, the record reflects that the prosecutrix went away from her home of her own free will to reside at the home of the respondent no. 2 as his lawfully wedded wife. In this context, the Court would refer to the dicta of the Supreme Court in *S.Varadrajan vs. State of Madras, AIR 1965 SC 942*, which held;

"where facts indicate that a girl left her father's protection, knowing and having capacity to know the full import what she was doing and voluntarily joined the accused, the offence of kidnapping cannot be said to have been made out."

9. The learned Additional Public Prosecutor for the State has referred to other grounds taken in the petition but they are either subsidiary or incidental to the main grounds i.e. (i) whether the prosecutrix was a minor for the sake of giving sexual consent or for living with another person and (ii) whether she was coerced to leave her parental home. Both these issues have been answered in the negative on the basis of the evidence. The reasons for and the conclusion arrived at in the impugned order are sound

and cannot be faulted. In the view of the above discussion, we are unable to agree with the learned counsel for the petitioner.

10. We find no reason to interfere with the impugned order.

11. Accordingly, the leave petition is dismissed.

NAJMI WAZIRI, J.

SIDDHARTH MRIDUL, J.

SEPTEMBER 26, 2017

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