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

+ **CRL. L.P. 541/2016**

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Date of Judgment: 22nd May, 2017

STATE (GOVT. OF NCT OF DELHI)

.... Petitioner

Through : Ms.Radhika Kolluru, APP.

versus

NITIN KUMAR

.... Respondent

Through : Mr.Dinesh Garg, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE NAVIN CHAWLA

G.S.SISTANI, J. (ORAL)

Crl.M.A. 15529/2016 (Condonation of Delay)

1. This is an application seeking condonation of delay of 22 days in filing the present leave to appeal. 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.
2. Application stands disposed of.

Crl. L.P. 541/2016

3. The present leave to appeal has been filed by the State under Section 378 (1) (a) of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') being aggrieved by the judgment dated 04.06.2016 passed by the Trial Court in Sessions Case 44618/2015 by virtue of which the respondent has been acquitted for charges under Sections 363/366/343/34 and Sections 376/506/34 of the Indian Penal Code, 1860 (briefly the 'IPC').

4. The case was registered on the basis of the complaint of the prosecutrix (PW-1) wherein the prosecutrix had stated that on 01.08.2011 at about 3:30 PM, when she was going for her tuitions, upon reaching Arun Book Depot, Nitin/respondent and Aman [declared juvenile ('JCL')] came on a motorcycle and enticed her and took her to Loni. En route, the prosecutrix asked where she was being taken, but she was scolded and given life threats. The prosecutrix was taken to a room in the house at Loni, which was closed from inside by the respondent, while Aman (JCL) stood guard outside. The respondent committed rape on the prosecutrix and went away after locking the room from outside. He returned the next day at about 9:00 AM and repeated the act of rape with the victim and again went away in the same fashion. No one came to the victim on the third or fourth day; but on the fourth day, i.e. 04.08.2011, respondent came at about 4 PM and took the victim out of the room on the pretext of providing her food. He took her on his motorcycle and abandoned her in a street behind MIG Flats, East of Loni. From there, the prosecutrix managed to reach her home in the night but did not reveal anything to her mother. On the next morning, the prosecutrix disclosed everything to her mother who, in turn, disclosed the facts to her father in the night and then they came to the Police Station and lodged the report.
5. During the course of trial, the co-accused Aman (JCL) was found to be a juvenile and his matter referred to the Juvenile Justice Board. After considering the records of the case and hearing the counsel for the parties, charge was framed against the respondent under Sections 363/366/343/34 and Sections 376/506/34 IPC. The respondent pleaded not guilty and claimed trial.

6. The prosecution examined 13 witnesses in all; the statement of the respondent under Section 313 Cr.P.C. was recorded and the respondent did not lead any evidence in his defence.
7. After examining the evidence before it, the Trial Court acquitted the respondent. The Trial Court found that (1) the testimonies of all the prime prosecution witnesses, being the prosecutrix (PW-1), Smt.Mukesh Rani (PW-2) and Sh.Hari Kishan Sharma (PW-5) were contradictory and inconsistent; (2) the conduct of the prosecutrix (PW-1) and her parents (PW-2 and PW-5) was questionable; (3) there is unexplained delay in the lodging of FIR; (4) the medical evidence has not supported the case of the prosecution; and (5) the minority of the prosecutrix was not established.
8. Ms.Kolluru, learned counsel for State, submits that the judgment of the Trial Court is contrary to law and the facts on record and is based on conjectures and surmises and thus, is liable to be set-aside. It is submitted that the Trial Court has erred in coming to the conclusion that the delay in lodging the FIR was not explained. Learned counsel submits that the Apex Court has repeatedly held that the delay in such cases may be attributable to the society's attitude towards such women, casting doubt and shame rather than comfort and sympathy. The Trial Court did not appreciate the fact that Sh.Hari Kishan Sharma (PW-5) had deposed in Court that he had gone to the police station to lodge a missing report, but the police officials advised him to search for the victim himself.
9. Learned counsel for the State next submitted that the Trial Court has erred in coming to the conclusion that there are material contradictions in the statements of the victim/prosecutrix (PW-1). It is

submitted that the sole testimony of the prosecutrix can be made the sole basis of conviction in a rape case and there is neither a rule of law nor of practice mandating corroboration. There were no material omissions, improvements or contradictions which go to the root of the case and thus, the testimony of the prosecutrix could not have been discarded.

10. The final submission of Ms.Kolluru is that the Trial Court erred in coming to the conclusion that the prosecutrix was a consenting party and that the age of the prosecutrix could not be proved.
11. We have heard learned counsel for the State and have carefully examined the judgment of the Trial Court.
12. The following questions arise for our consideration:
 - (i) Whether the sole testimony of the prosecutrix (PW-1) could be made the sole basis of an order of conviction?
 - (ii) Whether the delay in lodging the FIR was satisfactorily explained?
 - (iii) Whether the failure of the parents of the prosecutrix (PW-2 and PW-5) to lodge a missing report raises a question upon their conduct?
 - (iv) Whether the Trial Court was correct in finding that the prosecution had failed to prove the age of the prosecutrix?
13. In respect of the first question, the Trial Court had refused to rely upon the sole testimony of the prosecutrix as the same was found to be plagued by contradictions. The prosecutrix (PW-1) had given three statements: first, under Section 161 Cr.P.C. (Ex.PW1/A); second, under Section 164 Cr.P.C. (Ex.PW1/B); and the third, before the Trial

Court. In this regard, we deem it appropriate to reproduce the relevant portion of the judgment of the Trial Court in extenso below:

“15. It was pointed out that in her statement under Section 161 CrPC, Ex.PW1/A, the victim alleged that she was enticed (behlana-fuslana) and taken on the motorcycle, whereas under statement under Section 164 CrPC, Ex.PW1/B she never used the word ‘enticed’. In the later statement Ex.PW1/B, the victim stated that after taking her to the room, she was bolted inside and both the accused went away. She stated that about 9.00pm on the same, accused Nitin came inside the room having cold drink which he gave to the victim and she drank. She further stated that thereafter, Aman also came and both of them committed rape on her. These facts are not to be found either in her statement Ex.PW1/A or even in her deposition before the Court. Apart from that she never stated in Ex.PW1/A or before the Court that both accused had locked her inside at the first instance and went away and returned back at 9.00pm in the night. On the contrary, she stated that she was raped for the first time immediately by accused Nitin alone on reaching the said room. She also never alleged before the court that she was raped by both the accused.

16. She had further stated in Ex.PW1/B that she was not knowing as to where she was and when she was crying, both accused had slapped her and thereafter, they went away after closing her inside. She alleged that on the next day only accused Nitin came and committed rape upon her. No one came on the third day and on the fourth day, she stated that only Nitin came and took her on the pretext of offering her eatables and left her on the road behind LIG flats.

17. Ld. Counsel submitted that the place where the victim was allegedly left by the accused Nitin has also been stated differently by her in different statements. In Ex.PW1/A, she stated that she was left in a street behind MIG Flats, East of Loni. In Ex.PW1/B, she stated that she was left on a road behind LIG Flats and in the deposition before the Court, she deposed that she was left near LIG Flats, Loni Road. Furthermore, before the doctor, at the time of her medical

examination, the victim disclosed to the doctor the she was dropped to her school. In the cross-examination, she admitted that MIG and LIG flats are situated in different directions and PS Jyoti Nagar is in front of MIG flats. She denied the suggestion that she had stated different places in Ex.PW1/A and Ex.PW1/B as to where she was allegedly abandoned or dropped. She further denied that she had stated in her deposition before the JJB as well as to the doctor that she was left at her school but improved by saying that she had stated that she was left in a gali behind the school which was of LIG flats.

18. The contradictions as recorded above in various statements of the victim and her improvements show that she was not sure as to where she was left by the accused, which raises suspicion about the fact if she was actually abandoned by the accused in the manner deposed by her.

...

25. *In her examination-in chief, she deposed that when she sat on the motorcycle, she was the last of the pillion rider but in her cross-examination, she denied her position and claimed herself to be in the middle of the two i.e. the driver and the last pillion rider. ...*”

(Emphasis Supplied)

14. From the foregoing, it is clear that the testimony of the prosecutrix (PW-1) was plagued by contradictions and improvements. Recently, a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in ***State (Govt. of NCT of Delhi) v. Charan Singh, 2017 SCC OnLine Del 8186*** had after referring to numerous pronouncements of the Supreme Court, observed as under:

“25. It is clear that the Trial Court found glaring inconsistencies and contradictions in the testimony of the prosecutrix. Even though there is no quarrel with the proposition that conviction can be based on the sole testimony of the prosecutrix but at the same time, it must be unimpeachable and beyond reproach precluding any shadow of doubt over her veracity. ...”

15. Applying the principle to the present case, we are of the view that the Trial Court was correct in declining to rely upon the sole testimony of the prosecutrix (PW-1) as the same was not, by any count, unimpeachable or beyond reproach. Her testimony was full of contradictions and improvements, both in respect of the incident and the surrounding circumstances. In such a case, the court cannot rely upon the sole testimony of the prosecutrix. Medical or forensic do not support the case of the prosecution. In the latter, no injuries were found on the body of the prosecutrix as is evident from the testimony of Dr.Bhanu Priya (PW-7) and only her hymen was found to be ruptured, but PW-7 could not opine as to whether the tear was fresh or old. Further, even though Smt.Mukesh Rani (PW-2) has deposed that the prosecutrix was taken to the hospital in the same clothes in which she returned and the prosecutrix (PW-1) had deposed that she had not taken a bath, yet no semen could be detected on any part of her body or body fluid, vaginal secretion etc.
16. Even otherwise, the testimony of the prosecutrix is questionable or unbelievable as the place from where the prosecutrix was allegedly abducted is a market place and a busy thoroughfare. The prosecutrix did not raise any alarm until she was confined in the room. It was only in her cross-examination before the Trial Court that she deposed that Nitin/respondent had a knife and pointed it to keep the prosecutrix silent. This fact was neither recorded in her statements under Section 161 Cr.P.C. or Section 164 Cr.P.C. or before the Juvenile Justice Board and the only reason for such omission was that she was never asked. Hence, it is unlikely that there was any weapon as no witness

can forget or omit to state such a vital fact in her statements, not once but three times. It is settled law that when the testimony of the prosecution is improbable, supporting evidence is called for and there was none in the present case.

[See *Tameezuddin v. State (NCT of Delhi)*, (2009) 15 SCC 566 (paragraph 9 and 10) and *State (Govt. of NCT of Delhi) v. Mohd. Rihan*, Crl. L.P. 287/2017 dated 15.05.2017 (paragraph 27 and 28)].

17. Accordingly, the first question is decided in the negative inasmuch as the sole testimony of PW-1 could not be made the basis of an order of conviction.
18. The second and third question are linked and revolve upon the justification for the delay in approaching the police by the parents of the prosecutrix and then by her. We note that the prosecutrix went missing on 01.08.2011 from her home and returned on her own in the night of 04.08.2011, but did not reveal anything to her parents. It was on the next morning, i.e. 05.08.2011, that she disclosed everything to her mother (PW-2) who, in turn, disclosed it to her father (PW-7) in the night; only then the report was lodged with the police.
19. Sh.Hari Kishan Sharma (PW-5) (father of the prosecutrix) who claimed himself to be a post-graduate, failed to approach the police within reasonable time of his minor daughter gone missing. He only stated that on the evening of 01.08.2011, he had gone to the police station to lodge a complaint, but was turned down by the police was saying that they should search for her on their own as the prosecutrix might of gone to the house of some relative. Other than approaching the police once in four days, when his daughter was missing, PW-5 took no other step in tracing his daughter. It is improbable that

anyone, let alone an educated person, whose daughter is missing would sit idle even if it is presumed that he had been turned down by the police on the first day. Similarly Smt. Mukesh Rani (PW-2) also stated that she searched for her daughter/prosecutrix, but did not even approach her relatives which was allegedly suggested by the police. It is hard to comprehend as to where she was searching then? There is no answer. Further, the factum of having been turned down by the police is not stated by the PW-5 in his statement under Section 161 Cr.P.C.

20. Additionally, when the prosecutrix (PW-1) returned on 04.08.2011, neither of the parents (PW-2 or PW-5) enquired about her whereabouts in the past four days and it was only the next day, when the prosecutrix described the incident. Even then, PW-2 waited till the evening to inform her husband (PW-5).
21. Thus, there is no explanation for either the failure to lodge a missing complaint or the delay in filing an FIR, which opens the possibility of introduction of a coloured version, exaggerated account or concocted story. We may notice a judgment of a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in ***State (Govt. of NCT of Delhi) v. Manoj Ram***, MANU/DE/1230/2016: 2016 SCC OnLine Del 3136 where the prosecutrix disappeared on 15.04.2013, was found on 16.04.2013, but the incident was informed to the mother on 17.04.2013 and the same was reported on 18.04.2013. The bench held that the delay created a suspicion about the version of the prosecution and coupled with the improvements and improbabilities in the testimony of the prosecutrix could not establish the guilt of the

respondent there and went on to uphold the order of acquittal of the Trial Court. The relevant portion of the judgment reads as under:

“25. According to the prosecution case, the prosecutrix went missing on 15.04.2013. If the prosecutrix went missing on the aforesaid date the mother who is expected to have necessitous concern, should have gone to the police station to lodge a missing report which could have prompted the Investigating Officer to act accordingly. It is worthwhile to mention that in rape cases the delay in filing FIR by the prosecutrix is not unusual on account of trauma and agony suffered as also the fear of social stigma. However, what prevented the mother of the prosecutrix to lodge a missing report remains unanswered. PW9 stated that on 15.04.2013 in the evening she searched for her daughter here and there and returned home. Again on 16.04.2013, she searched for her daughter in the morning and found her inside the park. Since she was disturbed she did not talk with the victim. On 17.04.2013 in the evening when she asked her daughter about 15.04.2013 she disclosed the fact of rape. On 18.04.2013 she caught hold of the accused and reported the matter to police.

...

28. In view of the settled proposition of law as well as on the above conduct of the mother, no reasonable and plausible explanation has been tendered as to why the FIR was lodged belatedly by the complainant after knowing from her daughter about the alleged rape. The delay in lodging FIR creates a suspicion about the version of the prosecution.”

(Emphasis Supplied)

22. Accordingly, the judgment of the Trial Court cannot be faulted for this reason as well. The failure of the parents (PW-2 and PW-5) of the prosecutrix to approach the police in the four days when the prosecutrix was missing raises doubt about their conduct and further, even though the prosecutrix returned on 04.08.2011, the incident was

reported only on 05.08.2011 opening the possibility of exaggerations or a concocted story being put forth.

23. We find the argument of Ms.Kolluru that the delay in the FIR can be explained by the stigma attached to the offence to be without any force. Even though, there is no quarrel with the proposition that the stigma attached by our society to a victim of rape may deter her or her family to promptly disclose the incident, but the same could not have deterred the parents of the prosecutrix to lodge a missing report in the four days she was missing.
24. In view of the foregoing, the last question loses all significance as the prosecution has failed to establish that there was either enticement, confinement or rape. Nothing turns on the age of the prosecutrix.
25. To sum up, the Trial Court was correct in not convicting the respondent based upon the testimonies of the prosecution witnesses which are plagued by inconsistencies, improvements, contradictions and exaggerations as well as being on the whole, improbable. Some supporting evidence was required, but none was led by the prosecution. Further, neither the delay in lodging the FIR was explained nor the inaction on the part of the parents of the prosecutrix in filing a missing report, creating a suspicion about the version of the prosecution.
26. Therefore, we are not inclined to grant the present leave to appeal. Even otherwise, it is settled law that the appellant 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); *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 (paragraph 42); *Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450 (paragraph 73); and *Muralidhar @ Gidda v. State of Karnataka*, (2014) 5 SCC 730 (paragraph 12)].

27. Accordingly, we find no illegality or infirmity in the judgment of the Trial Court warranting interference. The bond and surety under Section 437-A Cr.P.C. are discharged.
28. The leave to appeal is dismissed.

G. S. SISTANI, J.

NAVIN CHAWLA, J.

MAY 22, 2017

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