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

% *Date of Judgment: 24th July, 2017*

+ **CRL.L.P. 403/2017**

STATE (NCT OF DELHI)

..... Appellant

Through : Ms.Radhika Kolluru, APP for the
State alongwith Ins.Vipin Kumar
Sharma, SHO, New Usmanpur and
SI Santosh

versus

SALIK

..... Respondent

Through : *Nemo*

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

Crl.M.A. 11557/2017 (Delay)

1. This is an application seeking condonation of 180 days' delay in filing the present leave to appeal. Though we find no reason to condone the delay, but since we have heard the matter on merits, delay of 180 days in filing the present leave to appeal is condoned.
2. The application stands disposed of.

CRL.L.P. 403/2017

3. The present leave to appeal has been filed by the State under Section 378(3) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the judgment dated 14.10.2016 passed by the Additional Sessions Judge ('Trial Court') in SC 44819/2015 arising out of FIR 181/2013 registered at PS New Usmanpur, whereby the accused/respondent herein stands acquitted of all charges against him.
4. The case of the prosecution as noticed by the Trial Court is as under:

“1. On 09.06.2013, Smt. Husnaz Begum lodged a report with the police of PS New Usmanpur that on 08.06.2013, at about 10.00am, her daughter, victim, a minor girl, aged about 15 years had gone to stitching center to learn stitching work but neither she went there nor returned to house. She had searched for her in her relations but she could not be found. She suspected that some unknown person might have taken away the victim. On the basis of said statement/report, initially the present case was registered under Section 363 IPC. The investigation was carried on by the police. WT messages were got published through different agencies regarding the victim. Meanwhile, Smt. Husnaz Begum, complainant went to the police station and informed that her neighbour Mohd. Salik S/o Mohd. Sattar was also missing from his house from the day when the victim went missing. She provided the phone number of Salik to the police, which was found switched off. However, no clue could be found by the call detail records of the said phone/number. Again, during the course of investigation, complainant approached the police and suspected that the victim might be with Salik at Forbis Ganj, Bihar. Thereafter, police went to the house of Salik at Bihar and inquired his parents but no traces of either the accused or the victim were found. Meanwhile, the complainant again went to the police station and apprised the police that her victim daughter was with Salik and he was hiding at village Ram Pur, PS Forbis Ganj, District Arariya, Bihar. On the basis of said information, a raid was conducted at the said place on 22.07.2013. From there the accused was apprehended and the victim was recovered at the instance of complainant. The accused was got formally medically examined there. The victim's mother refused for her medical examination there. Thereafter, the accused and the victim were brought to Delhi. The victim was again produced before the doctor for her medical examination where she and her mother refused for the internal examination. Victim was produced before the Ld. MM where her statement under Section 164 CrPC was recorded. Thereafter, Sections 366/328/376 IPC & 3/4 of POCSO were added in this case.”

5. After completion of investigation, chargesheet was filed against respondent for the offences punishable under Sections

363/366/328/376 of the Indian Penal Code, 1860 ('IPC') and 3/4 of Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').

6. The Trial Court framed the charge under Sections 363/366/376 IPC against the respondent on 18.12.2013 and thereafter, an additional charge under Section 6 of POCSO Act was framed on 13.05.2014. The respondent/accused pleaded not guilty to all the charges and claimed trial.
7. To bring home the guilt of the respondent, the prosecution examined 14 witnesses. The statement of the respondent was recorded under Section 313 Cr.P.C. wherein all the incriminating evidence put to him, which he denied and pleaded his innocence. He took the defence that the victim was in friendship with him and for that, her parents had beaten her and sent her to her *jija's* house 3-4 days prior to the alleged incident. He also stated that he was called by her parents at their house one day prior to the incident and a quarrel took place between them. He never kidnapped the victim nor took her anywhere. The defence examined 2 witnesses.
8. After examining the evidence before it, the Trial Court came to the conclusion that the fact of the prosecutrix being a minor was not established, there were improvements and contradictions in the deposition of the prosecutrix and there were serious contradictions in the evidence led by the prosecution in respect of the recovery of the prosecutrix and the respondent and acquitted the respondent/accused of all the charges against him. Aggrieved, the State has filed the present leave to appeal.
9. Ms.Kolluru, learned counsel for the State, submits that the judgment of the Trial Court runs awry of the facts and legal principles and

hence, warranting interference by this Court. It is submitted that the Trial Court has failed to appreciate the evidence in its true sense and purport. The acquittal has been based on minor contradictions and imagined doubts which do not affect the case of the prosecution. Learned counsel contends that the prosecutrix was consistent in her statement under Section 164 Cr.P.C. and the deposition before the Trial Court. In respect of the refusal to go for medical examination, it is submitted that it is settled law that the testimony of the prosecutrix can be the sole basis of conviction and there is no need for corroboration by medical evidence.

10. Learned counsel submitted that the Trial Court has erred in returning a finding that the victim was not a minor at the time of the incident. It is submitted that the prosecutrix was admitted in school on 12.12.2008 directly and as per the records of the school (Ex.PW-6/A to 6/D), her date of birth was 09.09.1998. Accordingly, the present case would be covered by POCSO Act and the presumption under Section 29 POCSO Act would be applicable.
11. Lastly, it was contended that the Trial Court failed to appreciate the fact that the victim was recovered from the village of the accused/respondent and as many as 6 prosecution witnesses have deposed in this regard. All the six witnesses were consistent in their testimonies and thus, there was no occasion for the Trial Court to find that the recovery was doubtful.
12. We have heard the learned counsel for the State and carefully examined the judgment of the Trial Court. Three questions arise for our consideration:
 - (i) Whether the Trial Court erred in finding the prosecutrix to be a major?

- (ii) Whether the sole testimony of the prosecutrix could have been relied upon without any corroboration?
 - (iii) Whether the prosecution was able to prove the recovery of the prosecutrix and the respondent from village Ram Pur?
13. In respect of issue (i), the law is well settled. The Supreme Court in ***Jarnail Singh v. State of Haryana*, (2013) 7 SCC 263** (paragraph 20) has held that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 though strictly applicable to a child in conflict with law, would also be applicable to determine the age of a child who is a victim of a crime. Accordingly, Rule 12 (3) is applicable for determining the age of the prosecutrix, which reads as under:

“12. Procedure to be followed in determination of Age.-...

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

- (a)
 - (i) the matriculation or equivalent certificates, if available; and in the absence whereof;*
 - (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*
 - (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;*
- (b) *and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the*

evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence, whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

(Emphasis Supplied)

14. At the same time, it has been held in ***Birad Mal Singhvi v. Anand Purohit*, 1988 Supp SCC 604** (paragraph 15) that an entry relating to date of birth made in a school register is not of much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded [See also ***State (Govt. of NCT of Delhi) v. Charan Singh*, 2017 SCC OnLine Del 8186** (paragraphs 16-21); and ***State (GNCT of Delhi) v. Mohd.Irfan*, 2017 SCC OnLine Del 9111** (paragraphs 12-15)].
15. In the case at hand, Vijay Pal Singh (PW-9: wrongly numbered as PW-6) proved the records of school of the victim. As per the records, the prosecutrix was admitted in the school in 2nd Class on 12.12.2008 and as per the records of the school, the age of the prosecutrix was 09.09.1998. The school can by no means be said to be the ‘school first attended’ under Rule 12(3)(a)(ii) as the records of the victim prior thereto were not produced. Ms.Kolluru has submitted that the victim was admitted in the school directly. We find no basis for the submission in the absence of any evidence on record. Be that as it may, as held in ***Birad Mal Singhvi (Supra)***, such entry is of no value in the absence of the material on which it was so recorded. PW-9 deposed that the entry was based on an affidavit furnished by the mother of the victim (Ex.PW-6/C); however, he admitted in his cross-examination that the affidavit did not bear any date and was unsigned. Such affidavit is a nullity in the eyes of law and hence, the entry in the records cannot be said to be based upon any material. Accordingly,

even if the school was the one first attended, the entry was not based on any material and hence, was not of much evidentiary value. Thus, we find no infirmity in the judgment of the Trial Court on this count.

16. We proceed to issue (ii). Though it is settled law that the sole testimony of the prosecutrix can be relied upon to base an order of conviction without any medical evidence, however, the same should be of sterling quality and not leaving any shadow of doubt over her veracity. [*State v. Wasim*, 2017 SCC OnLine Del 8502 (paragraphs 19-21); see also *Sudhansu Sekhar Sahoo v. State of Orissa*, (2002) 10 SCC 743 (paragraph 18) *Krishan Kumar Malik v. State of Haryana*, (2011) 7 SCC 130 (paragraphs 24 and 31); and *State (Govt of NCT of Delhi) v. Jitender Kumar & Anr.*, 2017 SCC OnLine Del 9195 (paragraphs 28-32)]
17. Further, the Apex Court in *Rai Sandeep v. State (NCT of Delhi)*, (2012) 8 SCC 21 reversed the conviction of the Trial Court and its confirmation by the High Court finding contradictions in the testimony of the prosecutrix and that the same was inconsistent with the remaining evidence of the prosecution. While doing so, the Supreme Court examined as to when the prosecutrix can be called to be a ‘sterling witness’ as under:

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua

the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

(Emphasis Supplied)

18. We proceed to analyse the statement and testimony of the prosecutrix (PW-1). After the alleged recovery, the victim (PW-1) was brought to Delhi and her statement was got recorded under Section 164 Cr.P.C. on 27.07.2016, wherein she stated that about 1 ½ months ago, she was returning back home from the house of her sister; in the midway, the respondent met her alongwith two of his associates and they put her in a TSR and took her to the house of the relative of the respondent wherein she was closed in a room. She further stated that when she made hue and cry, she was administered some sedative as a result of

which, she became unconscious and when she came to her senses, she found herself without clothes and realized that she had been raped. She further stated that again she was made to smell something as a result of which, she became sedated and started following the commands of the respondent who took her to Bihar where he again committed wrong act with her. She stated that she made a phone call to her uncle from there and informed him about the place where she had been confined and accordingly, her uncle came with the police and brought her back to Delhi.

19. The victim was examined before the Trial Court as PW-1. She deposed in her testimony that in June 2013, she was residing with her parents. She knew the respondent as being her neighbour and also treated him as her brother (*muhbola bhai*). She deposed that on 08.06.2013, at about 10 AM, she was going to stitching center at 3rd Pusta, Usmanpur and when she reached near the center, the respondent came from behind and put a cloth on her mouth and pulled her in a TSR wherein two other boys were also present and then they took her to the house of the relative of the respondent wherein she was given food and water but she took only water and felt sleepy and slept. She deposed that when she awoke, she did not find any cloth on her body and the respondent was present there. On being asked as to who had removed her clothes, accused/respondent refused at the first instance and that she also felt something wet in her private parts. She deposed that she started weeping and crying and asked the respondent to leave her with her parents, but the respondent threatened that if she insisted, he would kill her. She further deposed that the respondent confined her in the said room for a week, during which period he repeatedly committed rape upon her against her consent and used to

keep her in the room after giving some intoxicating substance. She deposed that the respondent took her to Bihar after a week under intoxication to the house of the wife of his brother-in-law, where he obtained her signatures on a *nikah* paper and then also took her to the court where again her signatures were obtained on marriage papers without her consent. There, she came to know from a girl that the said place was Ram Pur and from the mobile phone of the said girl, she made a call to her uncle and informed her location to him. She further deposed that thereafter, her uncle reached that place with Delhi Police and brought her and the respondent to PS Forbis Ganj, Bihar and from there to Delhi. She deposed that she had refused for her internal medical examination both at Bihar as well as at Delhi.

20. PW-1 was cross-examined at length. She denied that the respondent was her distant relative. However, this fact that the respondent was related to her family, was admitted by her mother (PW-4). She admitted that she knew that the respondent was having two sons. She was confronted with her statement under Section 164 Cr.P.C. (Ex.PW-1/A) wherein the fact as deposed by her that respondent came from her behind on the day of the incident, put a cloth on her mouth and put her in a TSR was not recorded. Similarly, she was again confronted with the said statement Ex.PW1/A wherein she had stated that she was going to her house from her sister's house, without mentioning about any stitching center but later, she explained that she had to go to the stitching center after taking bath at her mother's house. She denied the suggestions that she was having an affair with the respondent about 5-6 months prior to the incident and was regularly talking to him on mobile phone, which fact came into the knowledge of her parents who were annoyed with it. She was further confronted with her previous

statement Ex.PW1/A where it was not recorded that when she came to her senses, she found herself without clothes and felt wetness in her private parts. She again came with an explanation when she was asked if she raised any alarm while she was being taken by the respondent, deposing that her mouth was gagged and two other associates of the respondent were present in the TSR.

21. It is clear that the testimony of the prosecutrix was plagued by contradictions and improvements over her previous statement (Ex.PW-1/A). She could by no means be classified as a sterling witness and therefore, it was incumbent on the prosecution to lead supporting evidence.
22. It has also been held by the Apex Court that the sole testimony can also not be relied upon, when the story fails to inspire confidence of the court as being improbable. In ***Tameezuddin v. State (NCT of Delhi)*, (2009) 15 SCC 566**, the Supreme Court found it improbable that the husband of the victim of rape, after coming to know of the incident, would have gracefully told the accused/appellant therein that everything was forgiven and forgotten but had nevertheless lured him to the police station and thus, wanting supporting evidence. The relevant portion of the judgment reads 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. We are of the opinion that the story is indeed improbable.

10. We note from the evidence that PW 1 had narrated the sordid story to PW 2 on his return from the market and he had very gracefully told the appellant that everything was forgiven and forgotten but had nevertheless lured him to the police station. If such statement had indeed been made by PW 2 there

would have been no occasion to even go to the police station. Assuming, however, that the appellant was naive and unaware that he was being led deceitfully to the police station, once having reached there he could not have failed to realise his predicament as the trappings of a police station are familiar and distinctive. Even otherwise, the evidence shows that the appellant had been running a kirana shop in this area, and would, thus, have been aware of the location of the police station. In this view of the matter, some supporting evidence was essential for the prosecution's case.”

(Emphasis Supplied)

[Also see ***State (Govt. of NCT of Delhi) v. Mohd. Rihan***, 2017 SCC OnLine 8549 (paragraphs 27 - 29); and ***Jitender Kumar*** (Supra) (paragraph 32-33)]

23. In the present case, PW-1 stated in her further cross-examination that she was unaware as to how she was taken to Bihar as she was not in conscious state during the journey up to there and no one else was accompanying them when the respondent took her to Bihar. This part of her testimony is highly improbable. The prosecutrix was a grown girl and even if the claim of the prosecution is presumed to be true and she is taken to be 15 years old, it is impossible for any person to carry her on his shoulders or otherwise to Bihar without coming into notice of any other person in the midway including the police officials who also remain present at transit points.
24. To conclude, the testimony of the prosecutrix was inconsistent, contradictory and improbable. Then, in the absence of any corroborating evidence, either in the form of medical evidence or otherwise, the testimony could not have been relied upon to convict the accused/respondent.
25. The final issue pertains to the alleged recovery of the prosecutrix and respondent from village Ram Pur. Ct.Devender Kumar (PW-2), Lady Ct.Rekha (PW-7), Ct.Ram Prasad (PW-8), Mohd.Islam (PW-10)

(brother in-law of the complainant) and SI Sonal Raj (PW-12) (IO) were witnesses to the recovery. The Trial Court found that there were serious contradictions in the testimony of these witnesses, however, it has been contended before us that they were consistent.

26. PW-2 could not remember the name of the train by which they had gone to Bihar or even the name of the station from where they boarded down. He also could not depose the name of any local police officials who helped them in the recovery of the victim. PW-7 deposed that on 22.07.2013, she again joined the investigation with the IO and they reached at PS Forbis Ganj, District Arariya, Bihar and on the pointing out of the complainant, the victim was rescued and respondent was arrested. However, she did not depose the name of the village from where the respondent was arrested or the victim was recovered. Similarly, Ct. Ram Prasad (PW-8), another member of the raiding party though deposed that they went on 22.07.2013 to search the victim to PS Forbis Ganj but disclosed the name of the district as Katiyar instead of Ram Pur. He also did not disclose the name of the village from where the recovery of the victim was effected.
27. The uncle of the prosecutrix (PW-10) had deposed differently from the prosecutrix (PW-1) herself. He deposed that on 22.07.2013, he came to know from the villagers that respondent was residing in village Ram Pur with the victim and he informed this fact to the mother of the victim on phone who then reached at his house with police and he accompanied them to village Ram Pur from where the respondent was apprehended with the victim. This is contrary to the version of the victim as she stated that she had called her uncle. Further, it is the prosecution case that they reached at PS Narpat Ganj on 22.07.2013 itself and on the same day, the recovery of the victim

was effected. If this witness had informed the complainant on 22.07.2013, there was no question of the recovery having been effected on the same day as it is not possible to reach Bihar on the same day by road. In the cross-examination, he admitted that he had not signed on any arrest documents of the respondent nor had provided the name and phone number of the person who provided information about the respondent to him. Thus, the Trial Court correctly found his deposition to be unreliable.

28. Further, even the arrest memo, personal search memo of the respondent and recovery memo of the victim shows that only the Delhi Police officials and the complainant had signed the same. ASI Madan Sharma (PW-5) who belonged to the Bihar State Police also turned hostile and even refused to identify the respondent. In this background, there was a serious cloud over the story of the prosecution in respect of the recovery of the respondent and the prosecutrix.
29. To conclude, we find no infirmity in the judgment of the Trial Court on any of the three counts. The age of the prosecutrix could not have been proved in the absence of any material on which the school records were based; the testimony of the prosecutrix being contradictory, inconsistent and improbable could not have been relied upon in the absence of corroborating evidence; and the alleged recovery of the victim and the respondent from Ram Pur was highly doubtful in view of the contradictions in the evidence of the prosecution.
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); *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)].

31. Accordingly, we find no ground to interfere in the judgment of the Trial Court.
32. We notice that the respondent had furnished bail bond with one surety under Section 437-A for a period of six months from 15.10.2016. The bail bond and the surety under Section 437-A Cr.P.C. are discharged if not already expired/discharged.
33. The leave to appeal is dismissed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 24, 2017

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