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

+ CRL.L.P. 8/2017 & CrI.M.A.No.275/2017

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Date of decision : 1st March, 2017

STATE

..... Petitioner

**Through: Ms. Aashaa Tiwari, APP for
the State with SI Inderveer
Singh from PS Karawal
Nagar**

versus

RAHUL

..... Respondent

Through: None

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT (ORAL)

GITA MITTAL, J.

CrI.M.A.275/2017

1. Heard.
2. We are satisfied that the State was prevented by sufficient cause from bringing this leave petition within the statutory period of limitation. Delay in filing the leave petition is condoned.

This application is allowed.

CRL.L.P. 8/2017

3. The instant petition has been filed under Section 378(1) of the Criminal Procedure Code praying for leave to assail the judgment dated 11th May, 2016 whereby the trial court has acquitted the respondent for commission of the offence with which he was charged in the case being SC No. 44864/2015 arising from FIR No. 324/2012 registered by the PS Karawal Nagar under Section 363/366-A and 376 of the IPC.

4. We note hereafter the essential facts of the case necessary for passing the present order. On 10th September, 2012, a complaint was lodged with Police Station Karawal Nagar with regard to the complainant's minor daughter aged about 15 years having left the house on 7th September, 2012 without informing anyone. Suspicion was raised in the complaint over one boy with whom the complainant had seen the victim a few days ago and it was alleged that he may have enticed her away. FIR No. 324/2012 was consequently registered under Section 363 IPC by Police Station Karawal Nagar with investigation being marked to SI Ashok Kumar (PW8).

5. The minor child was recovered on 18th September, 2012 from Shiv Vihar Pulia by the investigating officer at the instance of her parents in the company of the respondent who was thereafter arrested. The child's statement was recorded under Section 161 of the CrPC where she initially stated that she had developed a love affair with the respondent, who was her maternal uncle's tenant

while visiting her uncle in the summer vacations and that she continued to meet him thereafter. On being called by the respondent on 7th September, 2012, she had been enticed by him and had gone with him to the Khoda Colony, Ghazibad where he allegedly sexually assaulted her despite her resistance and without her consent. The police got the statement of the victim recorded on 20th September, 2012 under Section 164 of the CrPC before the learned Metropolitan Magistrate wherein the victim made allegations against the respondent. We find that the Magistrate, has at the time of recording the statement however, noted as follows :

“Witness is not coming out with truth. She is tutored.”

6. The victim was also medically examined by Dr. Nusrat Jahan (PW17) at the GTB Hospital, Shahdara on 18th September, 2012. The victim's MLC has been proved on record as Exh.PW17/A. The MLC notes a completely different history having been given by the victim as her having been lost from home on 7th September, 2012 and having returned on 18th September, 2012 during which period she had been assaulted two to three times. The MLC notes that there were lacerated lesions on her perineum after the assault. On local examination, injuries were observed including 3x1 cm ulcerated lesions over bilateral thigh and foul smell discharge emanating from it. Exh.PW17/A also records multiple puncture lesions over bilateral labia majora and minora and lesions on the anal opening. All these injuries were opined to be suggestive of sexually transmitted diseases ('STD'

hereafter).

7. In the cross examination conducted on 11th March, 2014, the victim testifying as PW2 categorically stated that it was not the present respondent who had taken her with him. She categorically stated that the respondent did not do anything wrong to her. In her further cross examination on 20th March, 2014, PW2 has categorically stated that between 7th September, 2012 and 18th September, 2012, she was staying at home. She reiterates that she had made the statement before the Magistrate at the instance of the police. However, in her cross examination on the next date, answering to a pointed query as to who had taken her on 7th September, 2012 if it was not the respondent, PW2 stated that there were some other person (*“woh koi aur bhaiyya the”*) and that she did not know his name. In these circumstances, the trial court has noted that there is complete confusion regarding the manner in which the victim was recovered and that contradictory facts have been stated by the witnesses in this case.

8. In the cross examination, PW17 has admitted that if efforts were made for sexual satisfaction by the individual herself, the medical history and injuries would be the same. However, in response to a court question, PW17 did observe that the findings as recorded in the MLC were suggestive of penetrated sexual assault recent in duration and were also suggestive of anal intercourse. At the same time, PW17 again added that these injuries would also be caused during masturbation with any foreign object. Thereafter she has clarified that however sexually transmitted diseases could not

be caused by masturbation.

9. On completion of the investigation, the police filed a charge sheet under Section 173 of the CrPC against the respondent for commission of offences under Section 363/366/376 of the IPC. After compliance with Section 207 of the CrPC the case was committed for trial to the Court of Sessions.

10. By an order dated 21st May, 2013, after considering the material placed by the prosecution on record, the Sessions Court framed charges under Section 363/366-A/376 of the IPC to which the respondent pleaded not guilty and claimed trial.

11. The prosecution examined 18 prosecution witnesses in support of its case. The incriminating circumstances in the prosecution evidence were put to the respondent under Section 313 of the CrPC which he denied and claimed false implication. It was also stated by the respondent that the victim had been tutored in her statement so recorded by the police under Section 161 of the CrPC and by the Metropolitan Magistrate under Section 164 of the CrPC. The respondent specifically alleged that the victim had made the allegations under the pressure of police officials. In his defence, the respondent examined his mother Smt. Kamlesh Pandey (DW1) as the sole witness in his support.

12. After consideration of the evidence led by the parties on record and application of mind, the learned Additional Sessions Judge by the judgment dated 11th May, 2016, opined that the prosecution had failed to bring home the charges against the respondent by legal evidence and consequently acquitted him of

the charges which had been levelled against him.

13. The State has preferred the instant petition under Section 371(1) of the CrPC merely contending that the learned trial court has erred in construing the evidence of the main witness who was the victim herself. It has been submitted that the witnesses supported the allegation of sexual assault on the victim who was only 15 years of age on the date of the offence.

14. Before, we deal with the discussion of the age of the victim by the trial court, it is necessary to examine the evidence led by the prosecution to support the charge of sexual assault by the respondent.

15. The evidence of the victim who was examined as PW2 establishes that she had been subjected to sexual assault which was recent in duration and she may also have undergone anal intercourse. However, it was essential for the prosecution to establish that the respondent was guilty of commission of these sexual acts to her.

16. We find from a perusal of the judgment dated 11th May, 2016, the trial court has discussed the statement made by PW2 during investigation as well as the court testimony in detail from para 9 of the judgment. The court has noted the first statement of PW2 recorded by the police on 18th September, 2012 that she had met the respondent when she visited her maternal uncle at Khoda Colony, Ghaziabad, U.P. where the respondent was a tenant under her uncle and developed intimacy with him and that she remained in his contact. PW2 had disclosed that she used to meet the

respondent in parks and that on 7th September, 2012, the respondent had called her to Yamuna Vihar and thereafter abducted and removed her to the Khoda Colony, Ghaziabad where he had sexual relations with her several times despite her resistance. She remained away from home for 11 days and on 18th September, 2012 came to Shiv Vihar as she was feeling home sick. They were apprehended by the police when they reached Hanuman Mandir, Shiv Vihar on the identification of her parents.

17. In her statement recorded on 20th September, 2012 during investigation under Section 164 of the CrPC, PW2 had stated before the Magistrate that she knew the accused for the last two or three months prior to the incident and treated him as her brother. She made a statement which was similar to her statement under Section 161 of the CrPC.

We have noted above, the observations of the learned Metropolitan Magistrate who recorded the statement that it appeared that the victim was not stating the truth and was giving a tutored statement.

18. In para 11 of the judgment, the trial court has noted that there were gaps in the testimony of the witness. PW2 discloses where she had remained for two or three days after she left her home on 7th September, 2012 but does not disclose where she remained for the remaining period of eight or nine days.

19. In her deposition before the court as PW2, the victim has made improvements in material particulars alleging that on 7th September, 2012 itself that the respondent had met her on the

morning and told her that he would meet her outside the school after school hours; they consumed juice from a shop nearby and that thereafter the respondent took her somewhere but did not know the place as she was unconscious. PW2 alleged that the respondent kept her at some place for two-three days during which period she remained unconscious. This has been noted to be not only a completely new stance taken by the victim but one which was never stated by her before, either while giving her statement to the police under Section 161 CrPC or in the statement recorded by the Magistrate under Section 164 of the CrPC.

20. Though PW2 states that the respondent had physical relations with her, but makes contradictory statements with regard to the place and regarding the particulars of the incident. She completely denied the statement attributed to her as having been made to the Magistrate under Section 164 of the CrPC as well as the statement attributed to her by police under Section 161 of the CrPC alleging that she had been read over her statement by the police but it was a different one from the one that they were alleging to have been got recorded by them. PW2 was subsequently declared hostile and was subjected to cross examination by the learned APP. Undoubtedly, the victim has made contradictory statements at different stages.

21. We also find that in the testimony of Ct. Dhananjay (PW4), (who has claimed to have apprehended the respondent with the victim near the Hanuman Mandir at the instance of the mother of the victim-PW1), he has testified that the “*two accused*” sat in the

back portion of the vehicle alongwith the lady constable. The trial court has observed that this testimony would show that, initially the prosecution was building a case implicating two persons for the offence. However, no second person has either been chargesheeted or tried in the case.

22. In this background, the trial court had concluded that the prosecution has not been able to prove its case against the respondent beyond reasonable doubt and that on the strength of the evidence which has been laid, no conviction could be returned against the accused.

23. We have noted above the testimony of PW17 which shows that PW2 had been subjected to sexual assault. However, this was not sufficient to bring home the finding of guilt against the respondent for the same. The prosecution had to establish commission of the offence by the respondent beyond reasonable doubt. No unimpeachable evidence establishing that the respondent was responsible for the acts has been led. We, therefore, agree with the trial court that the prosecution in the present case has failed to prove the respondent's culpability beyond reasonable doubt.

24. In view thereof, there is no merit at all in this leave petition which is hereby dismissed.

GITA MITTAL, J

MARCH 01, 2017/kr

ANU MALHOTRA, J