

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 26.09.2017

CRL.L.P.463/2017

STATE

..... Petitioner

Through: Mr. Ravi Nayak, APP for State.

Versus

PRADEEP KUMAR @ DEPAK MANDAL

..... Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE NAJMI WAZIRI

SIDDHARTH MRIDUL, J (ORAL)

1. The present leave petition instituted on behalf of the State, under Section 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') assails the judgment dated 27th July, 2016, rendered by the Additional Sessions Judge, (North-East), Karkardooma Courts Complex, New Delhi, thereby acquitting the sole respondent in case titled as "*State vs. Pradeep Kumar @ Deepak Mandal*"; arising out of FIR No.459/2011 under Sections 363/376 Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

2. Briefly encapsulated, the case of the prosecution is that the complainant Sukhlal (PW-2) lodged a missing person report on

23rd November, 2011, in relation to his daughter; aged about 16 years (hereinafter referred to as “the victim”). As per the complaint, the victim (PW-1) was missing since 1:00 P.M. on 23rd November, 2011. On the basis of the complaint the subject FIR was registered under Section 363 IPC. Thereafter, on 16th December, 2011, the brother of the victim, namely, Deepak (PW-7) received a telephone call from the victim informing that she was at the Bhajanpura Bus Stand, New Delhi. Pursuant to receiving the call, PW-7 reached there and escorted the victim to the Police Station. The victim was medically examined and her statement under Section 161 Cr.P.C was recorded founded on the allegation made against Pradeep Kumar *alias* Deepak Mandal (hereinafter referred to as ‘the respondent’); of enticing the victim and taking her to his house, marrying her and of committing rape upon her.

Subsequent statement of the victim under Section 164 Cr.P.C was also recorded before the concerned Magistrate and the charge under Section 376 IPC was also added. The respondent was subsequently arrested on 19th December, 2011. After completion of investigation, charge-sheet was filed against the respondent for the offence punishable under Sections 363/376 IPC and the Trial Court framed charges under the said sections. The

respondent pleaded not guilty to the charges framed against him and claimed trial.

3. In order to prove its case, the prosecution examined 16 witnesses, including the victim (PW-1). Subsequent thereto, statement of incriminating material was put before the respondent and later the statement of the respondent under Section 313 Cr.P.C. was recorded. The respondent denied all the allegations levelled against him and refused to lead any evidence.

4. The Trial Court after hearing learned counsel for the parties and thorough examination of the evidence on record, acquitted the respondent of the said charges framed against him. The respondent was acquitted particularly in view of the statements of the victim (PW-1) recorded under Sections 161 and 164 Cr.P.C, as well as, her deposition in Court, which in the considered view of the Trial Court indicated that she left her house and started residing with the former voluntarily, without any coercion, threat, pressure or enticement, and consented to have sexual intercourse with him.

5. It is the said order of acquittal dated 27th July, 2016, which has been assailed in the present petition seeking leave to appeal therefrom.

6. Without further ado, we would proceed to elaborate the basis on which the respondent was acquitted of all the said charges.

7. The Trial Court observed that during the cross-examination of the victim (PW-1) it was deposed by her that she was friend with the respondent and they used to talk to each other over the phone. It is also amply clear from the testimony of the victim (PW-1) that she did not leave her parental home on any inducement or threat given by the respondent, but voluntarily. The testimony of victim (PW-1) further unequivocally records that she met the respondent of her own free will. Further, it has been deposed by the victim that before her marriage with the respondent she used to stay in a tenanted room with the latter's aunt, uncle and their daughter, and after her marriage with the respondent; which was performed behind the back of her family members, they started residing together as husband and wife in a separate tenanted room in the same street. At this juncture, it would also be relevant to observe that the victim had categorically deposed that at no stage she complained either to the landlord or to any neighbour or to the relatives of the respondent that she was forcibly being detained. On the contrary, it was testified by the victim that she took normal meals and did normal household work and had even gone out of the house once or twice with the relatives of the respondent to purchase household items.

8. Furthermore, when the victim (PW-1) was examined at the hospital she had clearly made a statement to the attending doctor that she of her own free will had left her parental home and married her boyfriend on 26th November, 2011, and had physical relations with him many times thereafter. In this behalf, it would be further relevant to note that the said statement recorded in her MLC (Ex.PW-16/A) clearly reveals that the doctor did not record any history of physical assault.

9. Based upon the above material, the Trial Court came to the following conclusion:-

“12. It is abundantly clear from the statements of the victim recorded u/S 161 Cr.P.C. and 164 Cr.P.C. as well as her deposition before the Court that she had gone from the house absolutely of her own free will, without any kind of coercion, threat, pressure or enticement on the part of the accused. She had ample opportunities to return back to her house when the accused did not meet her on 21.11.2011 at Ashok Nagar but instead of returning back to her home, she went to the house of one Parul and stayed with her overnight. Again, on the next day, she went from her house to Kashmere Gate instead of returning back to her house when she could have done so and there was absolutely no pressure or inducement upon her from anyone including the accused. There had been no explanation on her part as to why she chose to go to Kashmere Gate instead of going to her own house. It has come in her testimony that the house of Parul was situated at a walking distance of 10/15 minutes from her house and thus, she could have easily return back to her house, that too, when she was aware that her father was quite perturbed because of her missing from her house and was repeatedly calling her on phone.

13. The accused was nowhere in picture when she started from her house on 21.11.2011 and till she reached Kashmere Gate on 22/11/2011 where the accused allegedly met her. According to the victim, it was a single room where the accused was residing with three other persons namely Mausī, Mausā and their daughter. During her stay, as deposed by her, she performed normal activities, did household work and also went out for making purchases which clearly shows that she was not under any kind of threat or pressure. She also admitted that after marriage with the accused, she resided in a separate rented room as husband and wife but made no complaints to the landlord or any other person that she had been forced to stay there. This all shows that she had been a consenting party throughout and the sexual intercourse was also done with her consent as she has accepted the marriage without any kind of opposition. She had nowhere deposed that the accused had ever threatened her in any manner whatsoever to enter into marriage or to have sexual intercourse with her, except making bald allegations that such an act was performed against her wishes and consent which is hard to believe in the given facts and circumstances. If she could have called her brother on phone after about 15 days, she could have done so earlier also as she was having a mobile phone with her.”

10. Insofar as, the factum of whether the consent of the victim to have sexual intercourse with the respondent was validly given or not is concerned, the Trial Court held as follows:

“17. There is no authentic age proof of the victim on record. PW6 Ms. Meenakshi Arora-teacher of the last attended school of the victim proved her admission record, according to which her date of birth was mentioned as 29.06.1995. She admitted that no MCD date of birth certificate was furnished at the time of her admission. Even as per said date of birth, the victim was more than 16 years of age when she went out of her house and entered into marriage and sexual relations with the accused.

18. It is to be noted that the incident alleged in the present case is of November 2011 i.e. prior to coming into force of the Criminal Law (Amendment) Act No. 13, 2013, as per which Act, the age of consent in Section 375 IPC was raised to 18 years. It means that as on the date of the incident of the present case, i.e. November, 2011, the previous law was applicable and as per that law the definition of rape, as it then stood was that:-

“A man is said to have committed rape, who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First-.....

Secondly-.....

.....

Sixthly-With or without her consent, when she is under sixteen years of age.

19. It means that at the time of incident, a girl of more than 16 years was capable of giving consent for sexual intercourse and it would not amount to rape. In the instant case, as per the facts and circumstances enumerated herein above, it is clear that the victim was more than 16 years of age and was a consenting party to the sexual intercourse. The DNA report proved by PW14, though had found the DNA profile similar in the source Ex.2a i.e. payajami of the victim and Ex.3, gauze cloth piece of the accused, confirming sexual intercourse in between them but it would again be of no consequence considering the consent of the victim in having intercourse with the accused and since she was above 16 years at that time, it would not be an offence.”

11. In relation to the charge punishable under Section 363 IPC, the Trial Court observed as follows:

20. The accused has also been charged for the offence punishable under Section 363 IPC, but again it is clear that the victim had on her own went out of her house and despite the fact that she had ample opportunities to return home, she went alongwith the accused without any kind of threat, pressure, coercion or inducement.

21. In *S. Varadrajan Vs. State of Madras*, AIR 1965 SC 942, it has been held that “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”.

(emphasis supplied)”

12. A perusal of the above findings rendered by the Trial Court would reveal that it is axiomatic that the victim (PW-1) voluntarily left her paternal home to join the respondent, and was more than 16 years of age at the time of having sexual intercourse with the latter; which as unequivocally deposed by the former herself was consensual.

13. In view of the foregoing, after observing the dictum of the Hon’ble Supreme Court in *S. Varadrajan v. State of Madras* (supra), as well as the legal position which obtained at the date and time of the occurrence of the incident i.e. November, 2011, evidently prior to coming into force of the Criminal Law (Amendment) Act No.13, 2013; which postulated the raising of the age of consent under Section 375 IPC to 18 years, the Trial Court

rightly held that the respondent could not be said to have kidnapped or committed rape upon the victim(PW-1).

14. Although, Mr. Ravi Nayak, learned Additional Public Prosecutor appearing on behalf of the State has underlined the grounds taken in the petition for grant of leave to appeal with some vehemence, in view of the foregoing discussion, we are unable to agree with him.

15. Consequently, we find no sufficient ground to permit the State to grant leave to appeal against the judgment and order rendered in “*State vs. Pradeep Kumar @ Deepak Mandal*”, dated 27th July, 2016, since in our view, the same does not warrant any interference.

16. The leave petition and all pending applications are accordingly dismissed.

17. No order as to costs.

SIDDHARTH MRIDUL, J.

NAJMI WAZIRI, J.

SEPTEMBER 26, 2017

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