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

+ **Crl. L.P.20/2017**

% Date of Decision: 20th September, 2017

STATE

..... Petitioner

Through Mr. Rajat Katyal, APP with SHO
Suresh Chand & ASI Puran Singh,
PS Gokal Puri, Delhi

Versus

PRADEEP KUMAR

..... Respondent

Through Mr. Ashish Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J. (ORAL)

CRL.M.A. 794/2017(delay)

1. For the reasons stated in the application, delay of 142 days in filing of the petition is condoned.
2. The application stands disposed of.

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3. The petitioner, by way of this petition, is seeking leave to appeal against the impugned judgment and order dated 03.05.2016 passed by Learned Additional Session Judge, Karkardooma Courts, New Delhi in Sessions Case No.44322/2015 arising out of FIR No.384/2014 under Sections 363/366/376(2)(n) & 6 POCSO Act registered at Police Station Gokal Puri.

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4. The case of the prosecution, as noticed by the Trial Court, is that, on 09.04.2014, at about 5.00 AM, the victim (PW-1), aged about 15 years, went missing from her house. Her mother (PW-3) lodged a missing report at Police Station, leading to lodging of the present FIR u/s 363 IPC. On 26.04.2014, the brother of the victim (PW-7) informed the Police Station that the victim was present at ISBT Anand Vihar alongwith the respondent Pradeep Kumar. The investigation was marked to WSI, who got the victim medically examined and also recorded disclosure statement of the accused and he was arrested. In her statement u/s 164 Cr.P.C., PW-1 alleged that the respondent enticed her and committed rape upon her in a room at ISBT Anand Vihar. To bring home the guilt of the respondent herein, the prosecution examined as many as 13 witnesses. The statement of the accused was recorded under Section 313 Cr.P.C., where he pleaded false implication.

5. The learned APP for the State has submitted that the impugned judgment and order dated 3.5.2016 suffers from various infirmities and is not sustainable in the eye of law. Learned APP for the State has also submitted that the learned Trial Court has fallen into error in not appreciating the fact that the Principal of the School (PW-5), stated that the victim was admitted in the School on 30.8.2006 in Class-II and as per their record, the date of birth of the victim was 12.8.1999, which was recorded on the basis of the affidavit given by her mother (PW-3), hence, as per their record, the age of the victim was about 15 years at the time of the incident. Hence, the consent of the victim was immaterial. The learned Trial Court

has failed in appreciating that the age of the victim was below 15 years on the date of the incident. Learned APP for the State has further stated that the learned Trial Court fell in error in not appreciating the fact that, even if it is assumed that the prosecutrix accompanied the accused without any hue and cry having befriended him, that does not infer or presume that the victim had consented for sexual intercourse and in the present case, the testimony of the victim (PW-1) is worth of credence. She had identified the accused and deposed in Court as well as before the Magistrate about the voluptuous act of the respondent against her consent. The learned APP for the State has further submitted that the learned Trial Court had fell into error in not appreciating the fact that the complainant had no motive to falsely implicate the respondent.

6. On the other hand, relying on the judgment of the learned Trial Court, learned counsel for the respondent has submitted that the contentions of the learned APP are required to be rejected and the judgment and order dated 13.5.2016, acquitting the accused, is not liable to be set aside on the grounds mentioned in the leave petition or argued by the learned APP for the State.

7. The evidence on record and the testimony of PW-5, who deposed that the prosecutrix was admitted in the School on 30.08.2006 in Class-II and as per their record, her date of birth was 12.08.1999. She also deposed that only an affidavit was given by victim's mother in support of the date of birth of admission of the prosecutrix. However, it is worthwhile to mention

here that neither the birth certificate of the prosecutrix was placed on Court record nor the ossification test was conducted by the prosecution to prove the age of the prosecutrix.

It has come in the cross-examination of the mother of the prosecutrix (PW-3) that the victim was her youngest child, the eldest was another daughter, aged about 35 years, the next was a son, aged about 32 years and then another son, aged about 26 years and thereafter, the victim, who was younger to him by about 7-8 years. Thus, she could not depose the date of birth of her children and could only give the age by approximation. In her further cross-examination, she deposed that she had no birth certificate of any of her children and that she had not furnished any date of birth certificate at the time of the admission of the victim in the school. Further, she had disclosed the date of birth of the victim at the time of her admission by approximation and the date, month and year of her birth was recorded by the teacher on her own.

8. Hence, there is nothing on record and we also do not find any error or infirmity in the findings of the Trial Court, holding that there is no authentic proof of age of the victim on record and her age has only been disclosed by approximation. The evidence regarding her age cannot be accepted and as such, the benefit would ultimately go to the respondent. In these circumstances, the victim cannot be considered to be a minor at the time of the alleged incident. As such, there is no force in the submission of the learned APP for the State that the prosecutrix was below the age of 15 years at the time of the incident.

9. PW-7 Sonu, brother of the victim deposed that on 26.04.2014, he received a call from his friend who told him that his sister was present at Anand Vihar ISBT. The name of the said friend was never disclosed by him nor was it tried to be ascertained by the IO. He further deposed that he then made a call to PW-9 ASI Hukum Singh and disclosed to him about the said fact, who along with one constable, came to his house and they all proceeded to Anand Vihar ISBT. In this respect, PW-9 deposed that on 26.04.2014 PW-7 came at the PS and informed him that the victim was seen with the respondent at Anand Vihar ISBT and accordingly, he, along with PW-2 Ct. Surender and PW-7, reached there. In the cross-examination, PW-7 deposed the time of making the call to PW-9 as 9:00 pm, whereas according to PW-9, PW-7 came to the PS at about 3:00 pm. Even the mode of reaching ISBT has been differently stated by all these witnesses. According to PW-7, they went there in the official van of PW-9, whereas PW-9 deposed that he, along with PW-2, went to the ISBT on his motorcycle, while PW-7 reached there on his motorcycle.

10. PW-7 further deposed in his cross-examination that her sister, i.e., the victim and the respondent were found sitting on the road on a wooden plank type object and were eating something. However, PW-9 deposed that the victim and the accused were apprehended near public toilet at the right side of the entry gate of the ISBT, whereas PW-2 could not remember the place from where the two were apprehended. PW-7 further deposed that no proceedings were conducted at the ISBT by the police and all the writing work was done at the PS, whereas PW-10, Investigating Officer deposed

that all the arrest documents were prepared at the ISBT itself. PW-9 deposed that he did not prepare any documents related to the arrest of the respondent at the ISBT, while PW-10 deposed that when she reached there, the respondent had already been arrested vide arrest documents Ex.PW-1/A to Ex.PW-2/B.

11. There are material contradictions and improvements in the statement of the prosecutrix. The statement of the prosecutrix was recorded under Section 161 Cr.P.C. on 26.04.2014 (Ex.PW-10/DA), wherein she has not alleged at all that the respondent committed rape upon her in the public toilet of the ISBT. The prosecutrix, in her cross-examination, has also deposed that the respondent was arrested from Meerut and she was not with him at the time of his arrest. Accordingly, the learned Trial Court has correctly held that the site plan prepared by the IO is totally incorrect and against the facts of the case. There are material contradictions and none of the material witnesses corroborate each other regarding the place or time or manner of the arrest of the accused. It is worthwhile to take into consideration the fact that the recovery of the victim as disclosed by the prosecution is also not only doubtful, but also contradictory. All the four witnesses related to the recovery of the prosecutrix have a different version to tell. As such, having major and material contradictions in their testimonies regarding the recovery. Hence, it cannot be held to be proved that the respondent and the victim were apprehended at Anand Vihar ISBT in the manner, as alleged by the prosecution.

12. It has to be noted that the prosecutrix has alleged that she was raped by the respondent but she refused for her internal medical examination. However, the IO has admitted in her deposition that the victim stated to her that she was in love with the respondent and had gone with him on her own will. This fact also finds mentioned in her statement (Ex. PW-10/DA), which clearly demonstrates and proves that the prosecutrix had gone with the respondent on her own will, but as is evident on record, the custody of the prosecutrix was handed over to her mother at the police station. She remained in the custody of her parents till her statement under Section 164 Cr.P.C. was recorded and there is a certain possibility as to the prosecutrix being tutored by her family members. If we look into the case of the prosecution from a different angle, PW-3 had deposed that she got prosecutrix medically examined, but gave an alleged history that she was lost from home on 09.04.2014 and was found in Meerut on 26.04.2014, as she had run away with a boy, but there is no history of sexual assault or sexual abuse or being drugged. She has further testified that the prosecutrix was not willing for her internal medical examination and UPT. It is evident from the testimony of PW-13 Dr. Bhanupriya that the prosecutrix, at the time of her medical examination, did not make any allegation against the respondent of any nature regarding rape or sexual abuse etc., as rightly stated, at the first given opportunity. The prosecution has failed to prove on record that the prosecutrix was a minor at the time of the alleged incident as well as there are material contradictions regarding the arrest of the respondent and recovery of the prosecutrix. There are also material contradictions on record regarding the place of incident. Furthermore, there

are contradictions regarding the time, the victim left the house, in the statement of PW-1 to the police, wherein she stated it to be 9:00 am, though in her deposition to the Court, she stated it to be 6:00 am. The victim refused her medical examination without any cogent reasons. The prosecutrix did not make any allegation of rape or sexual assault or being drugged during her medical examination, at the first given opportunity. There is probability that the prosecutrix might have been tutored, when she remained in the custody of her parents before the recording of her statement under Section 164 Cr.P.C. Even otherwise, the conduct of the prosecutrix also suggests that she must have gone with the respondent on her own will, but changed her version. Hence, in view of the aforesaid discussions, it would be erroneous to rely upon the descript testimonies against the respondent. Accordingly, we find no infirmity in the decision of the learned Trial Court. There are material improvements and contradictions, as discussed hereinabove, in the testimonies of the witnesses. The testimonies of the prosecutrix and the other witnesses have failed to inspire confidence and are on the whole improbable. Hence, in the absence of any corroboration of medical or forensic evidence, in our view, the learned Trial Court has correctly held that the prosecution has failed to prove its case against the accused beyond reasonable doubt and accordingly acquitted the respondent of the offences charged against him.

13. In the light of the above discussions, we hold that the prosecution has failed to prove its case beyond any shadow of doubt against the respondent

and we are in agreement with the conclusion arrived at by the learned Trial Court, consequently the leave to appeal is held to be devoid of any merit.

14. 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)].

15. Accordingly, we find no ground to interfere in the judgment of the Trial Court. The personal bonds and the sureties under Section 437-A Cr.P.C. are discharged.

16. The leave to appeal is dismissed.

(CHANDER SHEKHAR)
JUDGE

(G. S. SISTANI)
JUDGE

September 20, 2017/tp