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

+ CRL.L.P. 775/2015 & CrI.M.A.No.18385/2015

Date of decision : 22nd March, 2017

STATE

..... Petitioner

Through: Ms. Nandita Rao, SC for the
State with SI Om Parkash
from PS Parliament Street

versus

RAHUL SHARMA @ SHAMSHER SINGH Respondent

Through: Mr. Asim Ali, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT (ORAL)

GITA MITTAL, J.

CrI.M.A.No.18385/2015 & CrI.L.P.775/2015

1. The instant petition seeks leave to appeal against the judgment dated 26th March, 2015 passed by the Id. Additional Sessions Judge in SC No. 112/13 arising out of FIR No. 69/13 registered by the Police Station Parliament Street whereby the learned trial court has acquitted the respondent of the charge on which he was arraigned to stand trial. The appeal is accompanied

with CrI.M.A.No.18385/2015 praying for condonation of delay of 160 days in filing the leave petition.

2. The record of the trial court has been received. We have heard Ms. Nandita Rao, Id. Additional Standing Counsel and Mr. Asim Ali, Id. counsel appearing for the respondent at length. The record of the trial court has also been perused.

3. The record of the trial court shows that on 29th November, 2013 the respondent was charged under Section 363/366 and Section 376 of the IPC as well as Section 6 of POCSO Act and Section 506 of IPC.

4. The prosecution case against the respondent was to the effect that he had enticed the prosecutrix (examined as PW4 before the trial court), who was about 15 years of age, from the custody of her guardians and kept her in his custody for the period between 30th April, 2013 till his arrest on 15th June, 2013. The trial court has completely disbelieved the prosecution case except the prosecution allegation that the prosecutrix was 15 years of age at the time of the incident.

5. Our attention has been drawn to the first complaint lodged by Sh. Praveen Kumar (PW5), father of the prosecutrix stating that the prosecutrix had gone missing on 30th April, 2013 when the family members had gone to visit the Bangla Sahib Gurudwara. This complaint has been lodged only on 4th May, 2013, after a delay of 5 days after his daughter went missing, resulting in

registration of FIR No. 69/13 by the Police Station Parliament Street.

6. So far as the age of the prosecutrix is concerned, Mr. Asim Ali, Id. counsel for the respondent has pointed out that the respondent had disputed the age of the prosecutrix and had asserted that she was 18 years of age. Given the charge against the respondent, it was incumbent upon the prosecution to have established that the prosecutrix was below the age of consent and less than 18 years of age. There is no firm evidence to support the finding that the appellant was 15 years of age at the time of the occurrence, even though it has been contended that the prosecutrix was school going. In view thereof, the finding of the trial court in para 16 regarding the age of the child is not established by any documentary evidence as established required in law.

7. It is further pointed out that the prosecution case was that the respondent and the prosecutrix had travelled to Amritsar and stayed together in a hotel for over a month. No documentary evidence of them as having travelled to Amritsar, taken lodging in any hotel was established.

8. The trial court has discussed the evidence led by the prosecution at great length. It has been noted that the statement of the prosecutrix before the Magistrate under Section 164 of the CrPC as well as the court testimony is neither credible nor supported by any cogent and reliable evidence. The prosecution had failed to establish its case that the respondent had enticed the

prosecutrix to Amritsar where they cohabited for a period of over 1½ month. It is pointed out that the prosecutrix could not give the name or address of the hotel where she alleges that they stayed in Amritsar for over a month.

9. The trial court has discussed at length the evidence on record which established that the prosecutrix was moving freely during the entire period and was not confined at any place. Our attention is drawn to the evidence on record to the effect that the respondent and the prosecutrix were eating their meals at the Gurudwara, admittedly without any force or pressure from the respondent.

10. It has been vehemently urged by Mr. Asim Ali, ld. counsel that it is in the testimony of the prosecutrix that she had free access to the public at large which, if she was to be believed, included officials/personnel of the railways and police personnel. Yet, she has not made a single complaint over the entire period. She did not seek help from any hotel or gurudwara personnel even. While staying in Delhi, there is no evidence that the prosecutrix was obstructed from contacting her family members given the evidence that she hailed from Delhi.

11. So far as the charge under Section 361 of IPC is concerned, we may note the pronouncement of the Supreme Court reported at *(1973) 2 SCC 413 Thakorlal D Vadgama v. State of Gujarat* wherein the expression “takes or entices” have been interpreted thus:

*“10. xxx The expression used in Section 361 IPC is “whoever takes or entices any minor”. The word “takes” does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. **This word merely means, “to cause to go”, “to escort” or “to get into possession”.** No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word “entice” seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words “takes” and “entices”, as used in Section 361 IPC are in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. **The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361 IPC.”***

(emphasis by us)

12. The trial court has, therefore, rightly held that the prosecutrix was not enticed by the respondent or taken away from the custody of her guardians. It may be noted that it is the case of the prosecution that the respondent at the time of the incident was working as a *sewadar* in the *Gurudwara* and not possessing the alleged means.

13. Given the entirety of the circumstances, the prosecution has failed to establish beyond reasonable doubt that the respondent committed the offences with which he was charged. On a consideration of the matter, we are unable to disagree with the findings returned by the trial court given the nature of evidence which was led by the prosecution before the trial court.

14. The prosecution has also failed to establish sufficient grounds for condonation of delay in filing the appeal.

For all these reasons, this application and leave petition are dismissed.

Bail bonds, if any, shall stand discharged.

GITA MITTAL, J

MARCH 22, 2017/kr

ANU MALHOTRA, J