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

+ **CRL.L.P. 551/2018 & Crl. M.A. No. 30524/2018**

STATE (N.C.T. OF DELHI)

..... Petitioner

Through: Ms. Radhika Kolluru, Additional
Public Prosecutor for State.

Versus

MOMIN @ SUDAMA

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

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24.08.2018

This leave petition seeks to impugn an order dated 31.05.2018 acquitting the respondent of the charges under sections 354/354B/506 of the Indian Penal Code, 1860 (IPC) and section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) in a case bearing FIR No.387/2015, registered at Police Station Timarpur.

It is the prosecution's case that the respondent-accused had molested the prosecutrix on 29.05.2015 at about 7.30 p.m.; that she was a minor; the accused, who was already married, had mislead her into a relationship and took undue advantage of her. The alleged incident happened on 29.05.2015 but it was reported to the police on 02.06.2015. The Trial Court found the version of the prosecutrix replete with doubts and inconsistencies because the complaint was made by her mother after a few days i.e. on 02.06.2015, although the entire neighbourhood knew that the prosecutrix was missing and otherwise that she had been seen to be riding pillion on the motorcycle of the petitioner-accused at about 7.30 p.m. from the main market of 20

Foota Road in Wazirabad.

Since there was a doubt about the age of the prosecutrix, in the absence of any documents to prove her age, she was put to bone ossification test and the doctors opined that she was between 16 to 17 years of age. The margin of error, being two years leaned towards the accused. Therefore, in terms of the dicta of the Supreme Court in ***Jaya Mala vs. Home Secretary, Government of Jammu & Kashmir & Ors., AIR 1982 SC 1296***, the prosecutrix was ascertained to be a legal adult. Accordingly, the case would not fall under the provisions of section 10 of the POCSO Act. Nevertheless, the matter was examined under the other penal sections i.e. 354/354B/506 IPC. The learned Trial Court observed as under:-

“8. On the second occasion it was the motorcycle. It is asserted that if the person is not willing, he or she cannot be forced to sit on a motorcycle and in any eventuality, the victim had ample opportunity to raise alarm so as to attract the attention of the passersby if she was not willing or being pressurized or forced by the accused as it was a market from where she was allegedly taken. Absence of any resistance or protest, which stands substantiated from the medical examination, where not even a scratch was found on the body of the victim, reflects that either the incident did not take place at all or if at all it had, it was a consensual act and the victim was a willing party not only in accompanying the accused, but for whatever happened between two of them. With these contentions, it is sought that the accused cannot be held responsible for any offence whatsoever.

9. It is essential to establish by the prosecution that the age of the victim was less than 18 years when the incident took place or so to say that the victim was a child as defined in section 2 (d) of the POCSO Act. In this context, prosecution has relied upon the testimony of Dr. M.K. Panigrahi, examined as PW-02 who has deposed that a board of doctors consisting

of himself, Dr. Ankur Srivastava, Dr. Suman Lata, Dr. Tarun Sareen and Dr. Priyansh was constituted to assess the age of the victim 'R' and according to the opinion of the Board, the age of the victim 'R' was between 16-17 years, as reflected in the report Ex.PW2/A. There is, as can be seen, no definite proof of the age of the victim and the opinion given by the board has placed her somewhere between 16-17 years. In this context, the principle of margin of error with regard to the determination of the age by ossification test comes into play. The age is, therefore, to be determined plus minus two years.

*10. The courts have consistently taken this margin of error to be read in favour of the accused. It is well settled that the age determined through radiological examination is not exact and may vary by two years on either side, Margin of error in such a radiological examination is two years on either side and according to the settled principles of criminal jurisprudence benefit of this variation must go to the accused. If such benefit is extended to accused, the age of the prosecutrix cannot be taken to less than 18 years. In this context, reference can be made to *Jaya Mala vs. Home Secretary, Government of Jammu & Kashmir & Ors.*, reported in AIR 1982 SC 1296 wherein the Apex Court took note of the fact that margin of error in age ascertained by radiological examination is to be taken as two years on either side.*

11. In view of the above, it cannot be presumed that the victim was minor or covered in the definition of a child. The moment victim goes out of the definition of the child, the POCSO Act also goes out of contention, Nevertheless, the offences under the Indian Penal Code with which also the accused has been charged still remain.

12. An explanation to the delay in FIR in such cases is readily available arising out of the social stigma and ostracization faced by the victim and her family in the society. The more conservative society it is, the more severe it is. Education, social standing and economic status etc are some

of the factors apart from awareness which governs and control this feature of Indian social life.

13. However, delay in registration of FIR has not been explained in the instant case and even if the above factors are considered, still it does not stand explained. The social stigma which invariably comes in to play and prevent the victim and her family from approaching law enforcement authorities was no longer there as neighbourhood of the victim already came to know that she was missing till 11.30 P.M.-12 A.M. in the night. It has come in evidence that not only the mother of the victim, but neighbours were also searching her. And it has clearly been stated by the victim in her statement dated 19.05.2018 that "the entire colony came to know that I was missing and they were talking that I had eloped with the accused Momin, hence, I told my mother the correct facts".

14. As such, the psychological and social barrier was not there, so the matter should have been reported immediately if the grievance was there, if not in the night of 29th May, 2015 then on the next morning matter should have been reported. What went on in these days from 29.05.2015 to 02.06.2015 is a mystery as the FIR was lodged on 02.06.2015. This puts a question mark on the case of the prosecution and brings in the possibility of the false implication.

15. The part of the statement of the victim reproduced above is pregnant with other dimensions also. Why the people would talk that the victim had eloped with accused Momin. It reflects that something more and may be different was there between the accused and the victim and what meets the eyes may not be truth or whole truth.

16. In cases of sexual harassment the sole testimony of the victim without any corroboration has been considered by the courts and if found above-board, credible and reliable, then the same was used to record findings against the accused person. Reference in this context can be made to the

judgements State of Punjab Vs. Gurmit Singh & Ors. (1996) 2 Supreme Court Cases 384 and State of Himachal Pradesh Vs. Sanjay Kumar @Sunny (2017) 2 Supreme Court Cases 51.

17. As can be seen that the testimony of the victim has to be trustworthy, believable and worth acting upon. However, whenever some taint is found, some deviation is observed, something fishy is seen, the testimony becomes vitiated and then corroboration is looked for, as a rule of caution and somewhat necessary as confirmatory test.

18. In the instant case the testimony of the victim appears to be afflicted by such circumstances which render it questionable. The victim should not have, in the first place, gone with the accused to an isolated spot. The explanation that she was threatened seems improbable. The threat was extended in the name of Sattar, the Uncle of the accused but it is not clear as to how and in what capacity Sattar would have prohibited the victim from carrying on her small business on the pavement. And in case the victim went with the accused in good faith but was molested, then she should have reported the matter to someone in her family or friends or the police. Why it has not been done? There is no answer to it except that the victim was frightened. Once she was back at her place then the fear cannot be there. It is not that accused or his uncle Sattar are persons of criminal tendencies or carry a fearsome reputation. Above all, in these circumstances, where was the occasion with the victim to accompany the accused on his motorcycle to any place that too at 7:30 pm or so, once she had had a bad and unwelcome experience and had burnt her fingers?

19. There is no sign of any sort of resistance, opposition or protest by the victim to the so-called molestation where she was disrobed too. It is not that the victim was threatened with something so that she was subdued to the extent that she disrobed herself. It is otherwise not possible for anybody to removing the clothes, if some resistance or protest is there.

There are no injury or scratch marks on the body of the victim despite the fact that she was disrobed by the accused against her wishes that too in the bushes where some or the other kind of trace is bound to be there on the clothes or on the body of the victim. Absence of any these factors reflect that either the victim was a consenting party or that nothing of that sort had happened. This brings the entire case of the prosecution under cloud.

20. The incident dated 29.05.2015 does not even seems to be plausible for the reason that the victim had gone to fetch chowmein. The area from where she was made to sit on the motorcycle is a public road and a market frequented by lot of people as area of Wazirabad is a very thickly populated area. It is, thus not possible that the accused or anybody would have made the victim to sit on the motorcycle of the accused without there being any commotion. It could not have gone unnoticed from the general public whose availability has been admitted by the victim herself and then, as discussed herein before, the possibility of incident taking place seems very bleak,

21. What appears from the entirety of the circumstances is that the victim was romantically inclined towards the accused, who either did not respond to the victim or that he took advantage of the emotional attachment of the victim. It can be inferred from the testimony of the victim that the victim was indeed inclined towards the accused as in the examination in chief of the mother of the victim, examined as PW-06, she has categorically stated that on inquiry victim told her that 'she loves Momin @ Sudama' Although, the mother of the victim had stated further that the victim had further told her that it was a repeat incident as two weeks ago also the same thing was done by the accused. The credibility of the witness is above-board if seen in the light of the fact that there is an unexplained delay in registration of FIR and she has contradicted herself in her deposition. The mother of the victim has stated in the examination in chief that she noticed the victim on the main road Wazirabad, where she was

standing and weeping, but in the cross examination she has denied this fact.

22. Then, the question thrown up by the circumstances is as to why the accused would be named by the victim if no such incident had taken place. There must be some motive for false implication. Nothing appears on the face of it except that the victim was upset to know that the accused was already married whereas she was in a way inclined to marry him. The accused has stated in his statement that victim used to pressurize him to marry her whereas he was already married. The statement of the victim reflects that she was under the impression that the accused was unmarried as was being represented to her by the accused according to her version, it has also come in the cross examination of the victim that she was not aware that accused was married or that he came to immerse the dead body of his daughter when the victim asked for money and came to know him.

23. The testimony of the vital witnesses is thus fraught with such circumstances which put a question mark over their credibility and in these circumstances the prosecution's case starts fading away. The composite reading of the entire gamut of facts and circumstances consisting of delay in lodging the FIR of about 3 days which remains unexplained; victim accompanying the accused even for the second time despite knowing and suffering of what all had taken place a fortnight before; the victim accompanying the accused on his motorcycle from a crowded market, full of persons removing any possibility of force or threat and there being no signs of any kind of force used by the accused in either of the incidents, especially with regard to the latter which being fresh, then it should have some traces on the body or the clothes of the victim; the victim being there in the market at 07.30 P.M. contrary to her regular time of return at 05.00 P.M. and that the testimony of victim having the element of improbability. The absence of the complaint with regard to the previous incident which remains unexplained as to why no such

complaint was made and the victim accompanying the accused on the second occasion makes it dangerous to rely on the testimony of the victim alone to record a finding against the accused, especially when the explanation offered by the accused that the victim was pressurizing him to marry her as reflected in the testimony of the victim and to some extent in the testimony of the mother of the victim also.

24. Therefore, in view of the afore-said circumstances, the accused Momin @ Sudama cannot be held responsible to have committed any offence solely based upon the testimony of the victim alone and he deserves the benefit of doubt. Accordingly, accused Momin @ Sudama stands acquitted of the charge. His bail bonds and surety bonds stand discharged after compliance of section 437-A Cr.P.C. File be consigned to Record Room."

What emanates from the above is that the prosecutrix herself had an amorous disposition towards the accused; she went on a motorcycle with him from a busy market place at a time when many people could have seen them riding together; there was no reason for her to have gone with the accused if she had otherwise been forced by him earlier into intimate physical relations. After the bone ossification test, she has been presumed to be a legal adult; she had entered into a willing dalliance with the accused and there is nothing to presume that the alleged incident, if it happened in the bushes near Naugaza Peer, Wazirabad at about 7.30 p.m. on 29.05.2018, was without her consent.

In the aforesaid circumstances, this Court finds no reason to interfere with the impugned order. The petition is without merit and is, alongwith pending application, dismissed accordingly.

NAJMI WAZIRI, J.

AUGUST 24, 2018/sb