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

+ CRL.A. 591/2017

KARISHMA

..... Appellant

Through: Mr. B. Badrinath, Advocate.

versus

STATE & ORS.

..... Respondents

Through: Ms. Kusum Dhalla, APP for State
with SI Gaurav, D/6092, PS-GTB
Enclave.
Mr. Sanjeev Bhardwaj, Advocate for
R-2 and R-3.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE I.S.MEHTA

ORDER

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19.09.2018

1. The present appeal - preferred by the complainant upon grant of leave, assails the judgment dated 05.10.2016 passed by the learned Additional Sessions Judge-01 and Special Judge (NDPS), Shahdara District, Karkardooma Courts, Delhi in Sessions Case No. 542/2016 (Old SC No. 123/15) arising out of FIR No. 603/2014 registered under Sections 363/368/376/506 IPC and Section 4 of the POCSO Act. By the impugned judgment, the two accused stand acquitted by the Trial Court of the charges framed against them. The brief facts taken note of by the Trial Court in the judgment are reproduced herein below with correction of typographical errors:-

Brief facts of the case as per case of prosecution are that on

23.09.2014, the minor girl, aged 15 years (hereinafter referred as 'prosecutrix' or 'child victim') left her house and when she did not return back home till evening, her mother (complainant) made a complaint at PS GTB Enclave wherein she expressed her doubt that one Pankaj Pal (accused) who was running a medical store opposite her house might have kidnapped her daughter/prosecutrix. Upon the said complaint, present case FIR No.603/14, was registered at PS GTB Enclave, initially u/s 363 IPC. However, the prosecutrix came back on 24.09.2016 when she went to PS GTB Enclave and gave her handwritten statement stating that on 23.09.2014, she had left her house as her mother had scolded her and had also threatened to stop her studies and to burn her books and school dress. In her said handwritten statement, prosecutrix further stated that accused Pankaj Pal was not involved in her leaving the house. However, no further action was taken by the police and as per IO/SI Geeta, the first IO kept requesting the prosecutrix and her mother (complainant) for getting recorded statement of the prosecutrix under section 164 Cr.PC but neither complainant nor prosecutrix cooperated with her and did not come forward to get the same recovered.

However, on 05.04.2015, prosecutrix again disappeared and a separate case FIR No. 202/15, u/s 363 IPC was registered at PS Harsh Vihar. On next day i.e. 06.04.2015, prosecutrix came back on her own and made statement to police levelling allegations against her mother (complainant

herein) stating that complainant wanted to forcibly marry her (prosecutrix) and therefore, she left the house and spent the whole night in a nearby Jagaran and came back home on her own on the next day. The said FIR was subsequently cancelled. The complainant (mother of the prosecutrix) refused to take the prosecutrix back home and therefore, prosecutrix was produced by police before CWC and on 08.04.2015, CWC recorded in its order that as per IO, mother of the prosecutrix was not willing to take her daughter/prosecutrix at home and therefore, prosecutrix was sent to Sanskar Ashram till 13.04.2015 and CWC called the mother of prosecutrix on next date i.e. 13.04.2015. On that day, complainant (mother of the prosecutrix) gave statement before CWC that she would take her daughter/prosecutrix back her home on 15.04.2015. The said order of CWC is Ex.PW3/DB. Interestingly, on 15.04.2015, complainant (mother of the prosecutrix) took custody of the prosecutrix and on the same day, prosecutrix was produced before Id. Metropolitan Magistrate (MM) who recorded her statement u/s 164 Cr.PC in present FIR. It is pertinent to mention that said statement u/s 164 Cr.PC was recorded after a delay of eight months of the alleged incident which happened on 23.09.2014. In her statement u/s 164 Cr.PC, prosecutrix gave a totally different version stating that on 23.09.2014, accused Pankaj Pal enticed her and took her to the house of co-accused Kuldeep where accused Pankaj Pal forcibly made physical relations with her without her consent

and threatened if she denied to have physical relations with him further then he would get killed her brother and maternal uncles. In her statement, prosecutrix stated that she was scared of the accused and of his father alleging that accused had taken her photographs and had also threatened to kill her brother and maternal uncle. The prosecutrix was also taken to GTB Hospital for her medical examination but her medical examination was never conducted. As far as co-accused Kuldeep is concerned, the only allegation that came against him was in the statement u/s 164 Cr.PC of prosecutrix as per which his only role was that he allowed the main accused Pankaj Pal to use his house where prosecutrix was allegedly raped by accused Pankaj Pal and during that period left the home. Accused Pankaj Pal was arrested and was sent to JC and after completion of investigation, charge-sheet was filed without arrest of co-accused Kuldeep.

2. The submission of Mr. B. Badrinath, learned counsel for the appellant is firstly, that the statement of the prosecutrix, if found credible, is sufficient to convict the accused of the offence of rape. He, secondly, submits that in the present case, the conduct of the police is highly suspect and they have deliberately botched up the investigation and failed to collect the evidence which would have been sufficient to corroborate the testimony of the prosecutrix and secure the conviction of the accused.

3. Mr. Badrinath points out that the prosecutrix was taken for her medical

examination on 23.04.2015. Since she was undergoing menstruation, her internal examination was not undertaken despite her giving her consent vide Ex.PW-3/DA. However, the prosecutrix was, thereafter, not taken for internal examination. Mr. Badrinath points out that this is a deliberate lapse committed by the Investigating Officer. He points out that to cover up the said lapse, the police purportedly recorded a self serving unsigned statement under Section 161 Cr.P.C. of the prosecutrix, wherein she is purported to have stated that she would not go for her medical examination again to the hospital and she also sought to give a clean chit to the accused Kuldeep. This purported statement under Section 161 Cr.P.C. was recorded on 23.04.2015 by ASI Geeta (PW-3) who was the second Investigating Officer in the case. Mr. Badrinath points out that this statement was not put to the prosecutrix in her examination. Yet, the Trial Court has relied upon the same.

4. Mr. Badrinath further points out that despite the writing of the letter Ex.PW-1/DA by the prosecutrix - which also bore the signature of the complainant and the maternal uncle - Ashok, the case was not closed and cancellation report was not filed. He points out that SI Kuldeep - the earlier IO in the case, out of the blue, recorded the statement of the prosecutrix under Section 161 Cr.P.C. on 15.04.2015 - Ex.PW-1/DB, wherein the prosecutrix is stated to have again given the clean chit to the accused - Pankaj with regard to the sexual assault allegedly committed on 23.09.2014, and to have made allegations against her own mother. Mr. Badrinath points out that, pertinently, on the same day (15.04.2015), the statement of the prosecutrix under Section 164 Cr.P.C. was recorded before the learned MM,

wherein she made a complete disclosure of the sexual assault perpetrated upon her by the accused - Pankaj. Mr. Badrinath submits that in her testimony before the Court, the prosecutrix explained in detail, the role played by SI Kapil Kumar, D-4314, PIS-16080229 and the other police officers in seeking to suppress and hush up the case against the accused. He points out that even though SI Kapil Kumar was named as prosecution witness at serial no. 14, he was not produced before the Court.

5. The further submission of Mr. Badrinath is that yet another FIR came to be registered vide FIR No. 475/15 on 06.07.2015 at PS-GTB Enclave on the complaint of the maternal uncle of the prosecutrix - Dilip. In those proceedings, the medical examination of the prosecutrix was undertaken vide MLC no. 2529/15 which was conducted on 22.09.2015, and her hymen was found torn. He points out that despite the said FIR being nearly four years old, till date, the final report has not been filed by the police and he submits that the accused in the present case and the father of Pankaj are instrumental in suppressing the said case against the accused.

6. So far as the present case is concerned, it has come in the testimony of PW-2, the complainant – mother of the prosecutrix, that she was informed of the entire episode of 23.09.2014, on 24.09.2014 itself. This she has stated in her examination-in-chief, as well as during her cross examination. In spite of that being the position, no allegation of rape was made either by the prosecutrix or by the mother/complainant till as late as on 15.04.2015 - when the statement of the prosecutrix was recorded under Section 164 Cr.P.C. before the learned MM vide Ex.PW-1/A. Unfortunately, evidence

has irretrievably been lost in respect of the alleged offence, since the prosecutrix was not got medically examined - presumably on account of her having given her signed statement Ex.PW-1/DA, which was also signed by the complainant and her maternal uncle - Ashok. It was for the prosecution to establish the guilt of the accused beyond all reasonable doubt and there is complete lack of evidence in that respect. In the light of the aforesaid circumstances, including the circumstance that the prosecutrix issued the communication Ex PW-1/DA – which was not withdrawn, the testimony of the prosecutrix cannot be considered sufficient to be the basis of conviction of the accused. In these circumstances, so far as the accused are concerned, their acquittal in the present case does not call for interference.

7. At the same time, the aspects which have been pointed out by Mr. Badrinath and taken note of by us hereinabove, certainly raise serious questions with regard to the role played by the police in the matter of investigation of the case. Pertinently, the victim was a minor and the allegations of the complainant and the prosecutrix disclosed commission of a serious and heinous offence.

8. In these circumstances, while dismissing the appeal, we direct the Commissioner of Police to institute an inquiry by a senior officer not below the rank of DCP, to examine the role played by the Police Officers/Investigating Officer, and in particular SI Kapil and SI Geeta (PW-3), in the case. Their lapses, if any, shall be identified and appropriate action be taken in accordance with law. The appellant shall be kept informed of the said inquiry. The appellant, the prosecutrix, and others may

be called upon to join the inquiry and they shall co-operate therein.

9. Let a report in this respect be filed on record within the next six weeks.

10. We also direct the Commissioner of Police to look into the reasons for the final report not being filed in respect of FIR No. 475/15, under Section 363 IPC registered at PS-Harsh Vihar.

11. A copy of this judgment be communicated to the Commissioner of Police for compliance.

VIPIN SANGHI, J

I.S.MEHTA, J

SEPTEMBER 19, 2018/nk