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

Date of Decision: 26th November, 2019

+ **CRL.L.P. 540/2019**

STATE (NCT OF DELHI)

..... Petitioner

Through: Ms. Aasha Tiwari , APP for the State
with SI Vipin, PS Khajuri Khas

versus

CHAND

..... Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J (Oral)

CRL. M.A.37209/2019 (exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

CRL. M.A.37208/2019 (for condonation of delay in filing)

The present application is filed by the petitioner for condonation of delay of 10 days in filing the present leave petition.

For the reasons stated in the application, the present application for condonation of delay in filing the present leave petition is allowed.

Application stands disposed of.

CRL.L.P. 540/2019

1. By the present Leave Petition filed under Section 378 (1) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') the State seeks leave to appeal against the judgment dated 04.06.2019 passed by Additional Sessions Judge-01, Special Court (POCSO) North East District, Karkardooma Court, New Delhi, whereby the respondent (accused before the Trial Court) was acquitted of the charges punishable under Sections 363/366/376 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO').
2. The brief facts of the case, as mentioned by the learned Trial Court are reproduced as under:

“Brief facts of the case as per the FIR are, the present case was registered on the complaint of complainant SP who alleged that her daughter/victim had been missing since 26.02.2018. She suspected that Chand had taken away her daughter.

2. During investigation, victim was produced before SI Hema Chaudhary. Victim was counselled and her statement was recorded. Victim alleged that for last one years, she was in love with her neighbour Chand. On 26.02.2018, she and accused Chand had gone for an outing to Gurugram and stayed there for a night. Next day i.e. on 27.02.2018, she came to PS. She further stated that nothing wrong had been done to her. During investigation, statement of victim u/s 164 Cr.P.C has been recorded wherein she alleged that accused had raped her four times. Accused was arrested. After completion of investigation, charge sheet was filed against the accused.”

3. In order to bring home the guilt of the accused person, the prosecution examined 19 witnesses in all. The incriminating evidence and circumstances were put to the accused person during his statement recorded under Section 313 of Code of Criminal Procedure, wherein he claimed to have been falsely implicated in the present case and chose not to lead any witness in his defence.
4. Ms. Aasha Tiwari learned counsel appearing for the State contended that the impugned judgment dated 04.06.2019 passed by the learned Trial Court was perfunctory in nature, full of conjectures and surmises, ignoring the well-settled proposition of law that the sole testimony of the victim of sexual offence is sufficient to base conviction of the accused. She further contended that the impugned judgment is a case of legal defects and the trial court has failed to appreciate the testimony of the prosecutrix in its correct perspective, and therefore is liable to be set aside.
5. Learned APP for State further contended that the Learned Trial Court has failed to appreciate that the prosecutrix was minor at the time of the incident. She further states that the Trial Court completely ignored the fact that the testimony of the prosecutrix is consistent, cogent and there are no major omissions and contradictions in her testimonies.
6. Learned counsel for the State further contended that the testimony of the prosecutrix is corroborated with the medical evidence, as her hymen was freshly torn. Moreover the FSL report had further supported her version as semen of the accused was detected on the vaginal sample of the prosecutrix.

7. We have heard the learned APP for the State at length and perused the available material on record.
8. The Trial Court in its impugned judgment giving benefit of doubt to the respondent/accused acquitted the respondent of the offences punishable under Sections 363/366/376 and Section 6 of the POCSO Act. Relevant portion of the impugned judgment dated 04.06.2019 is reproduced below:

“41. The prime witness in this case is the victim. She appeared as PW1. She deposed that on 26.02.2018 at around 01:00 pm, she had gone to the house of Shanti Aunty in gali No.1, Khajuri Khas. While she was returning home, Chand bhai met her, she know him because he was a son of her mother’s friend. He asked her to accompany him stating that he had some work from her. They travelled to Kashmere Gate in an auto. From Kashmere Gate, they took metro. She did not know where they were going. When they got out of the metro train, accused told her that they had reached Gurgaon. Accused then took her to a room of his friend and thereafter, he and his friend left her in that room. At night, accused came and she asked him whether they were not going home? Accused told her that he had already informed her mother and they would go home the next day. They had food and thereafter, they went to sleep. Accused then forced himself upon her. She protested and cried but accused did not let go off her and then raped her. During the night, accused did so three more times. In the morning, mother and wife of the accused reached that room. They were brought to PS Khajuri Khas. Then police recorded her statement. She was also taken to JPC Hospital for medical examination where her salwar (Ex. P-1), suit (Ex.P-2), undergarment (Ex, P-3) and bra (Ex.P-4) were taken by the doctor. She further deposed that her statement u/s 164 Cr.P.C was

recorded by a judge. However, the statement did not bear her signature and thus, it was marked as Mark PW 1/A.

42. During her cross examination, **she deposed that prior to that day, she had never gone for an outing with the accused. She admitted that she had stated to the counsellor that she was in love with the accused for past one year. She admitted that she had stated that no act was committed with her by the accused and volunteered, that she had lied because the counsellor was completely unsympathetic to her and told her that how she could go with a married man and she was destroying his married life. She denied that accused was her friend or that she was in love with him and volunteered, that she used to call him as brother. She admitted that the accused had married two months prior to the incident. She denied that as they were in love, she had insisted the accused to take her to Gurgaon. She denied that whatever had happened between her and the accused was with her consent. Till the time they had reached the room in Gurgaon, she was neither threatened nor forced by the accused to accompany him. She was not kept in that room forcibly. She stayed with the accused for the night because accused had told her that he had informed her mother. She knew that her mother would never have agreed for her staying alone at night with a male. She had no explanation why she did not call her mother to verify what the accused was saying despite knowing that her mother would never agree to such a thing. When she was going with the accused, she was anxious and scared. She admitted that she was not afraid of the accused but was afraid of the reaction of her parents when they would return. She admitted that she was afraid because she knew that she should not have gone with the accused and her family would not have**

approved. She denied that she had eloped with the accused of her own accord.

43. It is correct that in such cases, the testimony of the victim should be given prior importance and it should alone be sufficient to bring the guilt of the accused. At the same time, it is also well settled that such testimony has to be of sterling quality.

44. In the present case, it has not been disputed on behalf of the accused that victim had accompanied the accused. It is also not disputed that the accused had sexual intercourse with the victim. The stand of the accused is that the victim is lying on the aspect of establishment of forcible relations between the accused and her. The claim of the defence is that it was a consensual relationship.

45. A careful examination of the testimony of the victim would reveal that the only ground on which she had accompanied the accused had told her that he had some work from her. However, she had not explained what kind of work the accused had with her.

46. It is also to be observed that the victim accompanied the accused in a metro from Kashmere Gate to Gurgaon and even at that stage, the victim did not question the accused as to where he was taking her and why he was taking her. Even on reaching Gurgaon, she did not ask the accused to take her back and stated that accused had taken her to a room where she was allegedly raped. At that place also, victim stated that accused told her that they would stay in that room for a night and would return the next day and told her that he had informed her mother and her mother had agreed to it, but at the same time, she stated that she knew that mother would never agree to it. If she knew about it, she should have raised some protest. **On the contrary, she stated that she had no explanation why she did not verify from her mother**

what the accused was saying. She had also admitted that accused had not threatened her and that she was not scared of accused. Thus, nothing stopped the victim from asking the accused to take her back.

47. Another important aspect is that the prosecution has examined one more witness i.e. PW 17 Ashraf. He is the person in whose room the victim and the accused had stayed on the fateful night. He deposed that on 26.02.2018, Chand called him from Daulatabad. He went near Govt. School Daulatabad and met Chand and his wife. He brought them to his room. He left them at his room and then went to the room of his friend.

48. During his cross examination, he deposed that from Government School, Daulatabad till his room, he had brought Chand and wife of a motorcycle. Chand in front of that woman had said that she was his wife.

49. Therefore, it is also to be observed that in the presence of the victim, accused had introduced the victim to PW17 as his wife but the victim did not even protest in front of PW17 that she was not the wife of accused. Further the victim had stated that when accused was forcing himself upon her, she had shouted and cried. However, PW17, who was in adjoining room, has deposed that he did not hear any cry or shout for help. Thereafter, when she was recovered, she told before the counselor that she was in love with the accused but then went on to state as explanation during her cross examination that the counselor was unsympathetic to her.

50. I accordingly found that in view of the circumstances emerging from the testimony of the victim, it will be highly unsafe to rely upon the testimony of the victim that she was not a consenting party of such an act and the accused had forced

himself upon her, as has been stated by her. As the victim was having the age of consent, the possibility of victim being a consenting party is very strong. Thus, I find that the prosecution has failed to prove its case beyond all reasonable doubts. The accused is acquitted of all the charges framed against him. His bail bond stands cancelled. Surety stands discharged.”

9. Having discussed the judgment of the trial court and from the perusal of the evidence on record, we are of the belief that the prosecutrix willingly joined the company of the Respondent because during her cross-examination she deposed that “*till the time we had reached the room in Gurgaon, I was neither threatened nor forced by the accused to accompany. I was not kept in that room forcibly. I stayed with the accused for the night because he told me that he had informed my mother. I knew that my mother would never had agreed for me staying alone at night with a male. I have no explanation why I did not call my mother to verify what the accused was saying despite knowing that my mother would never agree to such a thing”.* Further during her cross-examination when she was asked as to how she came to know about the marriage of the accused she deposed that “*It is correct that the accused was married two months prior to the incident”* and had further herself contradicted with her initial version and had deposed ‘*It is correct that I stated to the counsellor that I was in love with accused for past one year. It is correct that I had stated that no act was committed with me by the accused. Vol. I had lied with the counsellor* because the counsellor was completely unsympathetical and she said to me that how I could go with a married man and I was destroying his married life.”

10. Moreover the testimony of PW-17 Ashraf Ali completely negates the version of the prosecutrix because during his cross examination he deposed that “*From Govt. School, Daultabad till my room I had brought Chand and his wife on a motorcycle. **Chand in front of that women had said that she was his wife.** It took us about 5 to 7 minutes to reach at my room. I left my room immediately on opening the room and handing it over to them. The friend’s room where I went, was in the same house. Chand and his wife had reached at my room at about 3.00 or 4.00 p.m. **During their stay at my room, while I was in the adjoining room, I did not hear nay commotion, shout or cry for help. During this period, that girl also did not make any complaint against Chand**”. The conduct of the prosecutrix shows that she was aware about the marital status of the accused/Respondent at all times and she was willfully residing with the accused/Respondent out of her own free will and also developed physical relations with the accused/Respondent without any force or threat.*
11. However at this stage it is relevant to determine the legal validity of the consent given by the prosecutrix as per the law, the focal point for discussion would be the age of the prosecutrix. The trial Court while taking the Ossification report into consideration has deemed that the prosecutrix had attained the age of consent. The relevant portion of the trial Court judgment has been reproduced as under:

*“39. In the present case, no document in the form of birth certificate and certificate of first school attended by victim or in the form of matriculation certificate is available on records. **Therefore, the only way to***

determine the age of victim was through the ossification test. The report of the ossification test has stated the age of victim to be 15 to 17 years. In these circumstances, keeping the in view the precedents, if one year is added to upper age limit of victim, the age of victim becomes 18 years and thus the benefit has to accrue to the accused.”

12. Perusal of the above extracted findings reveals that on the failure of the prosecution to provide any valid proof of age of the prosecutrix, the Learned Trial Court referred the prosecutrix for an ossification test to determine her age. The prosecutrix underwent the bone ossification test at the GTB Hospital, Delhi. As per the report of the Medical Board (Ex.PW-13/2), the age of the prosecutrix was determined as 15 - 17 years at the time of her medical examination. Further, in order to prove the report on record, the Radiologist of GTB Hospital, Delhi was examined as PW-13 who deposed as under:

“On 02.05.18, I was posted as abovesaid in GTB hospital. On that day, Medical Board was constituted by Director, GTB Hospital; with Dr. N.K. Aggarwal, Professor, Department of Forensic Medicines as Chairperson and I was one of the members of that board from the department of Radiology. I had examined the X-rays of shoulder, elbow, wrist, pelvis with hips of the victim. As per my X-ray report, the average radiological bone age of the victim was 15 to 17 years. I have seen my opinion. It bears my signatures at point A and the same is now Ex.PW13/1. I had also signed on the final opinion given by the report. It bears my signature at point A. The final opinion is Ex.PW13/2.”

13. However, the report of the medical board cannot be considered in isolation and needs to be read alongwith the law settled by this Court as well as by the Apex Court in series of pronouncements. In ***Jaya Mala vs. Home Secretary, Government of Jammu & Kashmir*** reported in ***AIR 1982 SC 1297***, the Supreme Court has held as under:

“9. Detenu was arrested and detained on October 18, 1981. The report by the expert is dated May 3, 1982, that is nearly seven months after the date of detention. Growing in age day by day is an involuntary process and the anatomical changes in the structure of the body continuously occur. Even on normal calculation, if seven months are deducted from the approximate age opined by the expert, in October 1981 detenu was around 17 years of age, consequently the statement made in the petition turns out to be wholly true. However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. Undoubtedly, therefore, the detenu was a young school-going boy. It equally appears that there was some upheaval in the educational institutions. This young school-going boy may be enthusiastic about the students' rights and on two different dates he marginally crossed the bounds of law. It passes comprehension to believe that he can be visited with drastic measure of preventive detention. One cannot treat young people, may be immature, may be even slightly misdirected, may be a little more enthusiastic, with a sledge hammer. In our opinion, in the facts and circumstances of this case the detention order was wholly unwarranted and deserved to be quashed.”

14. Moreover, in ***Rajak Mohammad vs. The State of Himachal Pradesh*** reported in ***(2018) 9 SCC 248*** while dealing with the benefit of doubt

to the accused in cases of age determination by ossification test, the Apex Court has observed:

“5. In this regard, we have considered the evidence and materials on record. The age of the prosecutrix has been sought to be proved by the prosecution by bringing on record the school admission form (Ext. PW 5/A) and the certificate (Ext. PW 5/B) issued by one Jasdeep Kaur (PW 5), JBT Teacher of Government School Dungi Plate. PW 5 in her deposition has stated that the writings in the school admission form (Ext. PW 5/A) are in her handwriting and the signature affixed is that of the mother of the prosecutrix.

6. In cross-examination, PW 5 had stated that the details mentioned in Ext. PW 5/A have been obtained from the school leaving certificate issued by the Government Primary School, Tambol. The certificate issued by the Government Primary School, Tambol on the basis of which the details in the admission form (Ext. PW 5/A) was filled up by PW 5 has not been exhibited by the prosecution.

7. Nothing hinges on the document exhibited by the prosecution as Ext. PW 5/B as that is the consequential certificate issued on the basis of the entries in Ext. PW 5/A. The mother of the prosecutrix who had allegedly signed Ext. PW 5/A has not been examined by the prosecution.

8. On the other hand, we have on record the evidence of Dr Neelam Gupta (PW 8), a Radiologist working in the Civil Hospital, Nalagarh who had given an opinion that the age of the prosecutrix was between 17 to 18 years.

9. While it is correct that the age determined on the basis of a radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, yet the totality of the facts stated above read with the report of the radiological examination leaves room for ample doubt with regard

to the correct age of the prosecutrix. The benefit of the aforesaid doubt, naturally, must go in favour of the accused.”

15. From the perusal of the case of **Jaya Mala (supra)**, it is clear that the margin of error in age ascertained by the radiological examination is two years on either side. It is also apparent from the decision of the Apex Court in the case of **Rajak Mohammad (supra)** that the determination of age on the basis of radiological examination may not be an accurate determination and sufficient margin either way has to be allowed, as such the benefit of doubt must go in favour of the accused. Applying the law as laid down in **Jaya Mala (Supra)** to the facts of the present case, we find that the margin of two years is to be considered on the higher side giving the benefit of doubt to the respondent-accused, which brings out that the prosecutrix had attained the age of consent and was fully competent to give her consent at the time of making sexual relations with the respondent and there exists no cogent reason to intervene in the findings of the Learned Trial Court in relation to determination of age of the Prosecutrix.
16. In the present case, on appreciation of the entire evidence on record we are of the considered view that the testimony of PW-1 is unworthy of acceptance as the same is found to be replete with infirmities and the same does not appear to be a case of sexual intercourse against the will of the prosecutrix rather it appears that the prosecutrix was a consenting party.
17. It is a settled law that while deciding a leave to appeal petition filed by the State, in case two views are possible, the High Court must not

grant leave, if the trial court has taken one of the plausible views, in contrast thereto in an appeal filed against acquittal. Upon re-appraisal of evidence and relevant material placed on record, in case, the High Court reaches a conclusion that another view can reasonably be taken, then the view, which favours the accused, should be adopted unless the High Court arrives at a definite conclusion that the findings recorded by the trial court are perverse, the High Court would not substitute its own views on a totally different perspective.

18. Having regard to the principles laid down by the Apex Court in the case of *Ghurey Lal vs. State of U.P.* reported at **2008 (10) SCC 450**, we do not find that there is any perversity in the reasoning given in the impugned judgment and for the abovementioned reasons, this Court does not find any reason to interfere with the same.
19. Accordingly, the present leave petition, being bereft of merit, is dismissed.
20. Trial Court record be sent back along with a copy of this order.

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

NOVEMBER 26, 2019

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