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

Date of decision: 31.10.2019

+ CRL.L.P. 585/2019, CrI. M.A. 39318/2019 & CrI. M.A. 39319/2019

STATE (NCT OF DELHI)

..... Petitioner

Through: Ms. Aashaa Tiwari, APP for the State.

versus

SHEKHAR

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J (Oral)

CRL. M.A.39319/2019 (exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

CRL. M.A.39318/2019 (for condonation of delay in filing)

1. The present application is filed by the petitioner for condonation of delay of 31 days in filing the present leave petition.
2. For the reasons stated in the application, the present application for condonation of delay in filing the present leave petition is allowed.
3. Application stands disposed of.

CRL. L.P.585/2019

1. By this petition filed under Section 378(3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C'), the appellant/State seeks leave to appeal against the judgment dated

01.06.2019 passed by learned Additional Sessions Judge (North West)-01, Special Court, Rohini District Courts, Delhi in Sessions Case bearing no. 101/2015 whereby the accused/respondent was acquitted of the charges under **Sections 376/363/366** of the Indian Penal Code and **Section 4** of the Protection of Children Against Sexual Offences Act, 2012 in FIR No. 442/2015 registered at Police Station, Aman Vihar.

2. At this stage, we deem it necessary to refer to the facts of the case. The Learned Trial Court in its judgment has enunciated the following relevant facts:-

“on 08.04.2015, complainant, R who the father of the victim A came to PS and reported that his daughter A, aged 17 years is missing since 7:00 a.m. today when she left the home for school. On his statement, present FIR was registered. On 10.04.2015, victim was recovered by her father and brought to PS. During counseling, victim reported that she married one Shekhar (accused herein) in a temple and established physical relations. Victim was taken to SGM hospital and was medically examined. Her exhibits were seized by the doctor and handed over to the IO. Thereafter statement of victim u/s 164 Cr.P.C. was got recorded where she stated that on 08.04.2015, she left for her school as usual when Shekher met her on the way and took her to Shakurpur in an auto. He kept her there for two days and raped her. When her parents reported the matter to the police, he dropped her in the morning and from there, she returned to her home. Her parents brought her to PS and later on, she was medically examined and sent to Nari Niketan. The accused was also arrested on 11.04.2015 and was

medically examined and his blood sample and exhibits were seized and sent to FSL and awaiting FSL result, chargesheet was filed.”

3. Charges for commission of offence punishable under Sections 376/363/366 IPC and Section 4 of the POCSO Act were framed against the accused on 06.07.2015 to which the respondent pleaded not guilty and claimed trial.
4. In order to bring home the guilt of the accused, the prosecution examined 12 witnesses in all. Statement of the accused was recorded under Section 313 of Cr.P.C wherein he denied the allegations of the prosecution and stated that he is innocent and has been falsely implicated in the present case.
5. The Trial Court in the impugned judgment while acquitting the respondent-accused under Sections 376/363/366 Indian Penal Code, 1860 and Section 4 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 has held as under:-

“9. As far as age of the victim is concerned, though PW-1 proved on record the admission form and admission register of first attended school of victim where she was admitted in class 1 by her father with the date of birth as 30.11.1997 but the said date of birth is not supported by any document including the affidavit of the father. On what basis, this date of birth was recorded remains unproved. More so, when victim as well as her mother stated in their cross examination that they do not know if age of the victim was understated by two years at the time of her school admission. Though the father denied this suggestion but ignorance showed by the victim and her mother to this question creates doubt regarding the date of

birth mentioned in the first attended school of the victim. Mother should have known or should have told the court about the fact as to whether the date of birth recorded in the school was understated or not. Prosecution has failed to prove that victim was minor. Otherwise also, if this date of birth is presumed to be correct even then by this date of birth the victim was almost 17 years and 5 months old at the time of incident dated 08.04.2015 and had already attained the age of discretion.

10. Coming to the main incident, victim admitted in her cross examination that she was in a love affair with the accused. Further, she went with the accused in an auto but did not raise any alarm in the entire journey. Further, in her first interaction regarding the incident, which was with the doctor she stated that the sexual intercourse with Shekhar was willing. The victim for the first time in the court took the plea that she did so as accused had prepared a video of the incident of rape. The same appears to be an afterthought as not only the victim did not tell about the alleged video before police and Ld. M.M but also did not tell about the same to her parents.

Further, victim is inconsistent as far as the incident is concerned. In the court she stated that on 09.04.2015, accused married her in that room itself, however in the statement recorded u/s 164 Cr.P.C she did not even mentioned about any such alleged marriage whereas in the statement recorded u/s161 Cr.P.C. victim stated that on 09.04.2015 accused took her to a temple at unknown locality and there he put vermilion on her forehead before the deity of goddess Durga. There are three different version in regard of said marriage.

Further the MLC of the victim shows that there was no injury and the hymen was found old torn which somewhat supports that defence of the accused that the sexual relations were consensual. It is unlikely that a girl will not suffer any injury internally or externally in an incident of rape. The fact that victim made material improvement by introducing the story of alleged video also makes her untrustworthy.

Though it is correct that FSL result found semen of the accused present in the vaginal secretion, cervical mucus collection and washing from vagina of the victim but as already said that the act was consensual and the prosecution failed to prove the age of the victim and therefore the FSL result is of no help to the prosecution.

Ld. Defence counsel though vehemently argued that in view of the detailed cross examination of FSL expert Ex. PW-10, the FSL result cannot be considered to be reliable but I do not find any force in the said contention as despite lengthy cross examination, there is nothing on record to doubt the findings of the FSL DNA examination report. The detailed cross examination of the expert could not create any doubt in the perfectness of the result. The fact that the FSL result is no assistance of the prosecution for other reasons is another aspect. Further, PW-12, the landlord of the premises where victim and accused stayed for two days told to the court that it was the victim who pleaded him to permit them to stay overnight being husband and wife. Victim did not tell her about alleged kidnapping or rape and rather introduced her as wife of accused. The prosecution could not prove alleged act of kidnapping or rape. The prosecution has not been able to establish commission of offence beyond

reasonable doubt. Benefit of doubt is given to the accused. Accused is acquitted accordingly."

6. Ms. Aashaa Tiwari, learned APP for the State contended that there are no discrepancies in the testimonies of the prosecution witnesses who have deposed on the lines of the prosecution case, pointing towards the guilt of the accused; that the learned Trial Court failed to consider the testimony of PW-3 (Prosecutrix) in the correct perspective and based the acquittal of the accused on minor inconsistencies in the testimonies of prosecution witnesses; that the respondent induced and threatened the prosecutrix to gain sexual favors/advantages; that the learned Trial Court failed to appreciate that the prosecutrix was studying in class 11th and the age of the victim was less than 18 years at the time of the incident; that the respondent forcibly got married to the prosecutrix who was a minor at the time of the alleged incident which stood proved by the school records and was not in the capacity to give a valid consent. In support of her contentions, she placed reliance on the case of *S. Vardarajan vs. State of Madras reported in AIR 1965 SC 94*.
7. We have heard the learned APP for the State at length and perused the available material on record.

Testimony of the prosecutrix

8. It is a settled principle of law that conviction in a case of rape can be based on the sole testimony of the prosecutrix of sexual assault without corroboration from any other evidence. Where the testimony of prosecutrix of sexual assault instills confidence in Court, the same

can be relied upon for conviction of the accused. It is also a well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance to prudence under the given circumstances. In this regard, reference can be made to the dicta of the Apex Court in the case of ***State of Rajasthan vs. Babu Meena*** reported at (2013) 4 SCC 206 wherein the Court has held that:

“9. We do not have the slightest hesitation in accepting the broad submission of Mr. Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigor in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.

10. In the background of the aforesaid legal position, when we consider the case in hand we are of the opinion that the statement of the prosecutrix is not at all reliable or in other words wholly unreliable. No other evidence has been led to support the allegation of rape. Hence, it shall be

unsafe to base the conviction on her sole testimony. In her evidence she had stated that she was subjected to rape at 12.00 noon when her sister Jitendra, the wife of the accused had gone to purchase milk. However, during the course of investigation she alleged that she was subjected to rape at 06.30 A.M. When confronted with the aforesaid contradiction in the cross-examination, she could not explain the aforesaid discrepancy. Her statement that she shouted for help when she was subjected to rape also does not find support from the evidence of Ramchandra Salvi (PW-11), the owner of the house where the incident is alleged to have taken place. Dr. Smt. Sushila (PW-12), has also not supported the allegation of rape as also the Forensic Science Laboratory Report. In the face of what we have observed above, the evidence of the prosecutrix cannot be said to be wholly reliable.”

9. Further reliance can be placed on **Krishan Kumar Malik vs. State of Haryana** reported at (2011) 7 SCC 130, wherein the Apex Court has held that:

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said

offences. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (Code of Criminal Procedure), FIR and deposition in Court.”

10. It is vital to note that if the statement of the prosecutrix fails to inspire confidence or is not worthy of credence then the same should not be the basis for conviction. The same was reiterated in ***Sadashiv Ramrao Hadbe v. State of Maharashtra*** reported at (2006) 10 SCC 92, wherein the Supreme Court held that:

“9. It is true that in a rape case the Accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and believe the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

11. The prosecutrix during her statement recorded under Section 164 Cr. P.C. deposed as under:-

“08.04.2015 Ko Morning Me Mai School Ke Liye Nikli Thi. Wahan Raaste me se Shekhar Mujhe Auto Se Shakoorpur Le Gaya. Wahan Mujhe Do Din Rakha. Wahan Shekhar Ne Mere Sath Jabardasti Ki. Rape Kiya Tha. Jab Meri Family Ne Shekhar Ke Khilaf Report Ki To Usne Mujhe Morning Me Chor Diya. Phir Mai Wahan Se Ghar

Aa Gai. Phir Mere Parents Mere Ko Thane Lekar Aaye. Mujhse Poochtach Ki Gai Aur Mujhe Hospital Le Jaya Gaya. Wahan Mera Medical Hua Tha. Wahan Se Dobra Thane Le Jaya Gaya. Wahan Se Mujhe Naari Niketan Bhej Diya. Saturday Sunday Naari Niketan Rahi. Mai Apne Parents Ke Sath Jana Chahti Hun. Bas.”

12.The prosecutrix in her testimony before the Trial Court deposed as under:-

“My date of birth is 30.11.1997. I am residing with my family at the address mentioned against my name in the list of witnesses, which is owned by my father. My family consist of myself, my parents, my two sisters and one brother. Presently I am studying in class 12th from Open School. At the time of incident I was studying in class 11th and was regularly attending the school in the area of Village Nithari.

Accused Shekhar, present in the court today (correctly identified by the witness through the design of wooden partition), was known to me for the last 4-5 years as he was running a small electric shop near my house. We used to talk to each other while going and coming from the school.

On 07.04.2015 accused told me that he had taken a room on rent at Shakur Pur and he wanted to show me that room to which I refused to go with him.

On 08.04.2015 at 7:00 am. When I was going to my school and was about to reach accused met me on the way and he seduced (apni baaton main mujhe behla fusla liya) and asked me to go roaming around but he took me to that room in an auto rickshaw and left me there and locked

On 09.04.2015 accused came back and we got married in that room thereafter he did ‘ zabardasti’ with me against my wish.

Ans. Usne mere sath rape kiya tha aur usne video bhi banai thi.

*On 10.04.2015 accused came to me and told me that my parents had lodged my missing report and thereafter he took me and left me outside Ambedkar Hospital, Rohini and he went away from there. I called my father from one PCO and told him about my status. My father came and took me to police station Aman Vihar. From there I was taken to SGM Hospital, Mangol Puri, Delhi where my medical examination was conducted. **I did not tell anything to the Doctor at the time of my medical examination except that the physical relations between me and accused were established with my consent. Vol. As the accused was having my video I could not tell anything to the Doctor or anywhere in my statement.** Thereafter I was brought to the police station where one Madam came and I was counselled. My statement was also recorded by Manisha Madam. **I was not taken by the accused to any Temple which was stated by me to the police. At that time I was under pressure and I was scared....”***

"I had a love affair with accused. I have never failed in any class. I do not know the date and year

of marriage of my parents. My sister immediately younger to me is aged about 16 years and she studies in class 11th. It is correct that there is no MCD birth certificate issued in my name. At the time of my admission in school my father had not submitted any document with regard to my age. It is wrong to suggest that my father had got recorded my date of birth on the basis of estimation. I do not know whether my father had understated my age by 2 years. It is wrong to suggest that my father had understated my age by 2 years. It is further wrong to suggest that at the time of incident I was more than 18 years of age and had crossed the age of discretion.

I used to talk to accused on phone occasionally. It is wrong to suggest that I had asked the accused on phone to talk to my parents about our marriage failing which he would suffer severe consequences.

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It is correct that I had not told about the accused having videographed me in my all the statements made by me before different authorities prior to today. It is wrong to suggest that my counsel, who is present outside the court had asked me to add the allegations about the videography today in court. It is wrong to suggest that I have today deposed in the matter after getting tutored by my father as well as my counsel."

13. From a plain reading of her statements recorded at various stages it is evident that there are various inconsistencies and improvements in the statements/testimonies of the prosecutrix. During her examination-in-chief, she deposed that on 08.04.2015, the accused seduced her and took her to a room in Shakarpur where he locked

her, however, in her statement recorded under Section 164 Cr. P.C. she failed to mention about forceful confinement. In her examination-in-chief she deposed that on 'On 09.04.2015 accused came back and we got married in that room thereafter he did zabardasti', however, in her statement under Section 164 Cr. P.C. the factum of marriage has not been revealed by the prosecutrix. Further, in her testimony recorded by the Court she deposed that on 10.04.2015 she called her father who took her to the police station, however, in her statement recorded under Section 164 Cr. P.C. she stated that 'To Usne Mujhe Morning Me Chor Diya. Phir Mai Wahan Se Ghar Aa Gai'. Moreover, during cross-examination she admitted that she was having a love affair with the accused and she had mistakenly deposed in her statement under Section 161 Cr. P.C. that she married the accused in a temple.

14. The statement/testimony of the prosecutrix is also in contradiction with the testimony of PW-12, Pradeep Malik, landlord of the house where the alleged incident took place. During his examination-in-chief PW-12 deposed that 'on 10.04.2015, I came to know of the aforesaid fact. I went there and found accused shekhar and his wife present in the said room'. During cross-examination the witness deposed that 'the wife of the accused was wearing vermilion on her forehead'. The testimony of the PW-12 completely negates the version of the prosecution that the prosecutrix was confined in a room and was raped.
15. As per school records produced by the prosecution the date of birth of the prosecutrix was 30.11.1997, however, the same was not

supported by any other documentary proof. Further during cross-examination the prosecutrix as well as her mother failed to give any cogent reply to the suggestion made by the counsel for defence that the father of the prosecutrix understated the age of prosecutrix by 2 years, in the school records, which creates a doubt in the story of the prosecution that the prosecutrix was below the age of 18 years at the time of alleged incident. Infact, PW-4 Smt. Meena, (mother of the prosecutrix) during her cross-examination deposed that '**I had not got recorded the date of births of my children with the authorities there. I had shifted to Delhi at about 12 years ago. I do know whether after coming to Delhi my husband had understated the age of prosecutrix by 2 years at the time of her admission in the school. My all the children were not studying in the village and I got all of them admitted to the school in Delhi simultaneously. After coming to Delhi I got all of them admitted in 1st Class. Al my four children were born within a gap of 6 years**'.

16. MLC, Ex. PW-6/A was proved by Dr. Urmila, S.R. Gyne, SGM Hospital as per which there was no external or internal injury on the body of the prosecutrix which further negates the charges punishable under Section 376 of the IPC. The opinion of FSL expert suggests that the semen detected from the body of the prosecutrix was proved to be of the accused, however, in absence of knowledge of the exact age of the prosecutrix coupled with the fact that the record depicts that the act of sexual intercourse was consensual, the accused deserves to be given the benefit of doubt.

17. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are of the considered view that the evidence of the prosecution has been held to be unworthy of acceptance because the same is found to be replete with infirmities and found to be not supported by the testimony of any independent witness. There are considerable inconsistencies and discrepancies in the statement of the victim, which consequently make it fabricated and unreliable. According to the prosecution, the accused seduced the prosecutrix and took her in an auto and locked her inside a room in Shakarpur. The story of the prosecution seems highly improbable as for two days the prosecutrix took no steps to free herself from illegal confinement, she neither raised an alarm to gain attention of the neighbors nor took any steps to approach the police authorities. The medical evidence also does not support the case of the prosecution. Therefore, the prosecution has failed to disclose the true genesis of the crime and to establish the charges against the accused punishable under the Indian Penal Code beyond reasonable doubt.
18. 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.

19. 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 illegality or perversity in the reasoning given in the impugned judgment. The learned trial court has taken a holistic view in the matter and carefully analysed the evidence of all the witnesses.
20. Accordingly, no grounds to interfere with the impugned judgment are made out and the leave to appeal is dismissed.

SANGITA DHINGRA SEHGAL, J

MANMOHAN, J

OCTOBER 31, 2019
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