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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 13th September, 2023

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CRL.L.P. 302/2022

STATE

..... Petitioner

Through: Mr. Tarang Srivastava, APP for State
with Insp. Sumit Kumar, PS Moti
Nagar, Delhi.

versus

BASIR AHMAD

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)**

1. This Criminal Leave to Appeal under Section 378(3) of the Code of Criminal Procedure, 1973 (*hereinafter referred to as 'CrPC'*) has been filed by the State against the impugned Judgment dated 18.07.2020 acquitting the respondent for the offences under Sections 363/376/506 of the Indian Penal Code, 1860 (*hereinafter referred to as 'IPC'*) and Section 4 of The Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as 'POCSO Act'*).

2. The case of the prosecution was that on 13.02.2014, a complaint was made by *Bhabhi* of 'Ms.X', the prosecutrix that she was missing from the house since 13.02.2014 and had failed to return. During investigation, brother of the prosecutrix informed that the prosecutrix was present at the House No. 32A, Gali No. 3, Nehru Nagar, Anand Parbat. On this information, the Investigating Officer along with brother went to the said house and recovered the prosecutrix. Her statement was recorded and the offence under Section 376 IPC was added in the FIR already registered



under Section 363 IPC. After investigation, the charge sheet was filed under Sections 363, 376 and 506 IPC and Section 4 of the POCSO Act.

3. Charges against the respondent were framed on 23.05.2014 under the aforesaid Sections. Statements of 8 witnesses were recorded on behalf of the prosecution wherein the prosecutrix who appeared as PW-2 fully supported the case of the prosecution. However, the learned Additional Sessions Judge observed that the age of the prosecutrix was shown to be between 17 to 19 years and therefore, there was no conclusive evidence of her being a minor at the time of alleged offence. Consequently, the benefit was extended to the respondent who was acquitted.

4. **Aggrieved by the said acquittal of the respondent**, the State has filed the present Leave to Appeal.

5. The grounds pleaded essentially by the State are that the learned Additional Sessions Judge failed to appreciate the testimony of the prosecutrix i.e. PW-2 who in her statement under Sections 161 and 164 CrPC as well as in her testimony before the Court, had deposed that the respondent had made physical relationship with her under threat. It is pleaded that her statement throughout was consistent and there was no material contradiction. The testimony of the prosecutrix was corroborated by the forensic evidence wherein the FSL report corroborated the presence of human semen on the exhibits of the prosecutrix. The learned Additional Sessions Judge also ignored the DNA profile which matched with that of the accused-respondent herein.

6. For the purpose of determination of the age, the ossification report was considered which suggested the age of the prosecutrix in the range of 17 to 19 years. The learned ASJ overlooked the age of the prosecutrix on the



lower side despite the sensitivity of the matter and simply extended the benefit of doubt to the respondent. The impugned Judgment thus suffers from material illegality and thus, leave to appeal against the said acquittal of the respondent is filed.

7. **Submissions heard.**

8. The first submission made on behalf of the State was that the age of prosecutrix was estimated between 17 years to 19 years in the ossification test. The age on lower side should have been accepted and the learned ASJ fell in error in holding that prosecutrix was not proved to be minor beyond reasonable doubt.

9. In the case of Jarnail Singh Vs. State of Haryana (2013) 7 SCC 263, the Apex Court observed even though Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 is strictly applicable only to determine the age of a child in conflict with law. However, the aforesaid statutory provision should also be the basis for determining the age of a child who is the victim of crime for there is hardly any difference insofar as the issue of minority is concerned between a child in conflict with law or a child who is the victim of the crime. It was held that it would be just and appropriate to apply Rule 12 of the Rules, 2007 to determine the age of the victim.

10. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (*hereinafter referred to as 'Rules, 2007'*) provides for procedure for determination of the age and reads as under:

“12. Procedure to be followed in determination of Age.

.....(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee



by seeking evidence by obtaining—

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law”.

11. In Jarnail Singh (supra), it was explained how the Rule was to be followed. It explained that Rule 12 provides that the age of the child be ascertained by adopting the first available basis out of the number of options postulated in Rule 12(3) of the Rules, 2007. If an option is available in the first clause, it shall have overriding effect on the options given in the subsequent clauses. Highest rated option should be as per the sequence mentioned in Rule 12(3) of the Rules, 2007. If first option i.e. the Matriculation Certificate or equivalent certificate is available, then, it should be the sole basis for determination of age. In its absence, the second option shall be the Birth Certificate from the school first attended and in its



absence, the third option being the Birth Certificate given by the Corporation or a Municipal Authority or Panchayat should be considered. If none of these documents are available, only then the medical opinion may be sought for determination of the age of the child.

12. In the cases of Ram Suresh Singh Vs. Prabhat Singh (2009) 6 SCC 681, Jaya Mala Vs. Govt. of J & K (1982) 2 SCC 538 and Jyoti Prakash Rai Vs. State of Bihar (2008) 15 SCC 223, it has been held that the ossification test is not conclusive for determination of age. It is difficult to determine the exact age of a person on the basis of ossification test or any other medical test. It was further held that judicial notice of the margin of error in age ascertained by the radiological examination is two years on either side.

13. The question which thus, arises is whether the lower or the upper age recommended in the ossification test should be adopted to be the age of the prosecutrix. If benefit of doubt has to be given to the accused under all circumstances, then, it is the higher limit which has to be taken and benefit extended as has been held in the cases of Triveniben Vs. State of Gujarat (1989) 1 SCC 678 and Maru Ram Vs. Union of India (1981) 1 SCC 107. So being the case, we may consider the range of age of the prosecutrix as given in the ossification test to be 17 to 19 years. Applying the margin of error principle of two years on either side, the age of the prosecutrix could be anything between 15 to 21 years. Even if the margin of error is not on the higher side, the upper limit of the age has been estimated by the ossification test as 19 years. Giving the benefit, the age of the prosecutrix has to be held as 19 years. Similar conclusion was taken by the Court in the case of Shweta Gulati vs. State of NCT of Delhi 2018 SCC OnLine Del 10448. We thus, find that learned ASJ has rightly held the prosecutrix to be major at the time



of incident. We find no infirmity in the findings in respect of the age of the prosecutrix.

14. The charges have also been framed under Section 376 IPC against the respondent. Though it has been the case of the prosecution that the prosecutrix has been consistent in her statement having been raped by the respondent under threat but it was observed by the learned ASJ that the prosecutrix was missing since 13.02.2014 and there was an unexplained delay of one day in registering the FIR. Furthermore, there are material contradictions in the testimony of the witnesses. The learned ASJ observed as under:

“32. Besides the above contradictions, there are other material contradictions in the testimony of witnesses. In the statement recorded under Section 164 of the Code of Criminal Procedure of Ms. ‘X’, Ex.PW2/C, she has stated that on 15.02.14, there was no one at her house. Accused came at her house, allured her to accompany him and took her away to one room. Thereafter, in the said room, he committed rape upon her and left the room. She was recovered from the said room on the same day by the police. Contrary to this, in the court Ms. ‘X’ has deposed that on 13.02.2014, when she was returning home from her work, accused had given her something to drink. After which, she lost her consciousness and when she regained consciousness, she found herself in a room. It is further deposed that accused confined her in the said room for two day. Then Ms. ‘X’ has stated in her examination in chief that she does not remember if accused has committed rape upon her whereas in her statement under Section 164 of Code of Criminal Procedure, she has specifically stated that accused has committed rape upon her. When Ms. ‘X’ was cross examined by Ld.APP for the State, again she has changed her stand. In the said cross examination, she has stated that accused has forcibly established physical relations with her. Further, again in the



cross examination by Ld. Legal Aid Counsel for the accused, Ms. 'X' has stated that accused has induced her to go with him and therefore, she accompanied the accused. It is only after reaching at the room that the accused made her consume cold drink after which she lost her consciousness. This shows that Ms. 'X' has been changing her statement regarding the date of the incident, regarding the fact that whether she was sexually assaulted by the accused or not and whether the accused has given her a drink due to which she lost her consciousness and thereafter, accused took her to a room or whether she accompanied the accused out of inducement and at the room, accused administered her a cold drink. In fact in her statement under Section 164 of Code of Criminal Procedure, there is no mentioning of cold drink. There is a completely different fact stated. In the statement, Ms. 'X' has stated that accused visited her house and allured her to accompany him and had taken her away from there.

33. Perusal of examination in chief of PW2 shows that she has stated that first accused confined her in a room and then made her drink something due to which she had lost consciousness. From the said testimony, it appears that Ms. 'X' was fully conscious and was aware about the acts which were taking place prior to reaching the room of the accused. PW5 deposed that accused came to his house with a girl to reside in a rented room and introduced the said girl as his wife. This shows that prior to reaching the room, accused has introduced Ms. 'X' to PW5 as his wife and at that time, Ms. 'X' was fully aware and conscious about the surroundings. There is no explanation as to why Ms. 'X' did not raise any alarm in the presence of PW5 if the accused had taken her away forcibly. Further, during the entire way also, Ms. 'X' has not raised any alarm or tried to escape despite being completely conscious. The said conduct of Ms. 'X' hints towards falsity of the story of the prosecution.

34. There is contradiction in the testimony of PW3 i.e. brother and PW4 i.e. Bhabhi of Ms. 'X' also. As per the statement of Ms. 'X' and the IO, brother of Ms. 'X' accompanied the police to the room of the accused and she



was recovered from there in the presence of brother of Ms. 'X'. Brother who has been examined as PW3 has deposed that he is not aware about any fact and he was called in the police station after Ms. 'X' was recovered. Contrary to this the case of the prosecution is this that Ms. 'X' was recovered on the basis of information given by PW3. PW5 has also deposed that police took away Ms. 'X' from the room after her brother identified her. But this fact is disowned by PW3 thus rendering the fact of recovery of Ms. 'X' from the alleged room doubtful. PW3 has deposed that he was informed after the recovery of Ms. 'X' by the police that she is at police station. Similarly PW4 i.e. Bhabi of Ms. 'X' has also deposed that after Ms. 'X' was recovered, police informed them about the same and they went to the police station and took the custody of Ms. 'X'. Contrary to this, IO PW6 has deposed that the brother of Ms. 'X' came at the police station and informed about her whereabouts".

15. The learned ASJ has thus observed correctly that there were material contradictions in the testimony of the prosecutrix and the supporting witnesses and thus, their testimony were not reliable to prove the allegation of rape, which had no independent corroboration.

16. We conclude that the learned ASJ has rightly given the benefit of doubt to the respondent, acquitting him for the offences for which he was charged. We find no ground for grant of Leave to Appeal.

17. The Leave to Appeal is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 13, 2023/akb