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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 11th October, 2023+ CRL.L.P. 352/2022

STATE OF NCT OF DELHI

..... Petitioner

Through: Mr. Tarang Srivastava, APP for State
with Insp. Manoj Kumar, S.I. Pramod
Kumar, PS Mehrauli.

versus

SADDAM

..... Respondent

Through: Mr. L.K. Verma, Mr. Mohit Verma &
Mr. Hritik Verma, Advocates.**CORAM:****HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****JUDGMENT (oral)**

1. **Criminal Leave to Appeal under Section 378(1) of the Code of Criminal Procedure, 1973** (*hereinafter referred to as 'CrPC'*) has been filed on behalf of the State against the Judgment dated 31.01.2020 *vide* which the respondent has been acquitted for the offences under Sections 363/376 of the Indian Penal Code, 1860 (*hereinafter referred to as 'IPC'*) and under Sections 4/6 of the Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as 'POCSO Act'*).
2. **The case of the prosecution is that** a complaint dated 09.06.2013 was received at Police Station Mehrauli from one 'U' stating that at about 1.30 PM, her daughter 'N' who was roaming outside the house as there was



no electricity at home, went missing and had not returned home since then. The FIR was registered on the said complaint. On 02.07.2013, the victim/prosecutrix 'N' was found roaming with the accused/respondent near Purani Chaupal. She was recovered and the accused/respondent was arrested. Investigation was carried out and the medical examination of the victim/prosecutrix was done. The samples collected were sent to the FSL and the statement of the prosecutrix was recorded under Section 164 CrPC on 03.07.2013 by the learned M.M. On completion of investigation, charge sheet was filed in the Court. **The charges under Sections 363/376 IPC and Sections 4/6 of the POCSO Act were framed** against the respondent on 16.12.2013 to which the respondent pleaded not guilty.

3. **The prosecution examined 15 witnesses in all. The statement of the respondent was recorded under Section 313 CrPC** wherein, he pleaded his innocence.

4. The **learned ASJ** referred to the testimony of **PW8** Mr.B.R.Ghosh, who had produced the school record of the prosecutrix, according to which, the date of birth of the prosecutrix was 26.04.1998 and the testimony of **PW12** Ms.Sadhana who also produced the school record reflecting the age of the prosecutrix as 26.06.1997. The learned ASJ also referred to the statement of the prosecutrix as well as of her father alluded to the contradictory dates given in the two set of school documents and in ocular evidence to conclude that the prosecution was not able to prove that the prosecutrix was below 18 years of age.

5. The learned ASJ also concluded from the testimony of the prosecution witnesses that there was no evidence whatsoever to prove that the prosecutrix had been kidnapped. Rather, the overwhelming evidence on



record established that the prosecutrix had voluntarily accompanied the accused/respondent and thus, no offence of kidnapping was made out. The learned ASJ further noted that there were material contradictions and inconsistencies in the statements of the prosecutrix under Sections 161, 164 CrPC and her testimony in the Court. The contradictions were further compounded by the testimony of her parents i.e. PW2 and PW4, mother and father of the prosecutrix. Therefore, it could not be held that the prosecution was able to prove the offences under Sections 4/6 of the POCSO Act and the respondent was acquitted of the charges.

6. Aggrieved by the acquittal of the respondent, the present Leave to Appeal has been preferred by the State.

7. It is argued by the learned APP that there are school records of the prosecutrix which had been proved by PW8 Mr.B.R.Ghosh and PW12 Ms.Sadhana. It is asserted that no doubt, there are two different dates of birth viz. 26.04.1998 and 26.06.1997 reflected in the two sets of school records, but, even if the earlier date i.e. 26.06.1997 is taken, then too, the victim/ prosecutrix was below the age of 18 years of age and the offence under Section 4 of the POCSO Act was made out against the respondent. Therefore, the conclusion of the learned ASJ to the contrary is not supported by any cogent evidence.

8. The learned APP has further argued that even though there were contradictions in the evidence of the prosecutrix at different stages, but her statements under Section 164 CrPC and MLC reflected that she had sexual relationship with the respondent. Since her age has been proved to be below 18 years, the offence under Section 4 of the POCSO Act was made out and the respondent was not entitled to acquittal.



9. **Submissions heard and record perused.**

10. **The first aspect for consideration** is the age of the victim/prosecutrix. As submitted by the learned APP, one set of school record reflected the age as 26.06.1997 and another set reflected 26.04.1998, but as candidly admitted by PW8 and PW12, there were no supporting documents on the basis of which the age of the victim/prosecutrix had been so mentioned in the school record. PW4, the father of the prosecutrix was also unable to give the date of birth of the prosecutrix. Likewise, PW2, the mother of the prosecutrix, in her testimony stated that her daughter was born at Maharashtra and her date of birth was twenty sixth, however, she was not aware of the month and year of the birth. Thus, it has been rightly observed by the learned ASJ that in view of contrary stands and the inconsistencies in the testimonies of the prosecution witnesses, it was not established beyond doubt that the prosecutrix was below 18 years of age.

11. **The second aspect for consideration** was whether the victim had voluntarily accompanied the respondent and whether there was any physical intimacy established between the two. The case of the prosecution was that the prosecutrix went missing and a complaint was given at the Police Station by her mother on 09.06.2013. PW2 Smt. 'U', mother of the victim in her testimony had deposed that her daughter 'N' on the day of incident was roaming outside the house at about 8 PM when there was no electricity. After the electricity came back, she noticed that her daughter was not in the house. She along with her other family members, made a search for the prosecutrix but she was not found. Thereafter, on 09.06.2013, she lodged a missing report with the police *vide* her statement Ex.PW2/A. She further deposed that her daughter talked to her on mobile phone after about two



days of making the complaint and informed that she was with her friend at Mehrauli. The prosecutrix then came back and her mother took her to the Police Station to withdraw the missing complaint but as the Investigating Officer was not available, they came back. Thereafter, in the afternoon, her daughter again went away without permission and was recovered along with the respondent in the area near Bhul Bhulaiya, Mehrauli after about one month.

12. PW4, father of the prosecutrix in his testimony had deposed that his daughter had gone to the school and not returned to home and could not be subsequently traced. After they made a complaint to the police, she was recovered after about 8-10 days from a house in Mehrauli. He admitted in his cross-examination that 2-3 times before the incident, his daughter had gone away without their permission and every time, they had sought the help of the police to recover her. He also admitted that the terms between him and his daughter were not very cordial and his daughter used to talk to them in a rude manner. He however, denied that his daughter had returned back home and had accompanied the mother to the Police Station on 11.06.2013 to withdraw the police complaint and that, she again left on the same day at about 3.30 PM.

13. The prosecutrix who is the third important witness, in her testimony as PW1, deposed that she left her parental home on 07.06.2013 because of some altercation with parents. She roamed around and met the accused/respondent who took her to his house at Mehrauli. Thereafter, she accompanied him to Varanasi and after 15-20 days, they came back to Delhi.

14. The testimony of the prosecution witnesses therefore established that



the prosecutrix had not left her parental home under any inducement or allurements by the respondent, but she had some altercation with her parents which compelled her to leave the parental home. Pertinently, it has emerged in the testimony of father and mother that she had done so 2-3 times in the past as well. It is also pertinent to note that as per her testimony, she accompanied the respondent in a train to Varanasi and stayed there for 15-20 days. Had there been any kind of forcible “*taking away*”, the prosecutrix had ample opportunity to raise an alarm or to seek the assistance of various people or the public whom she met during her days when she was with the respondent. Neither did she seek any help when she was travelling by train to Varanasi or sought any help in Varanasi. It was rightly concluded by the learned ASJ that there was no kidnapping of the prosecutrix.

15. **The other aspect for consideration** is whether the offences under Sections 4/6 of the POCSO Act were proved by the prosecution. Admittedly, the first statement of the prosecutrix was recorded by the police on 09.06.2013 when she had been recovered from Varanasi on 09.06.2013. In her statement under Section 161 CrPC, she did not state about having any sexual intimacy with the respondent. In supplementary statement of the prosecutrix under Section 161 CrPC recorded on 30.09.2013, she stated that they had a fake ceremony of marriage at Varanasi and thereafter, they kept roaming to different places and eventually, came to Delhi. Neither in her first statement under Section 161 CrPC nor in her testimony in the Court, did she depose that there had been any sexual relationship between her and the respondent. In her statement under Section 164 CrPC recorded on 03.07.2013, she for the first time, stated that she had got married on 16.06.2013 to the respondent and she had physical relationship with him



twice before they got married and regularly after their marriage. Significantly, not a word about her sexual intimacy is mentioned in her testimony as PW1.

16. The prosecution has relied upon the MLC of the prosecutrix wherein it was mentioned that she had got married to the respondent and had sexual relationship with him twice before marriage and every day after they got married and the sexual intercourse was consensual. Significantly, there is no evidence as to on whose information, this history was recorded. Moreover, nothing material was noticed in the MLC. It was observed that there was no fresh tear though hymen was not intact and there was no discharge. Further, samples were sent to the FSL but that also did not yield any result and nothing incriminating was observed either in the MLC or in the FSL. The learned ASJ has rightly observed that in view of these blatant contradictions and no allegations of rape could be held to be proved against the respondent, who was entitled to acquittal.

17. We find no ground for grant of Leave to Appeal, which is hereby dismissed.

18. The pending applications, if any, also stand disposed of.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 11, 2023
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