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

% *Date of decision: 25th July, 2023*

+ **CRL.L.P. 366/2022**

STATE

..... Petitioner

Through: Mr. Prithu Garg, APP for State.

versus

SANDEEP @ SONU & ORS.

..... Respondents

Through: Mr. Manish Kumar, Advocates
for R-1 to 3.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)

CRL.M.A. 14517/2020 (Condonation of delay)

1. *Vide* the present application, the applicant/petitioner seeks condonation of delay in re-filing the present petition.
2. For the reasons and grounds stated in the present application, the application is allowed. The delay in re-filing the present petition is condoned.
3. Accordingly, the present application is disposed of.

CRL.M.A. 14515/2022 (Condonation of delay)

4. The present application has been filed by the applicant/petitioner to seek condonation of 1 day's delay in filing the present petition.
5. For the reasons and grounds stated in the present application, the application is allowed. The delay in filing the present petition is condoned.

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6. Accordingly, the present application is disposed of.

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7. Present leave petition under Section 378(1)(b) Cr.P.C. for grant of Leave to Appeal has been filed against the Judgement dated 12.02.2020 *vide* which the four respondents i.e. respondent No.1 Sandeep @ Sonu, respondent No.2 John @ Vasu, respondent No.3 Manish @ Golu and respondent No.4 Sonu, have been acquitted for the offences under Sections 363/366/328/376D/506 IPC & Section 4 POCSO Act.

8. The case of the prosecution was that on 07.03.2014, Smt. 'U', mother of victim namely 'K', made a complaint that her daughter 'K' aged about 16 years has been missing since the evening of 06.03.2014. She suspected one Adil @ Kabir to have kidnapped her daughter. On her complaint, an FIR No. 221/2014 under Section 363 IPC was registered and the investigations were carried by SI Kaptan Singh. The victim 'K' was recovered from Sant Nagar, Burari on 09.03.2014 after which she was given counseling by an NGO. Her medical examination was conducted at BSA Hospital and it was found that her hymen was not intact. Further investigation was conducted and the statement of victim was recorded under Section 164 Cr.PC on 12.03.2014 wherein she revealed in detail the circumstances surrounding the occurrence of her rape.

9. **She stated that** on 06.03.2014 at about 5:00 PM, she received a call from her friend, Manisha. She went to meet her at the Petrol Pump, Sector-18, Rohini and then accompanied her in her Alto car in which Sandeep @Sonu was also present. On the way, in the area of Pitampura, two more friends joined them with green coloured wine bottles. After consuming the Fruit Beer offered to her, she felt drowsy and she told Manisha that she



wanted to go home as it was already late, but Manisha requested her to eat food and she along with all the four accused persons went to the restaurant where they had dinner.

10. Thereafter, she got a phone call from her friend Sagar (PW2) who told her to come near her house. It was further stated that though Manisha and the other respondents took her near her house where they met Sagar, Manisha who refused to let her go to her own home with Sagar. Instead, Manisha took the victim to the Gandhi Vihar flat under the false assurance of taking the victim to her own (Manisha's) house. All the other accused apart from Manisha left, and only the prosecutrix and Manisha stayed at the flat.

11. The next morning, Sandeep @Sonu came to the flat and upon being informed that her parents were searching for her, the prosecutrix became frightened. Sandeep @Sonu took her to some advocate in the High Court where she herself got a Notice in writing prepared that her parents wanted to forcibly marry her and that no action should be taken if any complaint of kidnapping is lodged by her parents.

12. Subsequently, she and Sandeep @Sonu returned to the same flat at Gandhi Vihar where he called his friend respondent No.2 John @ Vasu to come over. In the evening, they all ate food and had drinks but she only consumed a cold drink after which she went to sleep. Upon enquiry by the prosecutrix, John @Vasu informed her that Manisha and Sandeep @ Sonu had left the flat and then John @Vasu had sexual intercourse with her against her wishes. The next morning on 08.03.2014, she narrated the incident to Manisha and Sandeep @ Sonu who scolded John @Vasu and asked him to leave the flat.



13. Upon receiving knowledge of a complaint filed by the father of the prosecutrix, Manisha called her friend who was sometimes called Sudhir, and sometimes called Sonu to drop the prosecutrix at her house. However, Sudhir @Sonu took her to an office like place on his bike and after sitting there for a while, when she requested him to drop her at her house, he asked her to wait. He also ordered a cold drink and offered it to her, after which he committed rape upon her. Thereafter, Sudhir @Sonu received a call from Sandeep @ Sonu, who asked him to drop her on the road. She waited on the road for a while when Sandeep @Sonu reached there with the police officials who took her to the police station where she gave her statement.

14. The statements of other witnesses were also recorded. The four accused Manisha, Sandeep @ Sonu and John @ Vasu and Sonu Tomar were arrested. On completion of investigations, the chargesheet was filed in the court and all the four accused were sent for trial.

15. Charges under Sections 363/34 & 366/34 IPC were framed against accused Manisha and Sandeep@ Sonu. Charges U/s 4 POCSO Act and Section 376(1) IPC were framed separately against the accused Sonu Tomar and John @Vasu.

16. During the trial, the statements of 22 witnesses were recorded. The material witnesses were the PW1 prosecutrix and PW2 Sh. Sagar, friend of the prosecutrix.

17. The statements of the four accused persons were recorded under Section 313 Cr.PC. Thereafter, considering the contradictions in the testimony of the prosecutrix and attending circumstances including the DNA Report, all the accused persons were acquitted. Aggrieved by the said acquittal, the present petition for leave to appeal has been filed on behalf of



the prosecution.

18. The grounds agitated on behalf of the prosecution are that the conclusions of the learned ASJ are based on imagination, presumption, conjectures and surmises which cannot stand the scrutiny of law. The prosecutrix, who was a student of class 11, had given the entire sequence of event in detail and had also deposed about how she had been raped by the two accused viz Sonu and John @ Vasu who were in connivance with the accused Manisha. It is asserted that undue importance has been given to minor contradictions and omissions which do not go to the root of the matter or discredit the version of events as narrated by the prosecutrix. Insignificant embellishments do not affect the case of the prosecution and should not be made a basis for the rejection of the prosecution evidence. It is further stated that the testimony of the prosecutrix has been by and large consistent and corroborated by the testimony of the supporting witness PW2. The accused persons/respondents have been wrongly acquitted and the impugned judgment is liable to be set aside.

19. **Learned counsel on behalf of the respondent has, however, countered** the present petition for leave to appeal by claiming that the prosecutrix was not consistent in her testimony as she kept on blowing hot and cold in regard to the identity of Sonu. There was no evidence whatsoever of “enticing” or “taking away” of the prosecutrix from the guardianship of her parents; rather her testimony clearly proved that she herself had left her parental home and accompanied the respondents. The medical evidence also does not support the testimony of the prosecutrix that she was raped. It is submitted that the learned ASJ has correctly appreciated the prosecution evidence to conclude that the prosecution has failed to prove



their case. Accordingly, there is no merit in the present leave to appeal and the petition is liable to be dismissed.

20. **Submissions heard.**

21. **The first charge** being considered by this court against Manisha and Sandeep @ Sonu is that they **kidnapped** the prosecutrix by taking her out of the lawful guardianship of her parents. She has alleged that Manisha and Sandeep @Sonu had confined her against her will and that she had no access to communicate with her parents.

22. In corroboration of charge of kidnapping, the prosecutrix had deposed that on 06.03.2014 she went to meet Manisha at Petrol Pump, Sector-18, Rohini and accompanied her in her Alto car and the accused Sandeep @ Sonu was also present there. They went to Sector-8, Rohini where two more friends of Manisha and Sandeep joined them who had brought bottles of wine. After consuming the Fruit Beer offered to her, she felt drowsy and told Manisha that she wanted to go home as it was late, however, Manisha insisted on eating food. Thus, she along with all the four accused persons went to the restaurant where they had dinner. Thereafter, she got a phone call from her friend Sagar (PW2) who told her to come near her house. It is further deposed that though Manisha and the other respondents took her near her house where they met Sagar, Manisha refused to let her go to her own home with Sagar and instead she took the victim to the Gandhi Vihar flat.

23. It is apparent from her deposition that the victim herself went to meet Manisha at the petrol pump and there was no exercise of inducement or force on the prosecutrix by the two accused to meet them.

24. Further, the prosecutrix has asserted that she had requested Manisha to let her leave as she felt drowsy and intoxicated, but Manisha refused to



allow her to leave. Though the prosecutrix has claimed that as she was administered laced drinks by the accused persons, she was not able to discern the situation due to which she could not escape or return to her parents. However, there is no evidence whatsoever of her being intoxicated or being in a state of stupefaction. It may be observed that the prosecutrix, after having dinner at the restaurant, met her friend Sagar, but at no point of time did she complain about being intoxicated to Sagar or to any other person. Rather, it reflects that she had an access to communicate through telephone and there was nothing which prevented her from revealing the true facts of her being forcibly taken away or, intoxicated, confined and detained by Manisha or Sandeep @Sonu. The inevitable conclusion that can be drawn is that neither was she detained against her wishes at any time as she was free to move, nor was she intoxicated as alleged by her.

25. Further, it has come in the testimony of the prosecutrix that on the next day i.e. 07.03.2014, upon receiving information that her parents were searching for her, Sandeep @ Sonu took her to some advocate in the High Court where she herself got a Written Notice prepared that her parents wanted to forcibly marry her, therefore, no action should be taken if any complaint of kidnapping is lodged by her parents. The fact she herself accompanied the accused, Sandeep @Sonu to the High Court and even met an advocate again reflects that she herself had accompanied the respondents and that there was “no inducement” or “enticement” on their part. Although, she has deposed that she tried to contact her parents on 07.03.2014 but was not allowed to do so by the respondent Manisha, but in the same breath she has deposed that she along with the Sandeep @ Sonu had stayed overnight at Gandhi Vihar flat in the night of 07.03.2014 and had left the flat in the



morning of 08.03.2014 for breakfast in a restaurant at about 3 KMs. Thereafter, they in Alto Car, went to Nathupura (Delhi) which is at a distance of about 10-11 KMs far after which she was left at Nathupura bus stand and was asked to wait for Sonu Tomar. This again reflects that she had ample opportunity to have raised an alarm or to have contacted her parents or any third person if in fact she was being confined by the respondent against her wishes.

26. Even after being left at Nathupura as per her testimony, she waited for Sonu Tomar to come for about 20 minutes and did not make any effort to hire any auto or taxi or to make any call to her parents. The explanation given is that she was too perplexed to do so which, in the circumstances considering her entire conduct, does not inspire any confidence and is not believable.

27. The learned ASJ has rightly concluded that the testimony of the prosecutrix does not in any manner prove that she was “enticed” or “taken away” from the guardianship of her parents and it has been rightly held that no offence under Section 363 IPC is made out and the accused persons have been rightly acquitted.

28. **The second charge** against Manisha and Sandeep @ Sonu is that they kidnapped her in order to force or seduce her into illicit intercourse or knowing that she would likely be forced or seduced into the same.

29. It is evident from the testimony of the prosecutrix that when she narrated the incident of John @ Vasu committing rape upon her to Manisha and Sandeep @ Sonu in the morning of 08.03.2014, they not only scolded John @ Vasu but also asked him to leave the flat. Further, it is evinced from the narration of the incident by the prosecutrix in her statement that Sonu



had allegedly committed rape upon her under the pretext of dropping her to her house. Hence, it cannot be said that Manisha or Sandeep @ Sonu would have had knowledge of the same. Moreover, no cogent evidence has been led against Manisha and Sandeep @Sonu to prove that they were an accomplice to the commission of rape on the prosecutrix. Thus, they have been rightly acquitted by the learned ASJ **under Section 366 of IPC.**

30. **The other allegations were of rape against John @Vasu and Sonu Tomar.** Though, it is a settled proposition of law that the sole testimony of the prosecutrix is sufficient to bring home the offence of rape, but it has to be qualified with a caution that her testimony must be of stellar character and unimpeachable in nature.

31. In the present case, the prosecutrix has deposed that in the night of 07.03.2014 she was given laced drinks and thereafter she was raped by John @Vasu. However, the FSL report dated 12.09.2014 wherein the DNA profiling and comparison was done, states that the DNA found on the underwear and the sanitary pad of the prosecutrix did not match with that of the respondents Sonu Tomar and John @ Vasu. Hence, considering the conduct of the prosecutrix in not exercising the myriad opportunities to escape, the absence of any evidence of force being used against her by the respondents and the findings of the FSL Report, this court finds that the accused John @ Vasu has been rightly acquitted.

32. **Regarding the allegations of rape against Sonu Tomar** the prosecutrix has alleged that on 08.03.2014, under the pretext of dropping her home, Sonu Tomar took her to an office where he ordered a cold drink and raped her.

33. It can be gathered from the testimony of the prosecutrix that though



the prosecutrix had initially identified accused Sonu Tomar in her examination-in-chief on 18.08.2015 but on the next date of her cross-examination on 12.10.2015, she stated that she had seen Sonu Tomar for the first time in PS on 25.04.2014. She further stated that he was not the person who had committed rape upon her. The prosecutrix, however, again changed her stand during her re-examination dated 02.04.2016 by learned Special Public Prosecutor, in which she again deposed that she had rightly identified Sonu Tomar and that he in fact was her rapist and that the statements made by her in the cross-examination were wrong.

34. She was re-crossexamined whereby she clarified that the assaulter who had been called by Manisha, was being addressed by Manisha as Sudhir @Sonu, and he was not present in court. She further explained that she had never seen the respondent Sonu Tomar before her chief-examination and that she wrongly identified the accused during her re-examination upon being told to do so by the police official. The prosecutrix has thus, been oscillating and vacillating in the identification of the accused in her testimony which makes it not only inconsistent as she changed her stance every time she was examined or cross-examined, but also makes her testimony totally unreliable.

35. Apart from her testimony being unreliable, it is also not supported by the FSL report. The DNA found on the clothes of prosecutrix did not match with that of the accused. Hence, the respondent Sonu Tomar has also been rightly acquitted of the charge of rape.

36. We find that the Prosecution has not been able to bring forth any circumstance warranting interference with the impugned Judgement of acquittal.



37. Accordingly, the present petition is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

JULY 25, 2023
S.Sharma

