



2023:DHC:9494-DE



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: December 12, 2023***

+ CRL.L.P. 111/2021

STATE

..... Petitioner

Through: Mr. Tarang Srivastava, Additional
Public Prosecutor for State with
Inspector Harkesh Meena

Versus

MOHD. ALAM @ SONU

..... Respondent

Through: Ms. Aastha Vishwakarma, Mr. Vikas
Rathee & Mr. Vansh Kapoor,
Advocates**CORAM:****HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE SHALINDER KAUR****J U D G M E N T (oral)**

1. The present leave petition has been filed under Section 378 (3) Cr.P.C. seeking leave to grant appeal against the judgment dated 21.12.2019 passed by the learned Special Court POCSO, New Delhi District, Patiala House Courts, New Delhi in case FIR No.132/2013, under Sections 363 IPC and Section 4 POCSO Act, registered at Police Station Tilak Marg, Delhi.
2. The brief facts arising of the case are that on 18.08.2023, a call was received vide DD No.35A at the Police Station that a girl had left the house without informing anyone and she may have been kidnapped. Thereafter, on 19.08.2013, a complaint regarding the missing of minor daughter of the



complainant in which she stated that on 18.08.2013, at around 8:45 PM, when she was coming back to her house from work, her younger daughter came running and told her that elder brother and sister had been fighting. The elder brother had torn the book of the prosecutrix and in return the prosecutrix had slapped/hit her brother due to which her brother started bleeding, who was already a cancer patient. The complainant hurried back to home and chided the prosecutrix on which she came downstairs. Thereafter, she went missing after 9:00 PM from the house.

3. On her complaint, an FIR in question for the offence under Section 363 IPC was registered. Investigating Officer of the case started investigation, prepared a site-plan at the instance of the mother of the prosecutrix. On that very day, i.e. on 19.08.2013, the investigating officer reached the house of the prosecutrix where she was found present. Upon inquiry, the victim revealed that she had been sexually abused by a person. At the instance of the prosecutrix, the investigating officer along with mother of the prosecutrix W/Const. Neelam and Const. Tejpal reached at *Dargah* i.e. the spot of the crime, where the victim pointed out towards a *Takht* and told that she was raped there. At her instances, accused Mohd. Alam was arrested and he was taken to RML Hospital for medical examination. On the same day, the prosecutrix was also got medically examined at LHMC Hospital.

4. On 21.08.2013, statement of prosecutrix under Section 164 Cr.P.C. was recorded. During investigation, the Investigating Officer obtained the proof of age of the prosecutrix from the records of the school where she first attended, according to which her date of birth was 30.03.1999. After



completion of investigation, charge-sheet under Section 363 IPC and Section 4 POCSO Act was filed against the accused on 20.09.2013 before the Court. The learned Court of Metropolitan Magistrate remitted the case to the Court of Sessions where charge under Section 363 IPC and Section 4 POCSO Act, read with Section 376 IPC was framed against the accused.

5. The prosecution has examined as many as fourteen witnesses in support of its case. The accused in his statement recorded under Section 313 Cr.P.C. denied the charges leveled against him, however, no witness was examined in defence. The learned trial Court vide impugned judgment held that age of the victim could not be properly proved and due to contradictions in the statement of witnesses, the testimony of victim was of prime importance, however, it was not of sterling quality and, therefore, the accused was acquitted of all the offences by giving him benefit of doubt.

6. The challenge to the impugned judgment and order dated 21.12.2019 is on the ground that the learned trial Court has failed to appreciate the evidence on record by not correctly determining their statements in true sense and spirit.

7. Learned Addl. Public Prosecutor for State submits that in view of the statement of prosecutrix recorded under Section 161 Cr.P.C before the police and report of medical examination of doctor, it is proved that the victim was taken away by the accused on the pretext of taking her to a safe place to stay, where she was sexually assaulted by him. It was also submitted that since the learned trial court has erroneously held that the age of the victim could not be established, whereas on the basis of Certificate from the school, which prosecutrix first attended, the learned trial Court



should have been considered her as a minor rather than giving the accused benefit of doubt.

8. Reliance is placed upon decision in the case of ***Jarnail Singh Vs. State of Haryana (2013)*** wherein it has been held that on the issue of determination of age of minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 which reads as under:

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

(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(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.”

9. Learned Addl. Public Prosecutor for State has asserted that the prosecutrix had fully supported the case of the prosecution at the stage of trial and her statement is consistent and no variation is seen and so, the impugned judgment deserves to be set aside.

10. Upon hearing learned counsel for parties and on perusal of the trial Court record as well as decision relied upon, we find that the victim had gone missing on 18.08.2013, however, returned home on 19.08.2013. The prosecutrix in her cross-examination recorded before the learned trial court on 01.12.2014 stated that she had a quarrel with her brother and she had hit him, due to which he was hurt and fearing her parents, she went away from her house towards Nizamuddin. She further deposed that she met the accused at the bus stop who asked her to accompany him to his house. On



his asking, the complainant went with him who then took her to a *Masjid* and committed rape upon her. The victim stated to have returned to her home on the next day.

11. The learned trial court has charged the accused/respondent of the offence under Section 363 IPC. The provisions of Section 363 IPC reads as under:-

“Whosoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven year and shall also be liable to fine.”

12. It is not the case of prosecutrix that the respondent-accused had coerced her to join his company or she was kidnapped by the accused or that she was forced to accompany him after she had left the home. From her deposition, it is clear that the prosecutrix had left her home out of her own free will and she met the accused on the bus stop. The learned trial court on this aspect has held that the victim had left her house for no reason connected with the accused and he did not take her out of upkeep of her guardianship.

13. So far as determination of age of the prosecutrix is concerned, the Hon’ble Supreme Court in *P. Yuvaprakash Vs. State* 2023 SCC OnLine SC 846 has held that:-

“13. It is evident from conjoint reading of the above provisions that wherever the dispute with respect to the age of a person arises in the context of her or him being a victim under the POCSO Act, the courts have to take recourse to the steps indicated in



Section 94 of the JJ Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents:

“(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board

14. In the present case, the prosecution examined PW-1, the Principal of P&T Senior Secondary School, Atul Marg, Grover Road, New Delhi, who had brought the original application form annexed with an affidavit of mother of the prosecutrix, which was submitted at the time of admission of prosecutrix in the school. In the application form, the date of birth was mentioned 30.03.1999. PW-1 in his examination –in-chief stated that the Certificate in respect of age of the prosecutrix was issued under his signatures. During his cross-examination, he stated that no photograph of the child was affixed on the admission form and in Entry No.22, names of siblings were not mentioned. This witness admitted that in the admission form and the affidavit annexed thereto, the address of the mother of the



victim were different. This witness also admitted that in the original affidavit, use of fluid over the name of school was also there.

15. Accordingly, the learned trial Court on the aspect of age of the prosecutrix has observed that there is no doubt that the address of the complainant in the affidavit Ex.PW-1/B and admission register Ex.PW-1/D was different. Even the affidavit contained fluid marks and correction. The complainant also admitted that she was not aware about the contents of the affidavit as she was not conversant with the English language.

16. In the considered opinion of this Court, testimony of the only witness examined by the prosecution (PW-1) casts a doubt upon the authenticity of the documents filed before the school and tampering thereon, cannot be ruled out. Even otherwise, the school form does not enclose any photograph of the victim and also the address particulars furnished in the affidavit and school admission form are different.

17. It is settled position of law that burden to prove the age of the prosecutrix/ victim is on the prosecution. Despite there-being fault in the school records produced by PW-1, no application was moved by the prosecution before the learned trial court to get the ossification test of the prosecutrix done to determine her age. In our considered opinion, the prosecution has thus failed to putforth the correct age of the prosecutrix.

18. To find out the guilt of the accused, we find that prosecution witness Dr. Aparna (PW-9), Senior Resident from LHMC and Smt. S.K. Hospital, who had deposed to prove the MLC prepared by Dr. Lipi Priyadharshani, who had since left the services of the hospital, has in her examination-in-chief deposed that as per record on 20.08.2013 at about 04:00 am, victim



aged about 15 years was brought to the hospital by the police for her medical examination and in the history, the victim stated that she had left her house in anger at about 09:00 pm on 18.08.2013. The victim also stated before the doctor that she went to a nearby place with a person whom she met at the bus stand which was an isolated area. Further stated that the accused removed her clothes and had sexual intercourse with her. There was no history of physical assault. Dr. Aparna (PW-9) specifically stated that the victim had told her that neither she had taken bath after the alleged incident nor had she changed her clothes. Dr. Aparna (PW-9) further opined that UPT (Urine Pregnancy Test) was negative and on perineal examination, no abrasion or signs of injury in perianal and perianal region was found and old tear in hymen and mucoit discharge was present. During cross-examination, Dr. Aparna (PW-9) further opined that if in general the minor is already sexually active, then it is not necessary that the above mentioned injuries should be present in vergins, in case of forceful penile penetrative sexual assault, there are chances of aforesaid injuries. After going through MLC, this witness (PW-9) also stated that according to the MLC report of the victim on perianal examination it is documented "*old tear in hymen observed*", and so, sexual activity cannot be ruled out.

19. Another prosecution witness WSI Praveen (PW-7) in her examination-in-chief has stated that on 18.08.2013, after medical examination of the victim, doctor had handed over clothes of victim and her sexual assault evidence collecting kit, in a sealed *pulanda*. PW-7 proved the FSL report Ex.PW-8/DA, which mentions "*semen could not be detected on exhibits and the DNA profile of male origin could not be generated from the*



source of exhibits.” Moreover, the victim in her history recorded before the doctor, i.e. PW-9, had stated that neither had she taken bath nor changed her clothes before she was medically examined and yet the forensic examination could not yield any result in support of the alleged offence.

20. The prosecutrix in her cross-examination also stated that she had never gone to Nizamuddin and did not know if the Masjid was at the main road or not and also she cannot tell about the things she saw on the way when she reached at the Nizamuddin bus stop on the night of 18.08.2013. It is a matter of fact and record that she reached back her home the next day i.e. 19.08.2013 of her own. If the prosecutrix was unaware of the place and its surroundings, how did she manage to reach back home of her own belies the story putforth by the prosecutrix.

21. Also, the prosecutrix in her statement stated before the court that she met the respondent-accused on the bus stop and had walked for 20 minutes with him to reach the Masjid and at some points she has stated Mazar. During her cross-examination the prosecutrix stated that she never asked him as to why he had brought her to Masjid instead of his house.

22. In the considered opinion of this Court when the distance between Majar to Masjid was covered by both of them, the prosecutrix had full opportunity to scream or shout or to ask for help of any of the passer-by, but she did not raise any alarm. The prosecutrix accepted that the respondent-accused had not shown any weapon to her, which clearly exhibit that she had willingly gone with the accused and was not coerced by him.

23. The prosecutrix also accepted that usually Masjids have Maulvis and that many people visit Masjid for Namaz. But she neither admitted nor denied if there were other people present in Masjid. It is unbelievable that



there was not even a single person present in Masjid, be it Maulvi or Guard.

24. It is relevant to note here that the prosecution has alleged that the prosecutrix was taken to a room in *a Masjid* and was made to sleep on *a Takht* where she was forcibly raped by the accused person. How the respondent-accused had access to a room in the Masjid is also cryptic. Moreover, no public witness such like Maulvi of the Masjid or any other Guard/ care taker of the Masjid has been examined to prove that none remains present in Masjid in dark hours.

25. The prosecutrix also stated in her statement that she was made to sit on the bed by the accused and even though she had gone to sleep but at the time he tried to misbehave with her, she got fully awake but acceded that she neither raise any alarm nor resisted by hitting him or biting him. The manner in which the prosecutrix has narrated the allegation of rape by respondent-accused upon her, shakes confidence of this Court to accept the version put forth by her.

26. In our considered view, neither the statement of witnesses recorded nor the medical and scientific evidence placed on record, brings home the guilt of the accused and so, he has been rightly acquitted by the learned trial court.

27. Finding no ground to grant leave to appeal against the judgment dated 21.12.2019, the present petition is accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

(SHALINDER KAUR)
JUDGE

DECEMBER 12, 2023/rk/r