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

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Date of decision: October 20, 2023

+ **CRL.L.P. 534/2023**

STATE GNCT OF DELHI

..... Appellant

Through: Mr. Tarang Srivastava, APP for the
State with Inspector Asha, P.S.
Kapashera and SI Pinki, PS Dabri.

Versus

SURAJ

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T (oral)

CRL.M.A. 28985/2023 (exemption)

1. Allowed, subject to all just exceptions.
2. Application stands disposed of.

**CRL.M.A. 28984/2023 (condonation of delay in filing the petition) and
CRL.M.A. 28986/2023 (condonation of delay in re-filing the petition)**

3. For the reasons stated in the applications, the delay of 535 days in filing the petition and the delay of 20 days in re-filing the petition is condoned.
4. The applications stand disposed of.

CRL.L.P. 534/2023

5. The present criminal leave petition under Section 378(4) of the Code of Criminal Procedure, 1973 has been filed by the State seeking leave to



Appeal against the impugned Judgment dated 29.07.2020 vide which the respondent has been acquitted for the charges for the offences punishable under Sections 366 IPC, 6 r/w 5(1) POCSO Act and in the alternative under Section 376(2)(i) & (n) of the Indian Penal Code, 1860 (in short, "IPC").

6. The criminal machinery of the State was set into the motion on 14.04.2017, when a missing complaint was lodged by "B", father of the minor girl "A". Thereafter, the minor girl was recovered from Firozabad and brought to Delhi by her family. On 26.04.2017, the parents of the minor girl "A" brought her to the police station. The minor girl was medically examined and found to be six months pregnant. The victim girl A (whose details are mentioned in column no.12 of the FIR and is aged about 14 years) revealed that the accused Suraj had stayed on rent in their room for about 4 months. He forcibly used to have sexual intercourse with her. On 13.04.2017, the accused Suraj gave her a biscuit to eat. After eating the same, she fell unconscious. Then, accused Suraj kidnapped her and took her to his sister's house at Firozabad. He repeatedly raped her at his sister's place. They also criminally intimidated her of dire consequences if she informed anyone about this. On the basis of aforesaid allegations, FIR no.134/2017 was registered at Police Station Kapashera.

7. The investigation was taken up by the police. The statement of the prosecutrix under Section 164 Cr. P.C (Ex.PW-1/PX1) was recorded by the learned Metropolitan Magistrate.

8. Efforts were made to arrest the accused but he could not be apprehended. During the investigation, the investigation agency (the Investigating Officer) had obtained the non-bailable warrants of the accused on 09.06.2017 and 28.07.2017 vide the application Ex.PW12/C and



Ex.PW12/D. Since the accused could not be apprehended, process under Section 82 Cr.P.C was also obtained. Later the accused surrendered in the Court. After initial interrogation, the accused Suraj was formally arrested and his personal search was conducted vide memo Ex.PW12/E and Ex.PW12/F. During the police custody remand, accused pointed out towards the room situated at Khasra 15/2, Gali No.2, Samalkha, New Delhi where the alleged incident took place.

9. Blood samples were taken vide application Ex.PW12/J and the same was sent to FSL. The results dated 18.09.2017 and 14.03.2018 of FSL were collected and later on filed in the concerned Court vide application Ex.PW12/K and the same are Ex.P-1 and Ex.P-2. According to the result Ex.P-2, the accused was biological father of exhibit S-1 i.e. Foetus and exhibit S-2 i.e. Placenta. On completion of investigation, charge-sheet under Section 363/376/506/328 IPC & 6 POCSO Act was filed before the learned Metropolitan Magistrate. On the basis of prima facie evidence on record, charges for the offences punishable under Sections 366 IPC and under Section 6 read with Section 5(I) POCSO Act and in the alternative, under Section 376 (2) (i) and (n) IPC were framed against the accused to which he pleaded not guilty and claimed trial.

10. The prosecution examined 16 witnesses in all, the most important being the victim girl 'A' who was examined as PW-1. The statement of the accused was recorded under Section 313 Cr.P.C wherein he pleaded his false implication.

11. The learned Additional Sessions Judge ('ASJ') after examining the evidence adduced by the prosecution has concluded that the prosecutrix/child victim has not supported the prosecution case. It was



observed by the learned ASJ that the child victim in her examination-in-chief deposed that she had established physical relation with the accused on her own volition. It is further observed that during her stay at the house of sister of the accused, the accused had established physical relations with her consent. Learned ASJ also referred the testimony of PW9, PW10 and PW13 who were doctors and were members of the Board constituted for conducting the age determination test of the child victim. As per their testimony, the age of the child victim was more than 16 years and less than 18 years. Accordingly, the benefit of doubt was extended to the accused who was acquitted by the impugned Judgment.

12. Being aggrieved by the said acquittal of the respondent, the State has filed the present Leave to Appeal.

13. Submissions heard as advanced by the learned Additional Public Prosecution.

14. It is submitted by the learned Additional Public Prosecutor that the learned ASJ has failed to appreciate the deposition of the prosecution witnesses and acquitted the respondent without appreciating the settled law and evidence placed on record. It was submitted that for the purpose of determination of the age of the victim girl 'A', the learned ASJ has erroneously relied upon the Ossification Report and ignored her date of birth to be 5.6.2001 as mentioned in her school record wherein she was admitted in Class 1st. However, only in the absence of the aforesaid documentary evidence, the learned ASJ could have relied on Ossification Test Report. It was submitted, considering the fact that there is nothing on the record to disbelieve the school record which has been proved by the prosecution, the learned ASJ had no other option but to ascertain the age of the victim girl



‘A’ on the basis of school record.

15. Pertinently, the learned ASJ questioned the genuineness of the school record produced by the prosecution and found it not to be reliable. Accordingly, the respondent was acquitted by observing that the date of birth of the child victim as 05/06/2001 appears to be doubtful as per the deposition of PW 16 i.e., teacher from the school of child victim as no affidavit/birth certificate regarding the date of birth of the child victim was provided at the time of her admission in the school. Also, the mother and the father of the child victim have deposed that the child victim did not attend school which fact was reiterated by the IO of the case.

16. In the present case, the victim girl ‘A’ was examined as PW 1 and she admitted having sexual relation with the respondent, and that too with her consent. She did not support the case of the prosecution that respondent forcibly had sexual intercourse with her at any time. Thus she clearly admitted to having sexual relations with the respondent on her own volition.

17. The settled principle is that 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, Rule 12 is also the basis for determining age, even of a child who is a victim which is to be determined on the basis of options laid down in Rule 12(3). It is also well settled that opinion of a medical expert determining the age of a person has never been considered by the court of law to be conclusive in nature. However, in the present case, the learned ASJ had no option but to determine the age of the victim girl ‘A’ on the basis of ossification report. Relevantly, through PW16, the Head Teacher of the school had produced original record pertaining to the admission of victim girl ‘A’ in class 1st,



showing her date of birth as 05.06.2001. But the prosecution failed to establish beyond reasonable doubt the aforesaid date of birth of the victim girl 'A'. Her parents empathetically deposed that victim girl 'A' had not attended any school. Their testimony is supported with deposition of I.O. Further, the parents had not produced any Birth Certificate of victim girl 'A' before the I.O. Also, no affidavit/Birth Certificate of the parents were submitted at the time of her admission in the school. In this background, the date of birth of the victim girl 'A' to be 05.06.2001 as per school record is doubtful. Thus, the learned ASJ has correctly placed reliance on the ossification report of the prosecutrix to determine her age. The learned ASJ has also correctly concluded, as per ossification report, the age of the victim girl 'A' could be 14 years to 20 years after applying principle of margin of error of 2 years on either side to the estimated age to be 16 to 18 years.

18. In the light of the aforesaid, this Court is of the considered opinion that the prosecution has not been able to establish its case against the respondent and the learned Trial Court has rightly acquitted the respondent/accused giving benefit of doubt for the offences charged with.

19. Accordingly, we find no merit in the Leave to Appeal against the impugned judgment dated 29.07.2020 which is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(SHALINDER KAUR)
JUDGE

OCTOBER, 20, 2023/ ssc/SU