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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision:-24th September, 2024.

+ CRL.L.P. 69/2023, CRL.M.A. 3350/2023 & CRL.M.A. 3351/2023

STATE

.....Petitioner

Through: Mr. Mukesh Kumar, APP for the
State with Insp. Arun Kumar, P.S.
Adarsh Nagar.

versus

RAJIV @ RAJU

.....Respondent

Through: Mr. Akhilesh Pandey, Mr. Pankaj
Kumar, Mr. Manoj Kumar, Mr. B.P.
Gautam & Ms. Manisha, Advocates.

CORAM:**JUSTICE PRATHIBA M. SINGH****JUSTICE AMIT SHARMA****Prathiba M. Singh, J. (Oral)**

1. This hearing has been done through hybrid mode.
2. The present petition seeking leave to appeal has been filed by the State under Section 378(3) of CrPC, against the impugned judgment dated 4th December, 2019 by which the Accused/Respondent has been acquitted of charges framed under Sections 363/366/506/376 IPC and Section 4 of POCSO Act.
3. On 28th March, 2013, a complaint was registered at the instance of the mother of the prosecutrix. The allegation in the complaint was that on the night of 28th March, 2013, the Accused/Respondent along with a juvenile kidnapped the survivor, and took her to the roof of the said juvenile's house, where the Accused/Respondent committed rape upon the survivor. It is alleged that after some time the mother of the survivor heard the cries of the



survivor and reached at the spot along with other relatives. She found that her daughter was in the company of the Accused/Respondent, and the other co-accused allegedly ran away at that point of time. It is alleged that the Complainant was informed by her daughter that she had been raped by the Accused/Respondent. The father of the survivor was working as a night watchman, who was then called to the residence and thereafter, on the statement of the survivor, FIR **No.82 of 2013** was registered at P.S. Adarsh Nagar.

4. The Trial Court framed charges against the Accused/Respondent under Sections 363/366/506 IPC, Section 4 of POCSO Act, and alternatively under Section 376 of IPC. The Accused/Respondent pleaded not guilty and claimed trial. The survivor herself appeared as PW-9, the mother/ Complainant appeared as PW-2 and the father of the survivor appeared as PW-10.

5. In the Trial Court, the prosecution led its evidence and had filed all the relevant documents on record. The Trial Court acquitted the accused on the ground that age of the prosecutrix has not been established to be below 18 years. In this regard, the findings of the Trial Court are set out below:-

“11. Hon'ble Divison Bench of High Court of Delhi was dealing with a case where in FIR, the age of prosecutrix was mentioned as 14 years. As per school record, her age was 14 years and 8 months. Hon'ble High Court was of the view that in absence of any document submitted by prosecutrix's parents at the time of her admission for recording of her date of birth in school register, the such entry of date of birth will have no evidenciary value in eyes of law.

12. I am of the opinion that responsibility of proving that prosecutrix was less than the age of 18 years is upon the prosecution so as to bring the case within the ambit



of POCSO Act. The material on record however is not enough to prove that the prosecutrix was less than 18 years of age on the date of incident. Therefore, prosecution has not been able to prove that prosecutrix was "child" within the definition under Section 2(d) of POCSO Act 2012."

6. The Trial Court has thereafter, even examined the testimony of the survivor. The operative portion of the Trial Court's impugned judgment reads as under:-

"16. I find substance in the submissions of ld. Defence counsel and I agree with him that the prosecutrix might have gone voluntarily to the roof of Sandeep. Ld. Defence counsel has referred to a letter purportedly written by prosecutrix to accused which is marked as Ex.P9/D1, in support of his arguments that prosecutrix was in love with the accused. The prosecutrix in her cross-examination has not admitted this letter and had stated that it is not her writing. Since there is no other material to show that letter was written by prosecutrix, I discard the same. However, in view of above discussion, the version of prosecutrix that she was kidnapped / abducted by accused, and he made physical relation with her without her consent is highly doubtful.

17. It is necessary to mention here that the DNA finger printing report EX.PW14/H and the FSL report (Fl) filed through supplementary charge sheet proved that DNA taken from swab. Micro slide and clothes of victim match with the blood sample of accused. But it only proved that sexual relation had taken place between accused and the prosecutrix. However, there are high chances that such relation were consensual.

Conclusion

18. In view of above discussion, I gave benefit of doubt to the accused and acquit him. He is directed to



furnish personal bond in sum of Rs. 5,000/- with one surety in the like amount in terms of Section 437A CR.P.c. After furnishing the same, file be consigned to record room.”

7. This Court also notices that in the school records *i.e.*, admission form and school leaving certificate, which were produced by **PW-1** Ms. Seema Puri, Vice Principal of Sarvodaya Kanya Vidyalaya, Ashok Vihar, Delhi, the date of birth of the survivor is mentioned as 13th July 1998, however, except the admission form and school leaving certificate, there is no other document on record to establish the date of birth of the survivor. Neither the mother nor the father of the survivor have given any oral evidence as about the date of birth of the survivor.

8. It is the settled legal position that a mere school record without being supported by any credible or verifiable document cannot be held to be conclusive proof of age, as held in ***State v. Tofil Ahmad [2024 SCC OnLine Del 5403]***, extracted hereinunder:-

*“35. Further, in **State v. Shailesh Kumar (2019 SCC OnLine Del 8318)**, the ld. Division Bench was dealing with a similar situation wherein the Court was considering an issue regarding the determining the age of the survivor. Following the decision of the Supreme Court in **Jarnail Singh v. State of Haryana (2013) 7 SCC 263**, the ld. Division Bench held that no probative value can be attached to a record unless and until the parents or guardians are examined or the person on whose information the entry may have been made, is examined. The relevant portion of the said decision reads as follows:*

“18. It is well settled that an entry of the date of birth made in the school admission register would have evidentiary value only if there is material available



based on which the age was so recorded. In the case of Brij Mohan Singh v. Priya Brat Narain Sinha reported as AIR 1965 SC 282, the Supreme Court held that an entry of birth recorded in the school register maintained by an illiterate Chowkidar, was not admissible and had no probative value within the meaning of Section 35 of the Indian Evidence Act.

...

20. The probative value of the entry regarding the date of birth made in a school register has come up for consideration by the Supreme Court and the High Courts in several other cases and the common view expressed is that no probative value can be attached to such a record unless and until the parents are examined or the person on whose information the entry may have been made, is examined.

23. In the present case, the father of the victim, PW-5 deposed that he did not know the date of birth of his daughter as he was illiterate, nor was he in a position to state her current age. He stated that he got the victim admitted in the school in class-I in the village and at that time, she was about 3-4 years old. In his cross-examination, PW-5 admitted that he did not have any proof regarding his daughter's date of birth. It is therefore clear that the father of the victim had not submitted any document to the school at the time of getting his daughter admitted in class-I, on 12.08.2005, to establish her date of birth as 10.01.2000, as recorded by the school. He was candid enough to state that being illiterate, he did not know the date of birth of the victim and that she was between 3-4 years old when she was admitted in class-I.

24. In the absence of any primary material based on which the age of the victim was recorded in the school register, it is not possible to accept her date of birth as 10.01.2000. Moreover, even the teacher from the school in question, who had appeared as PW-3, had



stated that he had given a handwritten document to the police on 17.12.2014 (Ex.PW3/C), wherein he had recorded that when a child attains the age of 5+ years, the parents approach the school for their admission. If one goes by the said statement, then the testimony of the victim's father to the effect that he had got her admitted in class-I when she was about 3 -4 years, cannot be accepted, as it is premised on mere guess work.”

36. Perusal of Section 94 of the JJ Act shows that any of the following documents are required for establishing the age of the minor:

- i) Date of birth certificate from school;
- ii) Matriculation or equivalent i.e., Class 10th certificate issued by an Examination Board;
- iii) Date of birth certificate from the Corporation or Municipal Authorities;
- iv) In the absence of any of the above, by an ossification test or any advanced test as may be ordered.

37. In the present case, the only document that is available is the Shapath patra signed by DW 1 at the time of admission of the child in the school. The said guardian, who appeared as DW-1, and DW-2, another uncle of the survivor, could neither justify nor confirm the stated date of birth i.e., 2nd April, 1997. There is no other document as contemplated under Section 94 of the JJ Act to establish the date of birth of the survivor.

38. Further, the Prosecution did not conduct any ossification test or any other similar test to establish the date of birth of the survivor.

39. This Court agrees with the view taken by the Trial Court that the date of birth of the survivor mentioned in the School Admission and Withdrawal Register cannot be taken in evidence, and hence the Prosecution has not been able to establish beyond reasonable doubt that the survivor was under the age of 18 years when the incident took place.”



9. In addition, the present leave to appeal has been filed with substantive delay of 660 days, including both delay in filing and refiling of the instant petition for leave to appeal. This Court is of the opinion that the substantial delay has not been sufficiently explained.

10. Considering the lack of evidence to establish the date of birth of the survivor as also the delay in filing of this Appeal, this Court is not inclined to grant leave to appeal against the impugned judgment of acquittal in the present matter.

11. Accordingly, the present petition seeking leave to appeal is dismissed. The applications seeking condonation of delay in filing and re-filing are also dismissed.

12. Pending application(s), if any, also stand disposed of.

PRATHIBA M. SINGH
JUDGE

AMIT SHARMA
JUDGE

SEPTEMBER 24, 2024/bsr/ms