



\$~8

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 29.01.2024

+ CRL.L.P. 83/2022 & CRL.M.A. 2700/2022

STATE

..... Petitioner

Through: Mr. Tarang Srivastava, APP for State
with SI Pankaj Kasana

versus

SUNIL KUMAR

..... Respondent

Through: Mr. Rajesh Mahajan, Advocate
(DHCLC)

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

CRL.M.A. 2700/2022 (Condonation of Delay)

1. Petitioner has moved an application under Section 5 of Limitation Act read with Section 482 Cr.P.C. praying for condonation of delay of eight days.

2. For the reasons stated in the application, we hereby condone the delay. Application stands disposed of accordingly.

CRL.L.P. 83/2022

3. The present petition has been filed by the State under Section 378 (1) (b) of Cr.P.C. seeking leave to appeal against the judgment dated 02.11.2019



passed by the learned Trial Court whereby the respondent/accused herein has been acquitted of all the charges under Section 363/328/376/506/ IPC & Section 4 POCSO.

4. Leave has been sought, *inter alia*, on the following grounds: -

(i) Learned trial court has proceeded on presumption and conjectures and that there was enough of evidence on record which directly indicted the accused and, therefore, it was a fit case for recording conviction.

(ii) Testimony of prosecutrix was sufficient in itself to return the finding of guilt as she had leveled specific allegations against the accused and her stand was consistent.

(iii) There was no reason for the learned trial court to have held that the prosecutrix was not minor and the documents related to her date of birth should not have been ignored.

5. We have gone through the trial court record.

6. As per the case of prosecution, FIR was registered on 08.02.2014 on the basis of complaint of father of prosecutrix who claimed that her minor daughter was missing since 07.02.2014. At the instance of complainant only, his daughter was recovered from near Bihari Colony Red Light. She was got medically examined. During investigation, prosecutrix refused for her statement to be vidyographed. However, her statement under Section 164 Cr.P.C. was recorded. The accused was arrested and was got medically examined. Various exhibits were also seized and sent for forensic analysis.



7. Accused (respondent herein) was charged for commission of offences under Sections 363/328/376/506/ IPC & Section 4 POCSO to which he pleaded not guilty and claimed trial.

8. Prosecution examined eighteen witnesses. Complainant was examined as PW1 and his daughter i.e. prosecutrix as PW2.

9. Accused, in his statement, pleaded innocence and examined his father in his defence.

10. As already noticed above, the accused was acquitted. As per ld. Trial Court, prosecution could not establish that she was below 18 years of age at the time of commission of offence and it also did not find the testimony of prosecutrix of sterling quality.

11. There are, thus, two aforesaid aspects which need to be evaluated. Firstly, whether the prosecutrix was minor at the relevant time or not and secondly whether her testimony inspires complete confidence or not.

12. We have been taken through the testimony of prosecutrix as well as her parents i.e. PW1 (father) and PW8 (mother).

13. Learned counsel for the appellant very fairly admits that there is no birth certificate of the girl in question. He also admits that school record, where she got admitted for the first time, has neither been collected nor proved. It is also admitted case that father of prosecutrix has claimed himself to be an illiterate person.



14. Of course, FIR was got registered by her father claiming that age of his daughter was 13 years. As per prosecution, her date of birth is 01.03.2000. However, when her father entered into witness box, he claimed that he got married in the year 1992 and victim was born after 3 or 4 years of marriage. Her mother also claimed that they shifted from Bihar to Delhi after three years of the birth of prosecutrix. This goes on to indicate that when they shifted to Delhi in the year around 2000, victim was already three years old. Fact also remains that the parents of the prosecutrix are narrating about her age only on the basis of some estimation and guess work. For the reasons best known to the prosecution, record of the school where she was admitted for the first time has not been produced. There is no ossification test either.

15. Undoubtedly, it is not a case where no school record was produced before the Court. Learned Trial Court, after careful evaluation of the testimony led before it, discarded such record also. We have gone through such record i.e. Ex. PW6/B. If PW6 Mr. Sunil Kumar is to be believed then as per record maintained by their school, date of birth of the victim child was recorded as 01.03.2000 but fact remains that during his cross-examination, he categorically claimed that date of birth was never submitted at the time of admission. He also claimed that admission was done online whereas record in question which has been proved by him does not indicate that details ever were filled up online. Thus, document Ex. PW6/B does not inspire enough of confidence.

16. This Court also cannot be oblivious of the fact that during investigation, record of one hotel was seized where she and accused had



gone together and stayed and where, the victim was allegedly raped. However, while making relevant entry at the time of taking room, she herself mentioned her age as 18 years.

17. Be that as it may, there is no record before the learned Trial Court clearly depicting the date of birth of victim. Parents were not found be very specific and in such a situation, we do not find any error in appreciation of evidence with respect to the age of the prosecutrix and learned Trial Court was, therefore, justified in holding that prosecution could not establish that victim was below 18 years of age at the time of commission of offence.

18. As per prosecution story, victim and accused had gone to one hotel. At such hotel, she was given some food which made her fell unconscious and when she got up, she learnt that she had been raped. In her statement under Section 164 Cr.P.C., she claimed that after she got up, she started weeping and asked as to who had removed her clothes on which the accused claimed that he did not know, though he also threatened her not to reveal such incident to anyone.

19. We may note that CCTV footage of the aforesaid hotel was of immense importance and in this regard, we have seen the testimony of PW13, the manager of such hotel as well as the observations made by learned trial court. Interestingly, though CCTV footage was extracted and preserved, it is of no avail. Reason is two-fold. Firstly, when it was attempted to be run during trial, it could not run. Secondly, there was no mandatory certificate under Section 65B Evidence Act which is required to accompany any such electronic evidence. Such footage could have, at least,



shown as to the manner in which the prosecutrix had come to the hotel and left the hotel.

20. We have seen the statement made by prosecutrix under Section 164 Cr.P.C. and the one which she gave before learned trial court.

21. In her statement under Section 164 Cr.P.C., she categorically claimed that her mother had scolded her and she, therefore, had left the house in a fit of anger and had gone to the house of one friend J (name withheld) and thereafter she along with J and Sunil had gone to a hotel. According to her, father of 'J', who had overheard their conversation, also followed them and took 'J' back. However, in her testimony before the Court, she took up a different stand and claimed that she had started from her house for school and on her way, one aunty met her who forcibly took her to her house to have a cup of tea and she forcibly gave her a cup of tea due to which she lost consciousness and when she regained the same, she found herself in a hotel room. This version, naturally, is very damaging to the case set up by the prosecution as according to the prosecution story, she had herself gone to the hotel with the accused where she even made entry and claimed her age as 18 years. It is also pertinent to mention that prosecutrix had also claimed that accused had threatened her earlier also, through SMS, claiming that if she did not marry him, he would go to any extent. Fact, however, remains that these SMSs were also never produced or proved before the Court during trial.

22. Learned Trial Court has, in a very painstaking manner, evaluated and analyzed her testimony and came to the conclusion that her testimony did



not inspire any confidence. Learned trial court noted various anomalies in her version. Reference be made to Para-29 and Para-49 which read as under: -

“29. Therefore from the testimony of the victim it is apparent that victim is inconsistent even on the such aspect of the matters i.e. as to how and when she went from her house, as to how and where accused met her and who had gone to the hotel and who left and when? Further as to how she fell unconscious whether at the hotel or at the house of aunty and where wrong act was committed whether it was house of aunty or hotel? Further whether she was semi-conscious state of mind or unconscious when wrong act was being committed by accused at hotel? There are yawning gap from the period she left her house till she reached at the hotel. In such circumstances, victim child cannot be trusted at all except. If there is corroboration from scientific and medical evidences regarding commission of sexual intercourse with her.....

.....
49. Now coming to submission of Ld. Defence Counsel that the act was consensual and whether offence under S. 376 IPC is made out? Since POCSO Act is not attracted, there is no presumption available to the prosecution. Further, once it is held, that victim was over 18 years of age, she is quite "competent to give her consent. From the testimony of the victim as already discussed, she is inconsistent as to how she went to the hotel, at one point she claims she went with her friend and accused to the hotel voluntarily. The hotel record reveals name of accused along with name of victim recorded in the register where she has given her age as 18 years. The manager of the hotel also confirmed that accused was accompanied with a girl and he did not say about anything suspicious or abnormal from the girl. From the totality of the evidence of the victim wherein she is trying to hide real facts by concocting story of reaching hotel, further victim herself claims that it was only accused who was present and therefore she presumed that he committed sexual intercourse, meaning thereby she has tried to absolve the accused of the sexual intercourse and therefore the act of sexual intercourse appears to be consensual and victim has given her consent to accused for sexual intercourse and therefore offence u/s 376 IPC, 328 IPC and 506 IPC, the said charge/offence are also not proved as already discussed as victim has voluntarily gone with the accused to hotel and made entry in the hotel register and victim is also not found trustworthy regarding threat and there is no evidence led by the prosecution to prove offence under S 328 IPC.”



23. We need not reiterate that leave to appeal against an order of acquittal should be granted only when the appreciation of evidence and findings are perverse or wholly unsustainable. In the case in hand, the appreciation of evidence is appropriate and there is no perversity in the findings returned by the Court.

24. Resultantly, we decline leave to appeal. The petition stands dismissed accordingly.

(SURESH KUMAR KAIT)
JUDGE

(MANOJ JAIN)
JUDGE

JANUARY 29, 2024/dr