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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 16th December, 2024

+ CRL.L.P. 254/2022 & CRL.M.A. 10771/2022, CRL.M.A. 10773/2022

STATE

.....Petitioner

Through: Mr. Ritesh Kumar Bahri, APP for the
State with Ms. Divya Yadav, Adv.

versus

SANTOSH YADAV

.....Respondent

Through: Mr. Chirag Khurana, Adv.

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 leave petition has been filed on behalf of the State under Section 378(1) of the Cr.P.C. seeking leave to appeal against the judgment dated 6th July, 2020 passed by the Ld. ASJ-01 (West) Special Court (POCSO), Tis Hazari Courts in Sessions Case No. 497/2017 arising out of FIR No. 127/2016 registered at P.S. Patel Nagar for the offences under Sections 363, 376 of the IPC and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012. *Vide* the impugned judgment the Trial Court acquitted the Accused-Santosh Yadav.
3. Brief facts of the case are that the father of the Survivor, Ms. 'X' had filed a complaint stating that on 3rd February, 2016, his daughter had left home for school at 7:00 a.m. in the morning, in her school uniform, but did



not return. The daughter of the complainant is stated to be studying in the 11th Grade in Nigam Pratibha Vidyalaya, Baljeet Nagar, Delhi and her school usually got over around 2:00 p.m.

4. A missing complaint was reported and an ***FIR No. 127/2016*** was registered at P.S. Patel Nagar on 4th February, 2016 under Section 363 of IPC.

5. It is further stated that on 12th February, 2017 the parents of the survivor visited the police station Patel Nagar and informed that the survivor had returned to the Petitioner's house on 29th September, 2016.

6. The statement of the survivor, Ms. 'X' was then recorded by the Police and she had informed the Police that she had accompanied the Respondent to Ajamgarh, U.P. and after that they went to Ludhiana, Punjab. She further stated that she had physical relations with the Respondent out of her own will. A chargesheet was then filed on 5th April, 2018 under Section 363, 366 of the IPC and Section 6 of the POCSO, Act, 2012. The allegation in the chargesheet is that the Respondent-Santosh Yadav had taken away the survivor, Ms. 'X'.

7. The prosecution has examined six witnesses out of which PW-1 was the survivor herself, PW-2, (Mother of the survivor), PW-3 (Father of the Survivor). PW-6 (Mukesh Chand Meena) was the teacher from the school who produced the school record to confirm the date of birth of the survivor. The Trial Court recorded that, though the survivor had stated that her date of birth is 7th September, 1999, there was no evidence in support to confirm the same.

8. The Trial Court came to the conclusion that even from a perusal of the school records there was no basis for the survivor's date of birth to the school *i.e.* 7th September, 1999. The judgment records as under:



“30. Hence, in these circumstances, the school certificate and the documents placed on record have to be considered by the court and it has to be seen whether the prosecution has been able to prove the date of birth of Ms. 'X' from the said documents or not. During investigation, IO has collected the copy of application form submitted by father of Ms. 'X', along with declaration and affidavit given by the father of Ms. 'X' at the time of her admission in the school, admission and withdrawal register and age certificate, issued by Principal of Nigam Pratibha Vidyalay, Baljeet Nagar, West(Morning Shift), Delhi. As per the school record and the documents placed on record, the date of birth of Ms. 'X' is mentioned in the school record on the basis of affidavit given by father of Ms. 'X'. The said affidavit is also placed on record, photocopy of which is Mark Z. Perusal of the record shows that no date of verification is mentioned on this affidavit neither the same has been signed by the deponent. Further, father of Ms. 'X' is examined in the court but the said affidavit was not put to him for the purpose of identification. Mere photocopy will not prove the document. The document has to be proved by the author of the said document, specifically when the said person was examined in the court. Not only this, in fact, father of Ms. 'X', who has been examined as PW3 in the court, has stated that mother of Ms. 'X' is aware about everything and he has not mentioned the date of birth in the school of Ms. 'X'. PW2 is the mother of Ms. 'X'. She has deposed that she got Ms. 'X' admitted in the school and it is on the basis of her affidavit, that her date of birth is mentioned in the school record. As per testimony of PW2, she has given her affidavit and copy of ration card in the school on the basis of which, date of birth was recorded in the school record. The said deposition is completely contrary to the school record where date of birth is recorded on the basis of affidavit given by father of Ms. 'X'. PW2 has stated that she can bring the documents on the basis of



which date of birth of Ms. 'X' was mentioned. PW2 was given time to produce the same and her examination in chief was adjourned on 24.01.2019. Thereafter on 13.02.2019, PW2 stated that she has no such document with her. Despite giving opportunity, PW2 could not produce the documents. She did not give any reason for not producing the same, Hence, an adverse inference has to be drawn for the same.

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34. In the present case, the school record produced by the prosecution is an admissible piece of evidence. However, it has to be seen whether the same has been produced by the prosecution as per the law or not. In view of the above cited judgments, it is clear that the record of the school documents can be proved by examining the parent of the victim who has mentioned the date of birth in the school record. In the present case, as per the documents, father of Ms. 'X' has given an affidavit regarding date of birth of Ms. 'X' whereas in the court, P W 3 has denied having any such knowledge about Ms. 'X'. As per the case of the prosecution, it is PW 2 i.e mother of Ms. 'X' who has given an affidavit in the school regarding date of birth of Ms. 'X'. The said affidavit has not been produced and as per PW6, there is no such affidavit in the school. Hence, in these circumstances, the documents placed on record regarding the age proof of Ms. 'X' cannot be considered by this court.

*35. It is a settled principle of law that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Reference in this regard be made to the judgment of **State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. Vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015)***

**11 SCC 242.**

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38. In the present case, the case of the prosecution is based solely on the testimony of the victim and her family members examined as prosecution witnesses. As already discussed above, the testimony of these prosecution witnesses shows that Ms. 'X' left her home out of her own will, accompanied the accused also out of her own will and she has specifically deposed that whenever physical relations were established, it was with her consent. Further, prosecution has failed to prove that Ms. 'X' was under the age of 18 years at the time of alleged incident. Hence, as the acts were done with the consent of Ms. 'X' and it is not proved that she was incompetent to give her valid consent, I am of the considered opinion that accused is entitled to benefit of doubt."

9. It was held by the Trial Court that the date of birth of the survivor has not been proved and the accused was accordingly acquitted.

10. Mr. Bahri, Id. APP submits that the school teacher had been summoned who had submitted the admission and withdrawal register duly attested by him as Ex. PW-6/C and, thus, according to the Prosecution, this was sufficient to establish the date of birth of the survivor. In addition, the survivor herself has given her date of birth as 7th September, 1999 - thus, the date of birth stands duly corroborated.

11. On the other hand, Mr. Chirag Khurana, Id. Counsel appearing for the Respondent submits that PW-6, the school teacher, in his cross-examination as also the father of the survivor (PW-3) in his cross-examination are unable to prove beyond reasonable doubt as to what was the basis of the date of birth which was given to the school. In fact, in the cross-examination, it is recorded that the father did not admit the survivor in the school himself. It was stated



by the father, PW-3, that the admission of the daughter was done by PW-2, her mother. Thus, there is a clear contradiction.

12. The Court has considered the matter. The testimony of PW-6, the School Teacher would show that the said witness clearly states that the father of the survivor had given an affidavit with respect to the date of birth of the survivor. The application was also claimed to have been given by her father. The relevant portions of his testimony are set out below:

“1. Mr. Lekh Raj Meena and I have been deputed by Mr. Joginder Kumar Gupta, Principal of the above mentioned school to produce the summoned record and to depose in the present case. The authority letter issued by the Principal is Ex.PW6/A bearing the signatures of Mr. Joginder Kumar Gupta at point A. I can identify his writing and signatures as I have seen him writing and signing in the ordinary course of my work.

2. I have brought the summoned record i.e admission and withdrawal register and pasting file pertaining to the admission of Prosecutrix Ms.'X' (name of the minor prosecutrix has been deposed by the witness, is mentioned in the file and is withheld to protect her identity) in the school.

3. As per the admission and withdrawal register, Ms.X was admitted in class III on 26.04.2007 vide admission no. 11390. As per admission record, her date of birth is 07.09.1999. Photocopy of the relevant entry of admission and withdrawal register, duly attested by me is now exhibited as Ex.PW6/B (original seen and returned).

4. I have seen the certificate of the Principal annexed in the judicial record which is already marked as Mark X1. It has been issued by Mr. Sita Ram, the then Principal. I can identify his writing and signatures as I have seen him writing and signing in the ordinary course of my work. The certificate issued by Mr. Sita Ram which is already marked as Mark X1 is now exhibited as



Ex.PW6/C bearing his signatures at point A.

5. I have also brought the pasting file which contains the admission form submitted by the father of Ms.X, already marked as Mark X2, the declaration form of the father of the prosecutrix as well as his affidavit already marked as Mark X3 are now exhibited as Ex.PW6/D and Ex.PW6/F respectively. (Original seen and returned).

6. I have also brought the original application submitted by the father of Ms.X (original seen and returned). Attested copy of the same is now exhibited as Ex.PW6/G and it bears the signatures of Mr.Joginder Kumar Gupta at point A.”

13. In the cross examination, PW-6 also states as under:

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2. The father of Ms.X had not submitted her birth certificate issued by Municipal authorities at the time of her admission.

3. It is correct that the affidavit of the father of Ms.X which is exhibited as Ex.PW6/F is on a plain paper and not on any stamp paper or judicial paper and it is not attested nor notarized.”

14. In fact even the father, PW-3 states in his evidence that the mother of the survivor had admitted the girl. The statement of the father is extracted hereinunder for a ready reference:

“1.I have three children. Ms. X, the prosecutrix (name deposed and withheld to protect the identity of the prosecutrix) is my eldest child. I do not know her date of birth. My wife had got Ms. X admitted in the school and she had mentioned her correct date of birth in the school record.”

15. A perusal of the above stated evidence would show that the father of the survivor, PW-3 has completely refused to have admitted the survivor to



the school. However, the school states that the affidavit and the application was given by the father at the time of admission. The case of the prosecution is that the mother of the survivor gave the affidavit whereas the case of the school is to the contrary.

16. There is no birth certificate or municipal record which has been placed on record to establish the age of the survivor. Moreover, in the evidence of the survivor/PW-1, she clearly states that she had gone away with the Respondent on her own will and that she had established physical relations. From the evidence it is not clear as to what was the nature of physical relation claimed by PW-1 and whether the same would constitute offences under Section 376 of IPC and Section 6 of POCSO.

17. In the opinion of this Court, the present case would not be a case for being tried under the offences that have been charged inasmuch as the age of the survivor has not been established and the nature of physical relation has also not been established.

18. **CRL.M.A. 10773/2022** is the application for the condonation of delay of 10 days in filing the criminal appeal against the impugned order/judgment. Delay is condoned. Application is disposed of.

19. The leave petition is accordingly rejected. All pending application(s), if any, are also disposed of.

PRATHIBA M. SINGH
JUDGE

AMIT SHARMA
JUDGE

DECEMBER 16, 2024
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