



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

% Judgment reserved on : 30.01.2024
Judgment delivered on: 14.03.2024

+ CRL.A. 542/2023

STATE Appellant

VERSUS

ROHIT Respondent

Advocates who appeared in this case:

For the petitioner: Mr. Tarang Srivastava, APP for State. SI Rashmi Insp.Parmod Kumar

For the Respondents: Mr. N.K. Sharma and Mr. Rakesh Sharma, Advocates.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. State has taken exception to order dated 03.12.2020 whereby accused (respondent herein) has been acquitted of charges under Section 363/366/376(2)(i) IPC and Section 4 of Protection of Children from Sexual Offences Act (POCSO Act).

2. On 02.06.2016 at about 2.00 AM, mother of Miss S (name withheld) apprised her husband that their said daughter was not in the home. They searched for her but could not find her and suspected that



some unknown person had enticed her away. Fact, however, remains that on 02.06.2016 at about 8.00 AM, she was found near a temple situated close to their house. She was immediately brought to the police station for investigational purpose. Her medical examination was got done and her statement was recorded.

3. In her statement before the police made on 02.06.2016 itself, she claimed that she was in love with accused and that night, she was with accused and made physical relationship with her, while getting emotional. According to her, the accused had claimed that he would believe in her love only if she was ready to make physical relation with her. There was, however, no allegation of her being enticed away or making her smell any intoxicating substance.

4. She was also produced before concerned learned Metropolitan Magistrate for recording of her statement under Section 164 Cr.P.C. In her such statement dated 03.06.2016, she claimed having affair with the accused and they wanted to get married. She claimed that there was physical relationship between them, supplementing that she had rather forced and insisted the accused, who was, otherwise, not interested in making physical relationship.

5. As per the case of prosecution, Miss S was minor at the relevant time. Her date of birth is 28.08.1999 and the incident in question had taken place on the night intervening 01.06.2016 and 02.06.2016.



6. In the above backdrop, the case was put to trial and during trial, prosecution examined seventeen witnesses.
7. Accused, in his statement under Section 313 Cr.P.C., pleaded innocence and claimed that Miss S was his friend but her parents were not happy with such relationship. He stated that on 02.06.2016, Miss S had come to him while weeping and he consoled her and dropped her back. He stated that when her parents saw him dropping her, they falsely implicated him and that Miss S had deposed against him under the pressure of her parents. He also divulged that he had already married Miss S and they were blessed with one daughter.
8. He examined grandmother of Miss S in support of his defence.
9. Learned Trial Court, after analyzing the evidence led before it, came to the conclusion that prosecution had failed to prove that Miss S was less than of 18 years of age at the time of alleged commission of offence. It also observed that there were inconsistencies in the statements made by Miss S during investigation and during trial and she repeatedly changed her version, as per her whims and fancies.
10. Such order is under challenge before us.
11. Leave to appeal was granted to prosecution on 10.07.2023.
12. Argument of prosecution is two-fold.



13. Firstly, there was no reason to have disbelieved the age proof as according to school record, date of birth of Miss S is 28.08.1999 and, therefore, she was minor at the time of alleged incident.

14. Secondly, there is no inconsistency in the version of Miss S.

15. In addition to the above, prosecution has relied upon DNA Report to indicate that there was physical relationship between them on the fateful night.

16. According to respondent, learned Trial Court has appreciated all the material aspects and acquitted him after careful analysis of the evidence and the facts. It is contended by the respondent that there was no reason to have disbelieved the earliest version given by Miss S when she appeared before the concerned learned Metropolitan Magistrate for the purpose of recording of her statement under Section 164 Cr.P.C. Her subsequent deposition, being diametrically opposite, was rightly disbelieved. Thus, according to respondent, there is no illegality or infirmity in the impugned judgment.

17. It is quite obvious to us that when Miss S had appeared before learned Metropolitan Magistrate on 03.06.2016 and got her statement recorded under Section 164 Cr.P.C., she did not whisper anything incriminating against the accused. Before recording of her statement, concerned Metropolitan Magistrate had taken all the possible precautions



and asked several questions from her so as to ascertain about her state of mind, aspect of voluntariness and her level of understanding. It was specifically asked from her whether she had been influenced or threatened to give any particular statement to which she answered in negative and finding her in fit state of mind and after satisfying that she was in a position to make statement voluntarily, her statement was recorded. In her such statement, she claimed that she had left her house at about 2.30 AM to meet her friend. They both then went to his house where they talked about marrying each other. She categorically claimed that on her force and pressure, they entered into physical relationship. When accused asked her to go back, she did not agree to the same, initially. She claimed that she wanted to stay with him only. It was only at the insistence of the accused, she agreed to go back and then, the accused left her near Banke Bihari Mandir. In the meanwhile, her brother came there and took her home on his bike.

18. Thus, her version, leaving aside the aspect related to her age, did not reveal commission of any offence by the accused.

19. Let us now see what she deposed before the learned Trial Court.

20. Her deposition was recorded on 18.04.2017 and in her such deposition, undoubtedly, she pointed accusing finger towards accused. She did claim that accused was her friend and that they had exchanged their mobile numbers.



21. As regards the incident, she deposed that on night intervening 01.06.2016 & 02.06.2016, accused had made a call on her mobile number and asked her to come out as he was standing outside her house. She deposed that accused had threatened that if she refused, he would kill her parents and, therefore, she sneaked out of her house and drove away on the bike driven by accused. She claimed that elder brother of the accused was also present with him. She deposed that accused made her smell something because of which she fell unconscious and she was then taken by the accused to a house and she did not know as to what was done by him there. In the same breath, she also claimed that accused had forcibly made physical relations with her when she was unconscious volunteering that she had little bit of consciousness. When she asked him to resist, he again threatened to kill her parents and, in the morning, he dropped her at Banke Bihari Mandir.

22. Quite evidently, her deposition before the Court is in direct contrast what she had stated in her statement under Section 164 Cr.P.C. and there are significant improvements which remain completely unexplained as well. Since according to her, accused had called her up on her mobile phone, in cross-examination, she was asked to reveal her mobile. She came up with baffling and evasive reply claiming that she did not remember her mobile number. Her such deposition is not digestible. According to defence, she deliberately did not reveal her mobile number as that would have revealed a different tale. It is also not



believable that accused would call her up and threaten to kill her parents and on such mobile call, she would, stealthily and without any murmur come out of her house. Her parents were inside and instead of making them aware about any such threat, she rather sneaked out and drove away on his bike.

23. It will be equally important to see as to what she had claimed when she was taken for medical examination.

24. Her MLC has been proved as Ex. PW1/A and she initially told the attending doctor that she had left her home and went to Shivji Mandir which was closed at 2.30 AM on 02.06.2016. She remained at said temple till 4.00 AM and when mandir was opened, she went to another temple i.e. Banke Bihari Temple at 8.00 AM. She revealed to the doctor that at about 10.00 AM, she was captured by her brother from Banke Bihari Mandir. Thus, her first such version told to the attending doctor does not indicate anything which may even remotely suggest that she had gone with the accused.

25. Her mother had also accompanied her to the hospital and the attending doctor had recorded version of the mother as well.

26. Curiously, her mother claimed that she had left her home at 2.30 AM and stayed with her friend Naveen (one classmate) till 10.00 AM and was recovered by her brother from Banke Bihari Mandir on 02.06.2016.



27. This gives another twist to the case of prosecution as it is nobody's case that accused was known with name of Naveen also. Introduction of new character as perpetrator has thus damaged the case of prosecution to a very large extent.

28. Such MLC Ex. PW1/A would also further reveal that when Miss 'S' was again asked, she gave history of sexual intercourse with Naveen around 4.00 AM with her own consent. If Miss S has the audacity of giving name of someone else as the wrongdoer, she is, obviously, not worthy of any credence.

29. Thus, version of Miss S does not inspire any confidence at all.

30. In her statement given on oath under Section 164 Cr.P.C., she claimed that she had forced the accused to enter into physical relationship with her. When she was examined at SGM Hospital, Mangol Puri, she told different versions to the attending doctor. As per her first version, she merely remained at the temple and as per second version, she had entered into consensual physical relationship albeit with one Naveen.

31. We have seen the deposition of attending doctor i.e. Dr. Priyanka Kumari who categorically admitted that the prosecutrix was fully conscious and oriented and was not labouring under any kind of sedative or intoxicating substance when brought to her. She also admitted that the history was given by the victim of her own free will.



32. Thus, the inconsistencies are galore and *writ large*.

33. Mother of Miss S entered into witness box and deposed that she found her daughter missing at about 2.00 AM. She told about the aforesaid fact to her husband and if mother of Miss S is to be believed then, thereafter she fell unconscious and when she regained consciousness, the matter had already been reported to the police. She claimed that she did not see anything and did not know as to what had happened thereafter. So much so, according to her, she was not in position to identify the accused as she never saw him. Prosecution sought permission to cross-examine her and the examination of the witness was deferred. On the next date, she merely kept on answering in affirmative to all the questions put by the prosecution and even identified the accused. However, prosecution could not elicit any reason as to why she could not depose about all these material facts initially and why she could not identify the accused at the time of earlier examination. In her further deposition, she admitted that her daughter had already married the accused, after attaining majority.

34. Brother of Miss S, who had allegedly recovered her from the Banke Bihari Mandir, has also not made any incriminating statement against the accused. He deposed that they kept on searching of her and at about 8.00 AM, she was found near Banke Bihari Mandir. They made inquiries from her but she did not tell anything to anyone. He also



deposed that he had no idea whether Miss S was in one-sided love affair with the accused.

35. Similarly, testimony of father of Miss S also does not take us anywhere. He simply deposed that he had made call to the police and thereafter he went to PS where his statement was recorded. He did not make any allegation against the accused.

36. Be that as it may, fact remains that testimony of Miss S does not inspire much confidence, particularly keeping in mind what she had told earlier to the attending doctors and also to the learned Metropolitan Magistrate before whom she had made statement under Section 164 Cr.P.C. To make things worse, she deliberately refused to give her mobile number which would have given some kind of insight as to what happened on the night of the incident. We are not inclined to believe that it was a case of enticement or kidnapping. Miss S seems to have left the house on her own as she wanted to marry the accused, which she did eventually.

37. There is also not enough of clarity with respect to her age.

38. According to prosecution, her date of birth is 28.08.1999. When her grandmother entered into witness box as defence witness, she categorically claimed that date of birth of Miss S was 28.08.1997. Interestingly, even when mother of Miss S entered into witness box, she



was also found totally uncertain about the year of birth of Miss S as she deposed that date of birth was 28th August but year of birth of her daughter might be 1997, 1998 or 1999.

39. In order to prove her date of birth, prosecution examined Principal of the school where she had studied and such witness deposed that as per their record, date of birth of Miss S was recorded as 28.08.1999. However, in his cross-examination, this witness categorically admitted that when Miss S was admitted in the school, no birth certificate issued by MCD or any such statutory authority was submitted by the parents of the child.

40. It also looks quite obvious that Miss S was admitted in said school twice. Firstly, in Class-I and secondly in Class-VIII.

41. When she was admitted in Class-VIII, her father had given one affidavit dated 06.04.2013 in which he claimed that his such daughter had studied privately upto Class-VII. However, this is perplexing because if prosecution is to be believed then Miss S had studied in the same school when she had taken admission in Class-I. Thus, there is utter confusion with respect to the correct age of Miss S. Evidence suggesting approximate age of the victim would never be sufficient to conclude about her exact age, particularly in the backdrop of the established principle of criminal jurisprudence in India where, in case of any uncertainty, the benefit of doubt, invariably, goes to accused, and not to



the prosecution. Moreover, any entry with respect to the date of birth made in the school can be said to have evidentiary value only when there is some definite material available on the basis of which such date was recorded. As noted, there is no documentary proof of the age of Miss S and to make things worse, the mother of Miss S is herself not sure about her year of birth and, therefore, learned Trial Court was fully justified in holding that prosecution had failed to establish that at the time of alleged commission of offence, she was less than 18 years.

42. In view of our foregoing discussion and the testimony of Miss S which does not enthuse any confidence, DNA report, in itself, would not carry any real significance and, therefore, no weightage in isolation can be given to such report either. It must pale into insignificance in the peculiar factual matrix of the case in hand.

43. Resultantly, we do not find any merit in the appeal.

44. Appeal stands dismissed.

(MANOJ JAIN)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

MARCH 14, 2024/dr