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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.L.P. 188/2018

STATE

..... Petitioner
Through Ms. Aashaa Tiwari, APP for the State
with Insp. Josepha Kujur, P.S.
Defence Colony.

versus

KAISHAR ALI

..... Respondent
Through Mr. Brajraj Singh Chauhan, Proxy
Counsel

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Reserved on : 21st August, 2019
Date of Decision: 30th August, 2019

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Present criminal leave petition has been filed on behalf of the State challenging the judgment/order of acquittal dated 22nd November, 2017 passed by Additional Sessions Judge-01-Cum Special Court (POCSO), South East District, Saket Courts, New Delhi in FIR No. 140/2015 under Sections 376/366/363 IPC and Section 6 of POCSO Act registered with Police Station Defence Colony.

2. The Trial Court in the impugned judgment while acquitting respondent-accused held as under:-

“16. In the present case the complaint was filed by father of prosecutrix mentioning the age of prosecutrix/victim to be about 17 years. However, during his testimony as PW-2 father of the victim deposed that he does not remember the date and time of her birth and that he had got his daughter admitted in Lavela Public School, Tuglakabad in Nursery class when she was 2/3 years old. The prosecution has examined PW-3, Shri Kailash Chand Yadav, Asstt. Public Health Inspector, Central Zone, Lajpat Nagar to prove the age of the prosecutrix and as per said witness, date of birth in their record of the prosecutrix 'K' is 19.01.1998. No witness from the school of the prosecutrix has been cited as a witness nor got summoned/examined by the prosecution. As per Rule 12(3) of Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009, in every case concerning a child or juvenile in conflict with law, the first document to be considered for the age of the child is the date of birth certificate from the school (other than a play school) first attended by the child and only in the absence whereof the birth certificate given by a corporation or a municipal authority or a panchayat is to be looked into. In the present matter, the school record including the matriculation certificate of the victim has not been looked into by investigator alibit the victim was reported to be studying in class 12th at the time of incident. No justification is forthcoming from prosecution side as to the reason for not bringing on record the matriculation certificate or school record of the victim and same lends substance to the contention of Ld counsel for the accused who has vehemently argued that the girl/victim had herself told her age to be more than 18 yrs at the time of incident and same would have been substantiated by her school record/matriculation certificate. Mother of the Victim has not been examined by the prosecution who could have given the exact date of birth of the victim. No explanation is forthcoming as to why the date of birth of victim was not registered immediately after the birth. Thus, in view of the foregoing

discussion and particularly in the absence of first attended school record of the prosecutrix/victim and deliberate withholding of matriculation certificate of victim, it cannot be held with certainty that the prosecutrix/victim girl was a minor on the day when she had left her home with the accused.

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21. In the present case also the element of 'taking away' or 'enticement' is found to be lacking as there is no such averment in entire deposition of the prosecutrix, PW-1 who has categorically averred during her deposition on 06.10.2016 that she was having friendship with the accused since January, 2015. PW-1/prosecutrix has also deposed that she went with accused after her last board exams. She further stated that she had changed her clothes at Mool Chand Metro Station and went with accused to a village situated near Vaishali Metro Station, Ghaziabad and they took a room on rent and they remained there for ten days and she categorically deposed that during her stay with the accused no beatings were given by accused to her nor he misbehaved or maltreated her. During the cross-examination of victim/PW-1 by the Ld. Addl. PP for the State she has categorically denied the suggestion that she did not go with the accused with her consent or that accused took her by alluring her and that he made sexual relations with her against her wishes. Even during her statement, Ex.PW-1/A recorded under section 164 Cr P.C before Ld MM Delhi, the victim/prosecutrix has averred that she liked the accused but she apprehended that her parents will not agree for their marriage and that she had forced him to elope on 26.03.2015 after her last exam as her family members used to behave abnormally and she had falsely told her age to be 18 years to the accused as he would not have taken her otherwise. Thus the testimony of prosecutrix in the court as well as her statement before Ld. MM during the proceedings U/s 164 Cr.P.C. clearly establishes that there was no force, duress exerted upon her by the accused. No case of sexual assault by the accused is made out from the testimony of the prosecutrix/victim. As such, in the facts where prosecution is not

able to prove that she was minor at that time, no offence of kidnapping and penetrative sexual assault is made out against the accused.”

3. Ms. Aasha Tiwari, learned APP for State stated that the Trial Court failed to appreciate that PW-2 i.e. the father of the prosecutrix had deposed in Court that he had handed over a copy of his daughter's birth certificate to police which was taken into possession and seized by the IO vide memo Ex PW-2/B. She further stated that the father had deposed that as per record, the date of birth of his daughter was 19th January, 1998. She pointed out that this fact had been further corroborated by PW-3-Sh. Kailash Chand Yadav, Asstt. Public Health Inspector, Central Zone, Lajpat Nagar, SDMC, New Delhi who had deposed that as per their records, the date of birth of PW-1 (prosecutrix) was 19th January, 1998 which was entered in their record, on 23rd September, 2009 vide registration no. MCDOLR09279631 as per order dated 12th September, 2009 (Ex PW-3/A) of the Executive Magistrate, Kalkaji, New Delhi.

4. Learned APP submitted that as the victim/prosecutrix was a minor, her consent to accompany the accused and to have physical relations with him was of no consequence.

5. Having heard learned APP for State, this Court is of the view that it is essential to first outline the relevant facts of the present case.

6. In the present case, a complaint dated 27th March 2015 was lodged with police station Defence Colony by Sh. 'VK' that he had left his minor daughter/prosecutrix 'K' (aged about 17 years) at her school around 9:30 a.m. on the previous day as she had her class Twelfth board examination. She had thereafter not returned home and he suspected that some unknown

person had kidnapped her. In pursuance to the said complaint, a case was registered under Section 363 IPC and during the course of investigation, prosecutrix was recovered on 5th April 2015 from the possession of respondent-accused from House No. 187, 1st floor, Mausam Vihar, Village Pasonda, Sahibabad, Ghaziabad, Uttar Pradesh.

7. Subsequently, documents regarding age of the prosecutrix were obtained and her MLC was prepared. Statements of witnesses were recorded by the police and after completion of investigation, charge sheet was filed against the respondent-accused under Sections 376/366/363 IPC & Section 6 POCSO Act. The statement of the prosecutrix was also recorded under Section 164 Cr. P.C. and the same is reproduced hereinbelow:-

“Statement of Victim Khushboo, age 17 years, D/o Sh. Vinod Kumar R/o C-453, Indra Kalyan Vihar, Okhla Phase 1, New Delhi.

ON SA

Tell, what happened?

Ans. I liked Kesar Ali. I had made a call to him in the month of November, 2014. He was friend of my brother. He replied that he also liked me. He would keep me happy. Tell your parents if you want to marry me. He asked me to bring it to the knowledge of my parents. His parents would agree. He is a Muslim and I am a Hindu.

One day, I was talking on the phone and my parents came to know. They snatched my phone and gave me beatings. I thought that in case I talked about marriage, they would kill me. We are Kshatriyas Thakur. We don't do like this.

Kesar told me that he would marry me in case of my consent. I had persisted that I would go only after giving my last examination on 26th March, 2015. All the people behave in quite strange way at home.

He took me. I had told him falsely that I was 18 years old. I had told him falsely else he would not have taken me.

Ques. Then what happened?

Ans. We started living on rent in a room at Village Pasona in Secunderabad near Ghaziabad. We thought to do a court marriage. We required a sum of Rs. 15,000/- for the same. We had only Rs. 10,000/- with us. He started doing a job. We were about to be married on 8th April.

Ques. Then what happened?

Ans. I was very happy as there was no scarcity. I very much love Kesar. He did not force in any manner whatsoever. Last night, we were preparing meals. In the meanwhile, police and my father came over there. They took us to Police Station from there. Then, my father started persuading me to make a statement to the effect, "When I came out after giving examination, he met me over there and asked me to drop me at home. Then, he served a cold drink to me after mixing something in that and took me. (He) snatched my phone. I could not talk to my parents."

My father had lodged a complaint on 27th March that I had been kidnapped. (But) I had voluntarily gone. Yesterday, my father persuaded me to make statement that he had stolen Rs. 1000-1500 and my chain weighing 4 Tolas.

Ques. Anything else?

Ans. Now in the Court, my mother threatened me that in case I spoke in favor of Kesar, they would get him killed at Indira Camp and if I did not stand on their side, my life would be ruined.

Had my parents agreed, I never would have eloped. I want to live with Kesar. If anything happened to him, I will file a case against my parents. It was all my mistake.

ROAC
Sd/- Khushboo
(In English)

Sd/- Neha Gupta Singh (In English)
Metropolitan Magistrate (Traffic-II),
South-East, Saket Court, New Delhi

(emphasis supplied)

8. The relevant portion of the cross-examination of the prosecutrix is also reproduced hereinbelow:-

“I stated in my statement u/s 164 Cr. P. C. that I like Kesar from November, 2014. It is correct that I told in the statement that I have stated my age to Kesar as 18 years. It is correct that I stated in that statement that he did not commit any act forcefully. It is correct that in that statement I did not state that there was physical relations between us. It is wrong to suggest that I am deposing falsely in respect of physical relations between us under the threats of my parents. It is correct that I stated in my statement u/s 164 Cr. P. C. that my father is threatening me to depose that I was taken forcefully. It is correct that I made my statement u/s 164 Cr. P. C. voluntarily and without any pressure by anyone.”

(emphasis supplied)

9. A perusal of the aforesaid statement of the prosecutrix shows that she had misrepresented her age to be eighteen years to the respondent-accused. She had categorically stated that had she not done so, the respondent-accused would not have allowed her to accompany him.

10. Though this Court is in agreement with the contention of learned APP for State that the prosecutrix was a minor on the date of the incident, yet the element of *mens rea*, which is an essential ingredient of Sections 363/366/376 IPC is missing. In the present case, it is only because of a

misrepresentation by the prosecutrix with regard to her age, which the respondent-accused bonafidely believed to be true that he allowed her to accompany him.

11. In fact, statement of the prosecutrix clearly negates any charge including Section 6 of POSCO. Consequently, as the respondent-accused had not knowingly committed any offence, none of the charges can be said to have been proven.

12. It is also settled law that any acquittal order cannot be lightly interfered with by the Appellate Court, though it has wide powers to review the evidence and to come to its own conclusion. The power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of an accused.

13. The Apex Court in *Ghurey Lal vs. State of Uttar Pradesh*, (2008) 10 SCC 450 has held as under:-

“69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There

must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached—one that leads to acquittal, the other to conviction—the High Courts/appellate courts must rule in favour of the accused.

71. Had the well-settled principles been followed by the High Court, the accused would have been set free long ago. **Though the appellate court's power is wide and extensive, it must be used with great care and caution.**”

(emphasis supplied)

14. One of us, (Manmohan, J) in *Niraj vs. Ramesh Pratap Singh, 2012, SCC OnLine Del 3813* has held as under:-

“6. It is also well settled that the Appellate court should reverse an acquittal only for very substantial and compelling reasons. In the event, two views are possible on the evidence adduced before the trial Court and the view taken by the trial Court is a plausible view, the Appellate Court should not interfere and substitute its own view against the plausible view taken by the trial Court. In fact, the Supreme Court in *Chandrappa & Ors. Vs. State of Karnataka, (2007) 4 SCC 415* while referring to previous cases laid down the following general principles regarding the powers of appellate court while dealing an appeal against an order of acquittal:-

“42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.”

7. The Supreme Court in a subsequent judgment in *Arulvelu & Anr. Vs. State Represented by the Public Prosecutor & Anr.*, (2009) 10 SCC 206 has held as under:-

“40. Unquestionably, the Appellate Court has power to review and re-appreciate the entire evidence on record. The appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial court is found to be perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallized by aforementioned judgments of this Court. The accused is presumed to be innocent until proven

guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent. This fundamental principle must be kept in view while dealing with the judgments of acquittal passed by the trial court.”
(emphasis supplied)

15. In view of the above, the present leave petition, being bereft of merit, is dismissed.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

AUGUST 30, 2019

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