

(2017) 09 DEL CK 0081

In the Delhi High Court

Case No : Criminal Leave Petition No. 558 Of 2017

State (Govt. Of N.C.T Of Delhi)

APPELLANT

Vs

Kishan

RESPONDENT

Date of Decision : 26-09-2017

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 378(1)
Indian Penal Code, 1860 — Section 363, 366, 376, 376(2)(i)(n)
Juvenile Justice(Care And Protection Of Children) Act, 2015 — Section 94
Protection Of Children From Sexual Offences Act, 2012 — Section 6

Citation : (2017) 09 DEL CK 0081

Hon'ble Judges : G.S.Sistani, J;Chander Shekhar, J

Bench : Division Bench

Advocate : Radhika Kolluru

Final Decision : Dismissed

Judgement

G.S.Sistani, J

CRL.M.A. 15866/2017(exemption)

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

CRL.M.A.15865/2017(delay)

3. This is an application filed by the petitioner seeking condonation of 93 days delay in filing the leave to appeal. We find no ground to condone the

delay in filing the leave to appeal, however, since we have examined the case on merits, delay of 93 days in filing the leave to appeal is condoned.

4. The application stands disposed of.

CRL. L.P. 558/2017

5. The present leave to appeal has been filed by the State under Section 378(1) of the Code of the Criminal Procedure, 1973 (â??Cr.P.C.â?)against

the impugned judgment dated 10.03.2017passed by the learned Trial Court in Sessions Case No.57922/16 arising out of the FIR No.427/12 registered

at Police Station Shahbad Dairyunder Sections363, 366 and 376 of the Indian Penal Code (â??IPCâ?), by which the respondent has been acquitted.

6. The case of the prosecution, as noticed by the Trial Court, is reproduced as under:

â??1. Accused is facing trial in the present case on allegations of kidnapping prosecutrixâ??Sâ? aged around 14 years and committing her rape.

2. Initially FIR in question was registered u/s 363 IPC on the basis of missing complaint of father of prosecutrix alleging that her daughter went missing since 29.11.2012. Complainant suspected that prosecutrix was enticed by somebody.

3. Police searched prosecutrix through electronic and print media. On 21.12.2012, investigating team located prosecutrix was residing with accused at SM-61, Village Razapur, Shastri Park, Gaziabad, UP. They were recovered from there. Statement of prosecutrix was recorded wherein she alleged that accused enticed and took her with him. Accused established physical relations with her. Prosecutrix was got medically examined and her statement was also got recorded u/s 164 Cr.P.C.

4. Accused was arrested and charge-sheeted. Initially, charge for offence punishable under Section 363/366/376 IPC was framed against accused. However, an amended charge U/s 363/366 IPC and U/s 6 POCSO Act in alternative U/s 376(2)(i)(n) IPC was framed against accused. Accused pleaded not guilty and claimed trial.â??

7. To bring home the guilt of the respondent, the prosecution examined 17 witnesses in all. The statement of the respondent was recorded under Section 313 of Cr.P.C. wherein he claimed to be falsely implicated in the present case. It was further stated that the victim left her home voluntarily and insisted that he should take her along.

8. Ms. Radhika Kolluru, learned counsel for the State submits that the impugned judgment of the Trial Court is contrary to the law and facts on record and the same is based on surmises and conjectures . She further submits that

the learned Trial Court has lost track of the fact that the testimony of the victim has been consistent and the law is well-settled that an order on conviction can be passed based on the statement made by the victim. It is strongly urged before the Court that the learned Trial Court has overlooked that at the time of the incident, the victim was 14 years and 07 months of age. Her age was proved by PW-3 Mukesh, who had produced the school certificate during his examination. It is also contended that PW-1 and PW-2, being parents of the victim have also supported the case of the prosecution, which has not been considered by the learned Trial Court.

9. We have heard the learned counsel for the petitioner and considered their rival submissions.

10. The first question which arises for our consideration is with respect to the age of the victim. It is not in dispute that PW-3 Mukesh had produced the record from the first school the victim had attended which was exhibited as Ex.PW-3A/D. PW-4 Chhattarpal was examined who had produced the record from the second school which the victim had attended. It is not in dispute that the certificate was prepared based on an affidavit filed by the father of the victim and not based on any birth certificate. It would be useful to refer to the testimony of PW-1 and PW-2 with respect to the age of the victim.

11. PW1 Chander Pal in his examination-in-chief stated that he was working as a Peon in MCD. On 20.11.2012 at about 7:00 AM his daughter, aged around 14 years had gone to school and did not return back. On 30.11.2012, a missing complaint was lodged to the Police Station Shahbad Dairy. His statement was recorded which was proved as Ex.PW1/A. Thereafter, PW1 raised suspicion over the respondent Kishan who was residing in another gali. The statement of PW1 was again recorded on 01.12.2012. PW1 handed over the photographs of his daughter to the police. The victim was recovered on 21.12.2012 and was medically examined. The statement of the victim was recorded under Section 164 of Cr.P.C. PW1 deposed that his daughter was studying in 7th standard in Government School at Shahbad Dairy. The date of birth of the victim was mentioned as 10.04.1998 in the school records. It was deposed by PW1 that he cannot identify the respondent Kishan as he had never seen him before. PW1 came to know about the respondent Kishan when he was searching his daughter as some neighbours

informed him that the respondent Kishan might have taken his daughter.

12. In his cross-examination, PW1 stated that his eldest son Krishan is about 19 years of age. PW1 further stated that he had five children, his first child Krishan was born after eight years of marriage; second child Deepak was one year younger to Krishan; third child is the victim who was one year younger to Deepak; fourth child Kajal was three years younger to the victim and his fifth child Payal was four years younger to Kajal. PW1 has categorically stated that he had â??never got date of birth child (sic) entered in MCD or any other authority.â? He further deposed that â??I got my children admitted in the school. I do not remember what proof I have given for date of birth of my children. It is correct that I have given date of birth of my children in the school on the basis of guess workâ?.

13. PW-2 Rajkumari (mother of the victim) deposed in her examination-in-chief that her eldest daughter (the victim), aged about 14 years was studying in 7th standard in MCD school, Shahbad Diary. She further deposed that on 20.11.2012 at about 7:00 am, the victim had gone to the school but had not returned from the school. It was further deposed by PW-2 that she and her husband had searched for the victim in nearby places and inquired from relatives. On 30.11.2012, her husband went to the police station and reported the matter. The suspicion was raised on the respondent Kishan who was residing in another gali. The victim was recovered on 21.12.2012 and the respondent Kishan was also apprehended by the police. The victim was medically examined at M.V. Hospital, Poot Khurd where PW2 was also present. The statement of the victim was recorded under Section 164 Cr.P.C at Rohini Court and thereafter the victim was allowed to go with her by the order of the Court. PW2 could not identify the respondent Kishan as she had never seen him before. PW-2 deposed that she did not remember the date of birth of the victim.

14. In her cross-examination, PW2 stated that she had five children but did not remember the date of birth of any of her children. PW-2 further stated that she did not have any proof of date of birth of any of her children. She stated that all of her children were admitted to the school by PW-1 and did not have any knowledge of the documents submitted by him regarding the age proof at time of their admission in school. PW-2 further stated that

there was no gap year taken by the victim during her studies.

15. On a careful analysis of the testimonies of the parents of the victim would show that according to their assessment, the age of the victim was 17

years on the date of the incident, as per the testimony of the father, the victim was of 17 years and above and as per the testimony of the mother, the

age of the victim was 17 years of age. The learned Trial Court has also taken into consideration age factor of the victim. The relevant paragraphs 10-

13 of the judgment read as under:

10. Age of the prosecutrix: Before dwelling upon the incident of kidnapping or sexual assault, let us find out what was the age of

prosecutrix at the time of incident. Prosecution has relied upon the school record of the prosecutrix as Ex.PW3/A-D & Ex.PW4/A to C as per

which the date of birth of prosecutrix is mentioned as 10.04.1998.

11. Date of birth of prosecutrix is disputed by the defence by submitting that the school record of the prosecutrix cannot be taken as true

indicative of her date of birth as witness who produced the school record during his cross-examination admitted that at the time of

admission of prosecutrix, birth certificate furnished by her parents was not verified. It has also been contended that a Marriage Agreement

Ex.PW5/B was duly executed by prosecutrix in which age of prosecutrix is mentioned as 21 years and this goes to prove that the prosecutrix

had already attained majority on date of her leaving her house.

12. Juvenile Justice(Care and Protection of Children) Act, 2015, under Section 94 has laid down certain guidelines to arrive at a finding

about the age of a juvenile. It states that the age inquiry would conduct by the Court by Certificate of School in respect of date of birth of

juvenile, obtaining matriculation or equivalent certificate or the next option being the birth certificate issued by the municipal authorities or

corporation or panchayat be obtained. In absence of aforesaid documents, a Medical Board will be constituted to determine the age of a

juvenile.

13. Except for Ex.PW5/B there is no other document on record to controvert the date of birth of prosecutrix. In view of the mandate given

under Juvenile Justice(Care and Protection of Children) Act, 2015, age of juvenile (in present case, prosecutrix) as per her first attended

School record is taken to be true. School record Ex.PW3/A to D goes to show that date of birth of prosecutrix is 10.04.1998 and as such on

the date of incident (29.11.2012) prosecutrix was about 14 years 7 months old. Thus, it has to concluded that prosecutrix did not attain

majority on the date she left her house.â??

16. Having regard to the testimony of PW1 and PW2 being the father and mother of the victim, and the fact that the documents produced by PW3

and PW4 were not based on a birth certificate we find no infirmity with the finding of the Trial Court with regard to the age of the victim.

17. The statement of the victim was recorded under Section 164 of Cr.P.C. In her statement in Court, she deposed on similar lines. The relevant

portion reads as under:

â??On 20.11.2012, I went to my Schoolâ?|..at about 07.00 am and the accused Kishan (present in the court today correctly identified by

the witness) was standing outside the school. Accused stated to me, â??let us go for roaming (Chal Ghumne Chalte Hain)â?. I initially

refused to go with him as I have to attend the school, but, accused insisted that I will drop you till the school time is over. Thereafter, I went

alongwith the accused, went to the bus stand of Sector-26, Rohini and caught a bus. From there we went to the metro station and then to

railway station and from there we went to Etah, U.P. and we took shelter in the night at Etah Railway Station, as it was quite late. On the

next morning, we went to Kashganj in a Temple, where accused formally put Sindoor on my parting of head and did marry with me. From

there we went to the Court and marriage papers were prepared by the accused. I put my thumb marks on the said papers. We stayed one

day at the house of sister of accused Kishan. On the next day, we went to Shastri Nagar, Delhi by bus and we stayed there in the house of

distant relative of accused i.e. sister of accused. We stayed there for about two days and accused has made physical relationship with me. I

made a call to my brother namely Ajeet from the house of sister of accused i.e. from Shastri Nagar, Delhi. After half an hour later police

personnel came at the house at Shastri Nagar and apprehended me and accused Kishan and took us to the PS - Shahabad Dairy. Police got

me medically examined. My statement was also got recorded at Rohini Court

before a Magistrate.

¶. The Marriage Agreement which was prepared at Kashganj Court, in which photographs of mine and that of accused were also affixed

is Ex.SPW5/B and I had put my thumb impression at point A and accused had put his thumb mark at point B. ¶.¶

18. At this stage it would be useful to refer to the observations made by the Supreme Court of India in the case of Rai Sandeep v. State (NCT of

Delhi), reported at (2012) 8 SCC 21 wherein order of conviction passed by the Trial Court and its confirmation by the High Court was reversed finding

contradictions in the testimony of the victim and that the same was inconsistent with the remaining evidence of the prosecution. While doing so, the

Supreme Court examined as to when a witness can be called to be a "sterling witness" as under:

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore,

be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any

hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness

of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point

till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and

consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The

witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no

circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a

version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the

manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of

every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should

not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of

such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as

a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be

punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other

attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable

the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge

alleged."

(Emphasis Supplied)

19. Upon reading of the testimony of the victim, it would show that she has stayed with the respondent for about a month and during this period she

had made no effort to either contact her parents or to protest in any manner whatsoever. During her cross-examination, she admitted that she knew

the respondent very well and she had accompanied him from Delhi with her consent. The victim as well as the respondent had taken a bus from

Rohini and went to the Metro Station, then to Railway Station from where they went to Etah and took shelter at Etah Railway Station. During cross-

examination, she admitted that there were many people around her, but she did not make any effort to draw their attention. The victim has also not

disputed that they had gone to a temple in Kashganj where the respondent had formally put sindoor on the parting of her head and married her.

Thereafter, they even went to the Court when marriage papers were prepared, when she had put her thumb marks and did not protest at any point of

time. The respondent had even taken her to the house of his sister.

20. A complete reading of the evidence on record would show that the victim knew the respondent very well. She had accompanied him voluntarily,

had travelled with him by bus, Metro to the railway station and then boarded a train from Delhi to Etah. During the entire period, the victim did not

protest. There is no evidence on record that she was under fear and that the respondent had threatened her. The evidence shows that there was

ample opportunity for the victim to shout for help or escape from the clutches of the respondent. There is no quarrel to the proposition that an order on

conviction can be passed based on the sole statement made by the victim, provided the testimony of the victim is of sterling quality and it is reliable.

After examining the testimony of the victim, it is clearly established that she left her house out of her own will, she did know the respondent very well,

she travelled together with the respondent, she got married to him first in a Mandir and then court marriage was performed. She put her thumb

impression on the marriage document and admitted her age to be 20 years.

21. Even otherwise, it is settled law that the Appellate Court may only interfere in an appeal against acquittal when there are substantial and

compelling reasons to do so [See Sheo Swarup v. King-Emperor, AIR 1934 PC 227 (2); M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200

(paragraph 16 and 17); Tota Singh and Anr. v. State of Punjab, AIR 1987 SC 108: (1987) 2 SCC 529 (paragraph 6); State of Rajasthan v. Raja Ram,

(2003) 8 SCC 180 (paragraph 7); Chandrappav. State of Karnataka, (2007) 4 SCC 415 (paragraph 42); Ghurey Lal v. State of U.P., (2008) 10 SCC

450 (paragraph 73); and Muralidhar @ Giddav. State of Karnataka, (2014) 5 SCC 730 (paragraph 12)].

22. Accordingly, we find no illegality or infirmity in the judgment of the Trial Court warranting interference. The present leave petition is dismissed, the

leave to appeal is dismissed.