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

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*Reserved on: 12.12.2022*  
*Pronounced on: 06.03.2023*

+ **CRL.REV.P. 93/2018**

STATE (NCT OF DELHI)

..... Petitioner

Through: Mr. Manoj Pant, APP for State  
with SI Pradeep Kumar, P.S.  
Mandawali.

versus

VIPIN SHARMA

..... Respondent

Through: Ms. Upasana Verma, Proxy  
counsel

**CORAM:**

**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA**

**JUDGMENT**

**SWARANA KANTA SHARMA, J.**

1. The present petition has been filed under Section 397 read with Section 482 of the Code of Criminal Procedure, 1973, by the petitioner/State assailing the order dated 26.10.2017 passed by learned Additional Sessions Judge-01, East District, Karkardooma Courts, Delhi ('Trial Court') whereby respondent has been discharged for the offences punishable under Sections 363/376 of Indian Penal Code, 1860 ('IPC') and Section 4 of Prevention of Children from Sexual Offences, Act, 2012 ('POCSO Act'), in case FIR bearing no. 366/2017 registered at Police Station Mandawali, Delhi.

2. The prosecution case, in brief, is that the victim, aged about 14 years, had gone missing from her house on 16.08.2017. On the basis of missing complaint lodged by the victim's father, present FIR was initially registered under Section 363 of IPC on 17.08.2017. The victim, however, herself came to the police station on 20.08.2017 and informed the Investigating Officer (IO) that she had developed liking for the respondent/accused and on 16.08.2017, she had left with him on the pretext that she was going to her relative's house, but she had stayed with the accused in the house of his friend and both of them had planned to get married. It was further stated by victim that the accused had thereafter put *sindoor* on her forehead and both of them had consensual physical relationship thereafter. The statement of the victim was recorded under Section 164 of Cr.P.C. wherein it was stated that she had voluntarily gone with the accused on several occasions and that her relationship with the respondent was consensual. Charge-sheet was filed and the following order on charge was passed *vide* which the respondent has been discharged:

“The statement of the victim was also recorded u/s 164 Cr.P.C. in which she again repeated voluntarily going with the accused, performing of marriage and existence of physical relationship with him. The victim specifically stated that everything was done with her own consent and there was no pressure of any type from the side of the accused. She showed inclination to perform proper marriage with the accused after completion of her studies. This statement u/s 164 Cr. P.C. totally rule out the involvement of the accused in kidnapping or raping the victim. Infact, the victim has exonerated the accused.

From the facts of the prosecution case, it is clear that the victim herself left the house of her parents and gone with the accused as she was in love with him. Thereafter, victim had made sexual relationship with the accused after some marriage. Though the marriage took place only by putting a sindoor on the forehead of the victim and cannot be treated as a valid and legal marriage but both understood the same as completion of formalities of the marriage. It is not the case of the prosecution that accused intentionally performed a fake marriage only to sexually exploit the victim. Infact it was a case of running from the house and enjoying sex due to love affairs with intention to marry.

The date of birth of the victim is 27.02.2003 which means that on the date of incident, she was aged about 14½ years. Simple this fact that the victim was less than 18 years itself is not sufficient to hold that she was totally incapacitate to give consent.

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If the above law laid down by our own High court is taken into consideration and is applied to the present facts and circumstances, then no case of kidnapping, rape or penetrative sexual assault punishable under Section 363/376 IPC or Section 4 of the POCSO Act is made out especially when the age of the victim was about 14½ years when she left her parental house voluntarily with the accused and was having sufficient maturity to understand the consequences because she was regularly meeting with the accused outside due to love affairs and had left with him by telling a lie in her house that she was going to meet some relative as per her statement u/s 161 Cr.P.C.

The sexual relationship took place between the accused and victim voluntarily without any pressure or inducement. The victim has already shown her intention in her statement u/s 164 Cr.P.C. that she would marry the accused after completion of her studies and she has fully exonerated the accused and has not blamed him in any

manner so in such circumstances, the accused is discharged from this case. His bail bond is cancelled. However, accused is directed to furnish a bail bond of Rs.10,000/- with one surety under Section 437A Cr.P.C. which will be in force for a period of six months with an undertaking that he will appear in the Appellant Court as and when directed. File be consigned to record room after the bond is furnished and accepted.”

3. Aggrieved by the aforesaid order, the State has preferred the present petition. Learned APP for the State submits that the learned Trial Court has committed a grave error by not appreciating that the age of victim at the time of incident was only 14 ½ years and as per MLC of the victim, her hymen was found “freshly torn”. It is also stated that the Court concerned also failed to appreciate that the consent of a minor was of no consequence and the factum of the statement of victim under Section 164 of Cr.P.C. was given unnecessary weightage. It is also stated that the learned Trial Court did not appreciate that as per Section 375 of IPC and Sections 4 and 6 of POCSO Act, sexual intercourse with child amounts to rape and the consent, if any, given by the minor is no consent in the eyes of law.

4. Learned counsel for the respondent, on the other hand, states that the learned Trial Court had passed a speaking order and has given adequate reasons for discharge of the respondent/accused, and therefore, the petition be dismissed.

5. The arguments addressed on behalf of both the sides have been heard by this Court and the material on record has been perused.

6. Before advertng to the facts of present case, it would be appropriate to discuss the statutory provisions which are under consideration for this Court. Chargesheet against the respondent herein was filed under Sections 363/376 of IPC and Section 4 of POCSO Act.

6.1. The POCSO Act by way of Section 2(d) defines a 'child' as under:

**"2. Definitions.—** (1) In this Act, unless the context otherwise requires, —

...(d) "child" means any person below the age of eighteen years;..."

6.2. Further, Section 4 of POCSO Act provides punishment for offence defined under Section 3 of the Act , which reads as under:

**"3. Penetrative sexual assault.—**

A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

6.3. Section 375 of IPC defines the offence of ‘rape’, relevant portion of which is reproduced as under:

“375. Rape.—

A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions: —

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Sixthly.—**With or without her consent, when she is under eighteen years of age...**”

(Emphasis supplied)

7. It is clear from the mere reading of POCSO Act that the age of consent for sexual relationship is 18 years. Similarly, reading of Section 375 of IPC also makes it clear that sexual intercourse with a minor girl below the age of 18 years amounts to rape even if the minor has given



her consent for the same. The said proposition of law was also confirmed by the Hon'ble Apex Court in *Independent Thought v. Union of India (2017) 10 SCC 800*. In the said decision, the Apex Court, while reading down the Exception 2 to Section 375 and declaring sexual intercourse even with a wife under the age of 18 years as rape, had observed as under:

“29. Section 375 IPC defines "rape". This section was inserted in IPC in its present form by an amendment carried out on 3-2-2013 and it provides that a man is said to commit rape if, broadly speaking, he has sexual intercourse with a woman under circumstances falling under any of the seven descriptions mentioned in the section. (A "woman" is defined under Section 10 IPC as a female human being of any age). Among the seven descriptions is sexual intercourse against the will or without the consent of the woman; clause **"Sixthly of Section 375 makes it clear that if the woman is under 18 years of age, then sexual intercourse with her with or without her consent is rape. This is commonly referred to as "statutory rape" in which the willingness or consent of a woman below the age of 18 years for having sexual intercourse is rendered irrelevant and inconsequential.**

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32. Therefore, Section 375 IPC provides for three circumstances relating to "rape". **Firstly, sexual intercourse with a girl below 18 years of age is rape (statutory rape).** Secondly, and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse with her is her husband. Her willingness or consent is irrelevant under this circumstance. Thirdly, sexual intercourse with a woman above 18 years of age is

rape if it is under any of the seven descriptions given in Section 375 IPC (non-consensual sexual intercourse).

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79.2. Secondly, **the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse.** The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age.”

(Emphasis supplied)

8. The peculiar facts of the case at hand are that the victim in her statement under Section 164 Cr.P.C. had stated before the learned Magistrate that she had voluntarily gone with the accused and had consensual relationship with him and that there was no pressure from the accused for making physical relationship. She had also stated that she wanted to get married to the accused after completion of her studies. There is no doubt about the fact that the victim has completely exonerated the accused from every allegation. However, the material placed on record by the prosecution points out that the victim was aged about 14 ½ years on the date of incident, and the same has also been recorded by the learned Trial Court.

9. In this case, since the victim is a ‘child’ within the meaning of Section 2(d) of POCSO Act, the consent of the victim for physical relationship is of no consequence and cannot be of any help to the respondent/accused. The victim had clearly stated the factum of there



being sexual intercourse between her and the respondent, though with her consent, but since consent of a minor under the age of 18 years is considered no consent, the acts of sexual intercourse or penetration would prima facie fall under the purview of POCSO Act and Section 375 of IPC for the purpose of framing charge.

10. As far as reference by learned Trial Court to the decisions of this Court in *NCT of Delhi v. Umesh*, Crl. Rev. P. 266/2014 and *Shyam Kumar v. State* Crl. Rev. P. 424/2016, is concerned, the facts and circumstances of the said cases stand on different footing than the present case. Thus, reliance placed on the said decisions to discharge the respondent is incorrect in law.

11. Therefore, though it may be desirable that the cases of teenage infatuation and voluntary living with each other, eloping with each other or maintaining relationship, such as the present case, are dealt with on a different footing, the Court's hands are tied as far as framing of charge is concerned till any amendment is carried out by the wisdom of the Parliament of this country, if deemed appropriate.

12. Another offence for which the respondent has been accused of is Section 363 of IPC which provides the punishment for kidnapping. The offence of kidnapping from lawful guardianship has been defined under Section 361 IPC, which reads as under:

“361. Kidnapping from lawful guardianship.—Whoever **takes or entices any minor under** sixteen years of age if a male, or **under eighteen years of age if a female**, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

13. To establish an offence under Section 361 of IPC, it needs to be shown that a minor was taken or enticed out of the keeping of lawful guardian of such minor. Enticement involves the idea of inducement or allurement by an accused. In *S. Varadrajan v. State of Madras AIR 1965 SC 942*, the Hon'ble Apex Court had explained the scheme of Section 361 as under:

“...We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place.

14. It is, therefore, clear that the *sine qua non* of an act being covered as offence punishable under Section 361/363 IPC is that the minor should have been ‘enticed’ or ‘taken away’ from the custody of lawful

guardian of the minor. In the present case, there is no evidence on record or any sort of allegation from the victim that it was the accused, who had enticed, allured or induced the victim to leave her house or had taken her out of her lawful guardianship. The victim in her statement under Section 161 as well as 164 Cr.P.C. had stated herself that she had, on her own, gone to the accused and she had done so on several other occasions also, and it was not the accused who had either by any of his acts, verbal or otherwise, taken or enticed the victim away out of lawful custody of her guardian. It has been stated by the victim that she had developed friendship with the accused for a long time and had developed liking for him and that she had left her home on her own by telling lie to her mother.

15. Considering that the essential ingredient of the act of enticing or taking away is absent in the present case, this Court is of the opinion that offence punishable under Section 363 IPC is not made out against the accused/respondent.

16. Thus, in view of the aforesaid, the present petition is allowed to the extent that charges be framed against the respondent/accused for offences punishable under Section 376 of IPC and Section 4 of POCSO Act.

17. Accordingly, present petition stands disposed of in above terms.

18. However, it is made clear that the observations made by this Court are for the purpose of deciding the present petition and the Trial Court will not be influenced by the same.

19. A copy of this order be communicated to the learned Trial Court by the Registry for information and compliance.

**SWARANA KANTA SHARMA, J**

**MARCH 6, 2023/zp**

