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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% *Date of decision: 17th August, 2023*+ **CRL.A. 862/2017 & CRL.M.A. 7712/2022**

STATE GOVT OF NCT OF DELHI Appellant

Through: Ms. Manjeet Arya, APP for State
with Insp. Akhilesh Bajpai, PS
Dabri & S.I. Chandrakanta, I.O/
FRRO.

versus

MOHD KAYUM Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)**

1. An application under Section 378(4) of the Code of Criminal Procedure, 1973 has been filed on behalf of the State/appellant seeking Leave to Appeal against the judgment of acquittal dated 15.11.2016 vide which the respondent has been acquitted of the offence punishable under Section 376 IPC.

2. The case FIR No.226/2015 under Section 376 IPC was registered on 18.02.2012 on the complaint of Ms. Zarina who stated that in the month of October and November 2014 while she was alone, the respondent who is her real brother-in-law (jija) came to her house four to five times and committed rape upon her. A day before 18.02.2012 she felt



pain in her abdomen and her mother took her to DDU Hospital, where the Doctor confirmed her pregnancy.

3. On the registration of FIR, investigations were taken up during which the statements of the witnesses were recorded. The medical examination of the victim was got done and the Doctor opined that she was pregnant. On completion of investigation, charge sheet was filed in the Court.

4. Vide Order dated 17.04.2015 charges were framed against the respondent under Section 6 read with Section 5(1) of POCSO Act to which he pleaded not guilty.

5. The prosecution in support of its case examined 9 witnesses. The material witnesses being the complainant Ms. Zarina was recorded as PW1 and her mother as PW2.

6. Learned Additional Sessions Judge on appreciation of the evidence acquitted the respondent vide judgment dated 15.11.2016. Aggrieved, the present application for grant of Leave to appeal has been filed.

7. **Submissions heard.**

8. The prosecution in order to prove the age of the child victim had examined PW3 Ms. Rita Mishra, Principal, Sarvodya Kanya Vidhalaya, who brought the original Admission Register and original Pasting File, wherein the child was admitted in the school in sixth standard on 31.03.2012. Her date of birth was recorded as 13.05.2000. The father of the child had also submitted a School Leaving Certificate of class fifth at the time of her admission to class sixth. The date of birth of the child was therefore, not questioned according to which she was about 15 years of age at the time of incident.



9. The child victim was examined as PW2 who deposed that the accused/ respondent Kayum was her real brother-in-law (husband of her elder sister). He along with his family used to reside one or two street away from her house. In the month of December, 2014 she along with her mother, respondent and his wife had gone to native place in Bihar to attend the marriage of their cousin sister. After attending the marriage she got married to accused Kayum. Thereafter, she along with her mother and respondent husband and sister returned to Delhi. She further deposed that the respondent thereafter made physical relation with her on various occasions. She became pregnant and this fact came to the knowledge of her mother. Her parents were not aware about her marriage with the respondent. Therefore, in the month of February, 2015 her mother called the police and on the same day she along with her mother went to the police station, where her mother made a complaint. Her statement under Section 164 Cr.P.C Ex.PW1/B was recorded. She further deposed that the respondent had never committed any wrong with her before their marriage. Learned APP cross-examined the witness, but nothing material could be elicited.

10. The other material witness was PW2 the mother of the victim. She deposed that her elder daughter had got married to the respondent/ accused about 10 years back and they used to reside in a separate house in the vicinity. In the noon of 18.02.2015, her daughter/ victim complained about pain in the stomach. When she took her to the DDU Hospital, she was found pregnant. On making an enquiry, the child revealed that she had got married to the respondent without her consent. However, she did not rely on the version of her daughter and took her to



the Police Station where she made a complaint and got the FIR registered.

11. PW5 Dr. Arundhati Upadhyay had examined the child and had deposed that she performed the MTP.

12. The learned ASJ had rightly observed that in view of the testimony of the child that she got married to the respondent in the month of December, 2014 and only thereafter did they have physical relationship, no offence under Section 6 read with Section 5(1) of POCSO Act was made out and the respondent was rightly acquitted.

13. We find that since the child victim was the wife who was almost fifteen years of age, the physical relationship of the respondent with the victim, cannot be termed as rape. The respondent has been rightly acquitted.

14. We find no ground for grant of Leave to Appeal. The application is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

AUGUST 17, 2023

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