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**IN THE HIGH COURT OF DELHI AT NEW DELHI
CRIMINAL LEAVE PETITION No. 274/2016**

Date of Judgment : 20th May, 2016

STATE

..... Petitioner

Through : Ms. Aashaa Tiwari, APP for the State

versus

VASEEM

.....Respondent

Through : None

CORAM:

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J. (ORAL)

CrI.M.A.8303/2016 (exemption)

1. Exemption allowed subject to all just exceptions.
2. Application stands disposed of.

CrI.M.A.8304/2016 (delay)

3. This is an application under Section 5 of the Limitation Act read with Section 482 of the Code of Criminal Procedure filed by the State seeking condonation of delay of 8 days in filing the present leave petition.
4. Having regard to the submissions made and in the interest of justice the delay in filing the present leave petition is condoned.
5. Application stands disposed of.

CRL.L.P.No. 274/2016

6. The present Criminal Leave Petition has been filed under section 378(3) of the Code of Criminal Procedure by the Appellant seeking

leave to appeal against the impugned order dated 05.02.2016 passed by learned Additional Sessions Judge-01 (North-East), Karkardooma Courts, Delhi in Sessions Case No.44396/2015.

7. The facts of the case, as noticed by the learned trial court, are as under :

"On 26.10.2011, DD No. 23A was received at PS New Usmanpur on which SI Ashish Dahima and Ct. Lachhi Ram reached the spot, i.e. Sainin Halwai Wali Gali, New Usmanpur, Delhi where complainant Mohd. Mumtaz met them alongwith his daughter/victim-aged about 10 years, who was perplexed. IO called lady Ct. Gulistan from the PS who made inquiries from the victim and she was taken to GTB Hospital where on her medical examination the doctor opined sexual assault on her MLC.

Thereafter, IO recorded statement of complainant Mohd. Mumtaz who alleged that on 26.10.2011 at about 11.30 am, accused Vaseem, who was on visiting terms at his house, came to his house and requested his (complainant's) wife to send the victim alongwith him to do household work as his (accused's) wife was ill and accordingly victim was sent with the accused. Complainant further alleged that at about 4 pm when the victim returned to the house alone, she was perplexed and under fear and she told that accused took her to his rented house at 5th Pushta New Usmanpur where his wife was not present and then accused bolted the room from inside and did wrong act with her and also threatened her not to disclose about it to anyone or she will be killed and thereafter, accused left her near her house. Wife of complainant checked the victim and found injury marks on her private parts. It was then complainant called the police at 100 number. He also made search for the accused but could not succeed.

On the basis of statement of the complainant, present case was registered for the offence U/S 376/506

IPC. Further investigation was assigned to ASI Santosh and accused was arrested on 28.10.2011

After completion of investigation, charge sheet was filed against the accused for the offence punishable under Section 376/506 IPC. After supplying copies of charge sheet to the accused, case was committed to the Sessions Court. Charge for the offences punishable U/S 376 (2)(f)/506 IPC was framed against the accused, vide order dated 09.04.2012."

8. In order to substantiate the charge the prosecution examined 11 witnesses in all. Statement of the respondent was recorded under Section 313 of the Code of Criminal Procedure wherein he denied all the incriminating evidence put to him and claimed that he has been falsely implicated in this case due to enmity with the father of the victim who used to ply his rickshaw on rent but failed to pay two month's rent and when he demanded the same, hot talks took place and he lodged the present case concocting a false story. Respondent chose not to lead any evidence in his defence.
9. On scrutiny of evidence, the Trial court concluded that due to material contradictions in the testimony of the victim, lack of corroboration to the testimony of the victim with other material facts and circumstances including the medical examination and the FSL result, the prosecution failed to prove the guilt of the respondent and thereby acquitted the respondent for the charged offences.
10. Assailing the impugned Judgment, Ms. Aashaa Tiwari, learned counsel appearing for the State contended that the Trial Court disregarded and failed to take into account the relevant material available on record and has based its findings on mere conjectures

and surmises. She further submitted that the impugned judgment was erroneous in law and suffered from serious infirmities.

11. Learned counsel for the State vehemently argued that the sole testimony of the child victim can form the basis of conviction in a case of rape and in the instant case the minor victim has categorically alleged to have been raped by the respondent.
12. Learned counsel for the State further contended that the trial court erred in not appreciating the testimony of the mother of the child victim in the right perspective and acquitted the respondent on the basis of minor contradictions.
13. Learned counsel for the State further contended that the learned trial court has erred in holding that there was a delay in recording the statement of the child victim which shows malice on the part of Investigating Officer in framing the respondent in the present case.
14. Learned counsel for the State placed reliance on the MLC contending that the trial court has failed to take into account that there was no delay in conducting the MLC and the examining Doctor confirmed that there were injuries on the private parts of the child victim.
15. We have heard learned counsel for the State and also examined the material available on record.
16. Since, the testimonies of PW1 (Child victim) PW2 (Mother of the child victim) has been strongly relied upon by the learned counsel for the State, we deem it appropriate to discuss the evidence adduced by these prosecution witnesses in detail.

17. PW1 child victim stepped into the witness box and deposed that:-

"On 26.10.2011 at about 11.00 a.m., accused had come to my house when my father had left the house for his job and I along with my mother and brothers were present at home. Accused requested my mother to send me to his house for some house work as the wife of accused was not well. Accordingly, my mother sent me for house work of accused along with him. Accused took me to this house at 5th pusta, New Usmanpur, Delhi. His wife was not present there. Accused took me in his room and bolted the door from inside. Accused removed my wearing clothes and he also removed his wearing clothes and he laid me on the floor and committed wrong act/rape upon me forcibly. After committing rape accused dressed up me with my wearing clothes in addition to undergarment provided by him. Accused had also given me some medicine which I had consumed consequently I had vomiting. Thereafter, accused had taken me at 2nd Pusta Usmanpur and threatened me not to disclose about the rape to anyone otherwise he would kill me and went away. I reached at my house. My mother asked me as to why I was afraid? I told her about the incident. My mother called my father by calling him on his mobile phone. My father returned at home and he made call at 100 number."

18. This witness in her cross examination as under:

"I was crying and tried to shout but since my mouth had been gagged, therefore, nobody could hear my cry. I had told this fact to the police (Confronted with Ex PW1/DA where it is not so recorded). My mouth was gagged by the accused after entering into the room and upon closing the doors and before disrobing me. He opened the cloth piece from my mouth after 10-15 minutes and thereafter gave bath to me. I had stated this fact to the police. (Confronted with Ex. PW1/DA where it is not so recorded). The bathing water was clean and having no

colouring. After bath the accused first made me wear children's clothes and thereafter he made me wear my clothes. I was wearing all the clothes when I reached home. The said children clothes (inner wear) were thrown by my mother and my clothes were taken by the police. I had only told to the police that I was wearing inner clothes when I came home but had not told that my mother had thrown the inner clothes. (Confronted with Ex. PW1/DA where it is not so recorded). I was brought on a scooter to the pusta by the accused and I came crying to that place. I was also crying when he left me. No one asked me why I was crying. I came back home while crying. I did not met any policeman on the way. There was no crossing or red-light in between. I do not know the nature of cloth with which my mouth was gagged. I had not stated to the police that on entering the room, the accused had tied my hands with a dupatta. It is wrong to suggest that no such incident had taken place that is why I had not told these facts to the police. I had stated to the police that when the accused came to my house, my father had left for his job and my brother and mother were present. (Confronted with Ex. PW1/DA where it is not so recorded.) I had also stated to the police that when I reached the house of the accused, his wife was not present there. (Confronted with Ex. PW1/DA where it is not so recorded)..."

19. Hon'ble Supreme Court in catena of judgments held that the testimony of victim of rape needs no corroboration and conviction can be founded on the testimony of the prosecutrix alone if it is unimpeachable and beyond reproach. *In Mohd Ali vs State of U.P :* (2015) 7 SCC 272 it was held as under:

"22. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as

well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-Appellants for the alleged offences and the High

Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same."

20. In **Raju v. State of Madhya Pradesh: (2008) 15 SCC 133**, the Hon'ble Supreme Court has held that testimony of the victim of a rape cannot be presumed to be a gospel truth and observed that false allegations of rape can cause equal distress, humiliation and damage to the accused as well, in para 11, the supreme Court echoed the sentiments as under:-

"11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

21. The evidence of a child witness must be evaluated more carefully and with greater circumspection. In **Radhey Shyam Vs State of Rajasthan : (2014) 5 SCC 389** it was observed as under:

"9. In Panchhi, after reiterating the same principles, this Court observed that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy prey to tutoring. This Court further observed

that the courts have held that the evidence of a child witness must find adequate corroboration before it is relied upon. But, it is more a rule of practical wisdom than of law. It is not necessary to refer to other judgments cited by learned Counsel because they reiterate the same principles. The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation...".

22. Further In **Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan** reported in (2013) 5 SCC 72, the Hon'ble Apex Court held :

"It is a settled legal proposition that, while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the case of the prosecution, must not prompt the Court to reject the evidence thus provided, in its entirety. The irrelevant details which do not in any way corrode the credibility of a witness, cannot be labelled as omissions or contradictions. Therefore, the courts must be cautious and very particular, in their exercise of appreciating evidence. The approach to be adopted is, if the evidence of a witness is read in its entirety, and the same appears to have in it, a ring of truth, then it may become necessary for the Court to scrutinize the evidence more particularly, keeping in mind the deficiencies, drawbacks and infirmities pointed out in the said evidence as a whole, and evaluate them separately, to determine whether the same are completely against the nature of

the evidence provided by the witnesses, and whether the validity of such evidence is shaken by virtue of such evaluation, rendering it unworthy of belief. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." It is in fact, the entirety of the situation which must be taken into consideration. While appreciating the evidence, the Court must not attach undue importance to minor discrepancies, rather must consider broad spectrum of the prosecution version. The discrepancies may be due to normal errors of perception or observation or due to lapse of memory or due to faulty or stereotype investigation. After exercising such care and caution, and sifting through the evidence to separate truth from untruth, embellishments and improvements, the Court must determine whether the residuary evidence is sufficient to convict the accused. (Vide: **Bihari Nath Goswami v. Shiv Kumar Singh and Ors.** : (2004) 9 SCC 186; **Vijay @ Chinee v. State of Madhya Pradesh** : (2010) 8 SCC 191 and **Sampath Kumar v. Inspector of Police, Krishnagiri** : AIR 2012 SC 1249)."

23. It is a well settled law that conviction can be based on the sole testimony of the prosecutrix if the same inspires confidence. Plethora of decisions would show that once the statement of the prosecutrix inspires confidence and is accepted by the Court, the conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration would be required. However, as a rule of practical wisdom and as a matter of caution the court must find adequate corroboration to the evidence of the child witness. Let us now examine whether the testimony of the child witness herein is

corroborated sufficiently which unerringly points towards the guilt of the respondent.

24. PW2 Roshan Parveen mother of the child victim deposed before the court that:-

"I do not remember the date but in the month of October 2011, accused had come to my house at about 11:00 am and requested to send victim with him for his house work and on his consistent request I had sent victim with him. Victim returned at my house at about 04:00 pm. I had noticed that condition of victim was not well and she was nervous. I had also noticed blood oozing out from her private part and blood stains on her wearing clothes. Victim told me that accused committed rape upon her and provided undergarment after committing rape. It was also told by victim that accused had threatened to kill her and accused had directed to disclose as she had sustained injuries due to fall from staircase. I had made phone call to my husband and he came immediately and I narrated him about the incident committed by accused.

My husband called 2-3 neighbours and made call to police at 100 number. Police came and took us to police station and from there at the house of accused Vaseem present in court, correctly identified but he was not present and his room was found locked. From there police took us to GTB Hospital where victim was medically examined. Wearing clothes of victim had been taken into possession by the doctors. Police had recorded statement of my husband first, thereafter, statement of victim and mine..."

25. PW2 deposed in her cross examination that:

"At the time when accused had stated to have come at my house on the day of incident, my three sons were watching T.V. inside the house and the victim was present outside the house in the street. Before this, I had never sent the victim with anyone outside the house. I

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was aware that the accused was married. I do not know the name of wife of accused. I had not brought the victim from the street. (Vol. The accused had brought the victim to me from the street). At that time no neighbor was present over there. There were no shops in the Gali in which I was residing at that time. The accused had come to my house on motorcycle alone. I had not allowed the victim to go with the accused on his request. (Vol the accused had repeatedly requested for about one hour.) "

26. On perusal of the testimonies it has emerged that PW2, mother of the child victim deposed that respondent had taken her daughter on the pretext that the wife of the respondent was sick, however PW1 deposed in her cross examination that respondent was residing alone and not with his family. Confirmation by PW1 that the respondent lives alone in the house dents the case of prosecution. Further PW1 in her cross examination deposed that *"immediately after entering his house the respondent bolted the room from inside, started tying my hands with a string"* but in her examination in chief she was silent in this regard. Further PW-1 in her cross examination deposed that *"I was crying and tried to shout but since my mouth had been gagged therefore, nobody could hear me cry."* Again the child victim has not mentioned anything about the gagging of her mouth by the respondent in her examination in chief. PW1 in her examination in chief deposed that *"after committing rape accused dressed up me with my wearing clothes in addition to undergarments provided by him."* In her cross examination she deposed that *"on reaching home my innerwear were thrown by my mother and clothes were taken by the police."* However the innerwear of the child victim were seized

and sent for examination. This fact again creates doubt that if the innerwear of child victim were thrown by the mother of the child victim then which inner garments were sent by Investigation Officer for examination. Child victim further deposed in her cross examination that *"on the date of incident, my father had left for his job/work at about 08:00am. After my father left for his work, my mother was sleeping. I and my two younger brothers were watching T.V. I watched T.V. upto 10:00 a.m. My third brother is elder to me and was residing at the native village."* On the contrary PW2 mother of the child victim stated that *"at the time when accused had stated to have come at my house on the day of incident my three sons were watching T.V. inside the house and the victim was present outside the house in the street"*.

27. Further PW1 in her cross examination deposed that *"nobody from the neighbourhood had come to my house after arrival of my father also"* however PW2 mother of the child victim and PW3 father of the child victim stated that 2-3 neighbours were present outside their house after the alleged incident. The stand taken by the father and mother of the child victim in relation to the presence of neighbour is again contrary to the statement given by the child victim. It is worthwhile to mention that no neighbours were examined by the prosecution as Independent witnesses. Even the brothers of the child victim who were present at the house when the child victim was taken by the respondent have not been examined by the prosecution.
28. In the present case after reading the testimonies of PW1 and PW2 in its entirety, we are of the considered opinion that there are material

contradictions in their statements recorded at different stage of the trial and does not inspire any confidence. Under these circumstances, it would be highly difficult to accept the version of the prosecution on the basis of their testimonies.

29. It is a matter of fact that the incident took place on 26.10.2011 between 11:00 am to 04:00 pm and MLC of the child victim was prepared at about 12:15 midnight and after recording the statement of the complainant FIR was registered on 27.10.2011 at 02:05 am. No statement of the child victim under Section 161 of the Code of the Criminal Procedure was recorded by the Investigating Officer for 16 days and her statement was recorded only on 11.11.2011. Statement of the child victim under Section 164 of the Code of Criminal Procedure was not recorded. Neither any explanation has been rendered by the prosecution in relation to non recording of statement of the child victim under Section 164 of Code of Criminal Procedure nor any explanation with regard to delay in recording of statement of the child victim under Section 161 of the Code of Criminal Procedure was given.
30. Law relating to unexplained delay in recording of the statement of the material witness is clear. In the case of **Shahid Khan Vs State of Rajasthan** : Criminal Appeal Nos. 1460, 1461 and 1462 of 2008 decided on 02.03.2016 the Hon'ble Apex court has held that :-

"The statements of PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir were recorded after 3 days of the occurrence. No explanation is forthcoming as to why they are not examined for 3 days. It is also not known as to how the police came to know that these witnesses saw the

occurrence. The delay in recording the statements casts a serious doubt about their being eye-witnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced. The circumstances in this case lend such significance to this delay. PW 25 Mirza Majid Beg and PW 24 Mohamed Shakir, in view of their unexplained silence and delayed statement to the police, does not appear to us to be wholly reliable witnesses. There is no corroboration of their evidence from any other independent source either. We find it rather unsafe to rely upon their evidence only to uphold the conviction and sentence of the Appellants. The High Court has failed to advert to the contentions raised by the Appellants and re-appreciate the evidence thereby resulting in miscarriage of justice. In our opinion, the case against the Appellants has not been proved beyond reasonable doubt"

31. From the above settled position of law and facts of the present case it is an established fact that the unexplained delay in recording the statement of child victim is fatal to the case of prosecution and concoction on the part of Investigating Officer cannot be ruled out.
32. Moreover, no conclusive evidence emerged from the MLC connecting the respondent with the alleged crime. Significantly, even the FSL report does not favour the prosecution case as no semen stains were detected on the salwar, innerwear or in vaginal secretion of the child victim. Also, grouping of blood stains on the clothes of the child victim gave no reaction during examination.
33. The law with regard to the grant of leave is well settled by a catena of judgments. Leave to Appeal can be granted only where it is shown

that the conclusions arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle.

34. The law relating to an appeal against an order of acquittal was succinctly laid down by Hon'ble Supreme Court in *State of Goa v. Sanjay Thakran and Another* (2007) 3 SCC 755. Relevant para has been reproduced as under:-

14. By a series of decisions, this Court has laid down the parameters of appreciation of evidence on record and jurisdiction and limitations of the appellate court, and while dealing with appeal against order of acquittal this Court observed in *Tota Singh and Anr. v. State of Punjab* (1987) 2 SCC 529, as under:

6....The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous.

15. Further, this Court has observed in *Ramesh Babulal Doshi v. State of Gujarat* (1996) 9 SCC 225:

7....This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial court can be legitimately arrived at by the appellate court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then-and then only-reappraise the evidence to arrive at its own conclusions....

35. In the case of *State of Madhya Pradesh v. Dal Singh & Ors.*, reported at JT 2013 (8) SC 625, the Hon'ble Supreme Court has held that the appellate court while considering the appeal against the judgment of acquittal shall interfere only when there are compelling and substantial reasons for doing so and if the judgment is unreasonable and relevant materials have been unjustifiably ignored, it would be a compelling reason for interference.
36. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and the prosecution has to prove a charge

beyond reasonable doubt. The accused has a right to fair trial and the presumption of innocence is in favour of the accused.

37. In the light of the aforesaid dictum and for the reasons stated above, we do not find any infirmity in the impugned judgment passed by trial court. Consequently, the present leave to appeal petition stands dismissed.

MAY 20, 2016
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G. S. Sistani
G. S. SISTANI, J.

Sangita
SANGITA DHINGRA SEHGAL, J.