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

% *Date of Judgment: 19th July, 2017*

+ **CRL.L.P. 393/2017**

STATE

..... Appellant

Through : Mr.Ranbir Singh Kundu, ASC

versus

KISHAN LAL

..... Respondent

Through : *Nemo*

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

Crl.M.A. 11278/2017 (Exemption)

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

Crl.M.A. 11277/2017 (Delay)

3. This is an application under Section 5 of the Limitation Act filed by the appellant seeking condonation of 117 days' delay in filing the present leave to appeal.
4. Although there is no reason to condone the delay, but since we have heard the matter on merits, the delay is condoned.
5. The application stands disposed of.

CRL.L.P. 393/2017

6. The present leave to appeal has been filed by the State under Section 378(1) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the judgment dated 21.12.2016 passed by the Additional Sessions Judge ('Trial Court') in SC 55994/2016 (old SC 130/2013) arising out

of FIR 105/2013 registered at Khyala Police Station, whereby the accused/respondent herein stands acquitted of the charge under Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').

7. The case of the prosecution as noticed by the Trial Court is as under:

"1. Brief facts of the case are that in the case in hand, FIR has been lodged on the statement of Ms. 'S' (presumed name of the complainant) who is maternal grand mother of the prosecutrix "C" (presumed name), who is about 9 years of age. Wherein, she has alleged that prosecutrix "C" who is daughter of her daughter lives with her and on dated 21.03.2013 prosecutrix 'C' has told her that two days before the said date i.e. 21.03.2013, when, she was playing in the street alongwith her friend, who is about the 13 years of age, then one man, who resides in house i.e. A-238, Raghbir Nagar, Delhi had taken both girls/prosecutrices in his house and bolted the door of the room from inside and he asked the prosecutrices to remove their clothes and removed his clothes, juxtaposed his body with the prosecutrices and laid with them, kissed them and then, after giving Rs. 10/- to each prosecutrix, he asked them to not tell any person and she has further stated that on dated 21.03.2013, when, she saw the money with the prosecutrix 'C' she suspected, then the prosecutrix 'C' who is maternal grand daughter of the complainant had told that accused Kishan Lal had done GALAT HARKAT with both the prosecutrices and prayed for taking legal action. On the basis of such statement of the complainant, FIR No. 105/13, U/S 376 of IPC and 4 POCSO Act was registered on dated 21.03.2013 and the accused Kishan Lal was arrested on dated 22.03.2013 and since then he is behind bars [sic: bars]."

8. On completion of the investigation, the chargesheet was filed under Section 376 of the Indian Penal Code, 1860 ('IPC') and Sections 4 and 6 of the POCSO Act. Charges were framed by the Trial Court under Section 6 of the POCSO Act to which the accused/respondent pleaded not guilty. To prove the guilt of the respondent, the prosecution examined 14 witnesses.

9. The incriminating circumstances were put to the accused/respondent under Section 313 Cr.P.C., wherein he took the plea that he had been falsely implicated in the case and stated that he was not present on the date of the incident as he was out of Delhi from 18.03.2013 to 20.03.2013. Defence examined one witness, i.e. Kanhaiya (DW-1) being the brother of the respondent.
10. After analyzing the evidence before it, the Trial Court found material contradictions, inconsistencies and improvements in the statements of the two prosecutrices (PW-3 and PW-6) and PW-5 (maternal grandfather of PW-6) and unexplained delay of 2 days in lodging of FIR raising suspicion on the version of the prosecution and extended the benefit of doubt to the respondent. Aggrieved, the State has filed the present leave to appeal.
11. Mr.Kundu, learned counsel for the State, contended that the judgment of the Trial Court is based on surmises and conjectures and not on the correct appreciation of evidence, therefore, the impugned judgment deserves to be set-aside. It is submitted that the contradictions in the testimony of the prosecution witnesses, which was the prime reason for the Trial Court to acquit the accused, are minor and do not shake the basic foundation of the case of the prosecution. The Trial Court has failed to take note of settled proposition of law that when the witnesses are children of tender age, the courts should overlook minor and immaterial contradictions. In the present case, both the prosecutrices were of tender age as being just 13 and 10 years' old. Learned counsel for the State submitted that the Trial Court failed to appreciate that both the children (PW-3 and PW-6) have supported the case of the prosecution and have been consistent in their depositions

before the police, before the Magistrate under Section 164 Cr.P.C. and before the Trial Court. Their testimonies further stand corroborated by the FIR/complaint lodged by the maternal grandmother of one of the victims (PW-6).

12. We have heard the learned counsel for the State, perused the impugned judgment and examined the evidence placed on record. The only question which arises for our consideration is whether the testimonies of the prosecutrices (PW-3 and PW-6) could have been relied upon by the Trial Court to convict the accused/respondent herein?
13. In order to protect the identities of the victims, the Trial Court has assigned the following names to the prosecutrices and their relatives, which will be adhered to in the present judgment:
 - a. Prosecutrix 'C' aged about 9 years;
 - b. Prosecutrix 'A' aged about 13 years;
 - c. 'S' to the complainant being the maternal grandmother of 'C' (since deceased); and
 - d. 'BB' to the maternal grandfather of 'C' examined as PW-5 before the Trial Court.
14. We proceed to analyse the evidence led by the prosecution before the Trial Court. The facts disclosed in the complaint by 'S' (maternal grandmother of prosecutrix 'C') have already been noticed in paragraph 7 foregoing.
15. The prosecutrix 'A' in her statement to the police under Section 161 Cr.P.C. (Ex.PW-3/DA) recorded on 21.03.2013 stated that the respondent used to live in their *gali* (lane) and two days ago, when she was playing with her friend 'C' in the lane the respondent called them. He promised to give either of them Rs.10 and took them to his home.

The respondent bolted the door from inside and made them sit on his bed and made them remove their clothes. He also removed his clothes and started touching them with his hand and started touching her urinating part with her finger. The respondent kissed them and brought them close to his body (*apne sharir se chipka liya*). He then gave both of them Rs.10/- each and shooed them away saying to eat something. 'A' further stated that she did not disclose the incident to her family.

16. Later on, when the statement under Section 164 Cr.P.C. (Ex.PW-3/A) was recorded, 'A' stated that when she and 'C' were playing in the lane, one uncle came and took them to his home. He closed the lower gate and they started shouting, but there was no one to hear them. Their clothes were removed and he laid upon them. Thereafter, he put his part from which he used the toilet inside them and started pressing their breast. He put something white on them. Thereafter, he opened the lower and the upper gates and let them out. Then 'A' returned the Rs.10/- which was given by him. He had also kissed their lips and threatened them to take their and their parents lives.
17. Whereas Prosecutrix 'A' was examined as PW-3. She has deposed that about one year ago, she was playing in the lane with 'C' and respondent was correctly identified by her in this court and she has further deposed that respondent took her and her friend i.e. 'C' in his house and respondent bolted the door of his house. Removed her clothes and clothes of the prosecutrix 'C' and respondent laid on both the prosecutrices and also kissed both of them. He also touched their urinating parts and he put his urinating part in their urinating parts. Respondent gave Rs.10/- each to both the prosecutrices and she has also deposed that they had thrown the said Rs.10/- and respondent had

also threatened the prosecutrixes not to tell about this incident to any person, otherwise he would kill their parents. She has also deposed that owing to such threats, she had not disclosed the incident to any person.

18. PW-3 was cross-examined by the learned counsel for the accused/respondent wherein she has admitted that several children used to play in the locality and there are also movement of the people in the locality. She admitted that alleged incident is of day time and also admitted that she did not tell about the incident to her parents and stated that she was threatened. PW-3 stated that when the respondent had taken to the prosecutrixes, nobody was present and that all were sleeping. She has also deposed that she had cried, when, the respondent had taken to the prosecutrixes in the room and she had told about the same to the police and prosecutrixes remained in the room of the respondent for about 5 minutes. She had told to the police that they had thrown away the currency notes of Rs. 10/-, which were given by the respondent and further deposed that she has also told to the police that the respondent had threatened them. She admitted that police had not read over her statement of her and further deposed that on the date of alleged incident she had taken leave and prosecutrix 'C' had not gone to the school, because she was ill.
19. From the foregoing, it is clear that there were material inconsistencies and improvements in the testimony of the prosecutrix 'A'. In her statement under Section 161 Cr.P.C. (Ex.PW-3/DA), the prosecutrix never alleged any penetration and merely stated that the respondent had touched her vagina with the finger; while in her statement under Section 164 Cr.P.C. (Ex.PW-3/A) she stated that he put his part used to do toilet inside them (*unhone apna toilet wali*

jagah hamare under daal diya), which is clearly indicative of penetration. In her deposition before the Trial Court, she combined both of them and deposed that the respondent laid on them, touched their urinating parts and put his urinating part in their urinating part. Further in her deposition, she on one hand stated that nobody was in the house and on the other stated that everyone was sleeping. Additionally, the prosecutrix 'A' had never stated to the police that she had cried at the time of the incident or had thrown the Rs.10/- notes.

20. We may also notice that the deposition also runs awry of the initial complaint lodged by 'S' (Ex.PW-13/A) as therein it was stated that the suspicion of 'S' was aroused by seeing the Rs.10/- note in the hand of 'C', but if the notes were thrown as deposed by 'A' it becomes unclear as to what raised the suspicion of 'S'.
21. Similar is the situation with the statements given by 'C'. In her statement recorded under Section 161 Cr.P.C. on 21.03.2013, she stated that two days prior to the recording of the statement, she was playing outside alongwith 'A', when the respondent had called both the prosecutrices inside his house and bolted the door and removed his clothes as well of the prosecutrices and laid with them. He then made them lay close to him and fondled with his hands as well as rubbed his finger on her urinating part (*aur hame apne sharir par chipka liya tatha hame chooma tatha hamare upar haath ferta raha aur mere pishab karne wali jagah par ungli ferta raha*).
22. When her statement under Section 164 Cr.P.C. (Ex.PW-6/A) was recorded, she stated that when she and 'A' were playing in the street then the old man, namely Kishan/respondent, came to them and he took them inside her house and bolted the door of his room. He then

kissed them, removed clothes and climbed on top of them. He took them to the bathroom and inserted the part used by him to toilet inside them and took out something white. He had taken Rs.10/- each from us and had also inserted his finger causing pain to them.

23. When the prosecutrix 'C' was examined as PW-6, she deposed that about one year ago, she alongwith 'A' were playing in the street, outside of her house and respondent called them and took them inside of his house. He gave Rs.10/- to each of them and bolted the door of his house. He removed her clothes and also the clothes of 'A' and brought them close to his body (*aur apne shareer se hamko chipka liya*) and respondent had touched urinating parts of both prosecutrices. PW-6 has also deposed that on the next day again, when both the prosecutrices were playing, the accused called them inside of his house and gave Rs.10/- to each prosecutrix and threatened them not to disclose about this incident to anyone, otherwise, the accused would kill her and her family members. She has also deposed that she fell ill and her grand-mother made enquiries from her and she told about the incident to her grandmother and she informed to the police. On asking of leading question by the APP for the State with permission of the Trial Court, she has also deposed that it is correct that respondent put his urinating part in her urinating part and voluntarily stated that he had inserted it only little bit (*thodi si hi dali thi*) and also stated that it is correct that this accused also inserted his finger in her urinating part.

24. PW-6 was then cross-examined by the counsel for the accused/respondent and during her cross-examination she admitted that prosecutrices did not ask to the accused as to why he was taking them inside his house and she did not tell to her grandmother about

the incident on the same day. She has also deposed that the accused was apprehended from his house by the police in her presence and in the presence of 'A', her mother, sister and grandfather and also deposed that the prosecutrixes remained in the house of the accused for about 2 hours.

25. Again the testimony of 'C' is inconsistent and plagued with improvement over her previous statements. In her Section 161 Cr.P.C. statement, she never stated that there was any penetration, while she stated so in her statement under Section 164 Cr.P.C. Now in her deposition before the Court, a new fact was added regarding them being called again the next day and then threatened. This was never deposed to either the police or in Ex.PW-6/A. Her testimony is also contrary to the initial complaint lodged by her maternal grandmother 'S' (Ex.PW-13/A) as 'C' stated that 'S' had enquired as she was ill and not upon seeing the Rs.10/- note. Further the complaint (Ex.PW-13/A) never alleged that the respondent had penetrated the prosecutrixes.
26. When the testimonies of 'A' and 'C' are juxtaposed, numerous contradictions arise. 'A' had nowhere stated about them being called on the second day, had deposed regarding alarms raised by them and the throwing away of Rs.10/- notes and the duration of the incident varies from 5 minutes to 2 hours.
27. We may also notice that there is inconsistency in respect of the location from where the respondent was arrested. While as per Arrest Memo (Ex.PW-4/A), Ct.Raj Singh (PW-4) and 'BB' (PW-5), the respondent was arrested from Pashchim Vihar Metro Station, while 'C' stated in her cross-examination that the respondent was apprehended from his house.

28. In this background, the question which arises is whether the testimonies of the two prosecutrices (PW-3 and PW-6) could have been relied upon by the Trial Court to convict the respondent?
29. The law in this regard is well-settled, the sole testimony of the prosecutrix can be relied upon to convict the accused provided the testimony is of sterling quality leaving no shadow of doubt over its veracity. We may notice the observations of a coordinate bench of this Court, of which one of us (G.S.Sistani, J.) was a member, in ***State v. Wasim & Anr, 2017 SCC OnLine Del 8502*** wherein the bench had while finding the testimony of the prosecutrix therein could not be relied upon, observed as under:

“19. ...Even though there is no quarrel with the proposition that conviction can be based on the sole testimony of the prosecutrix but at the same time, it must be unimpeachable and beyond reproach precluding any shadow of doubt over her veracity. We may only refer to few pronouncements of the Apex Court in this regard. In Ramdas v. State of Maharashtra, (2007) 2 SCC 170, it was held as under:

“23. It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality.

...

25. In the instant case there are two eyewitnesses who have been examined to prove the case of the prosecution. We have rejected outright the evidence of PW 5. We have also critically scrutinised the evidence of the prosecutrix, PW 2. She does not appear to us to be a witness of sterling

quality on whose sole testimony a conviction can be sustained. She has tried to conceal facts from the court which were relevant by not deposing about the earlier first information report lodged by her, which is proved to have been recorded at the police station. She has deviated from the case narrated in the first information report solely with a view to avoid the burden of explaining for the earlier report made by her relating to a non-cognizable offence. Her evidence on the question of delay in lodging the report is unsatisfactory and if her deposition is taken as it is, the inordinate delay in lodging the report remains unexplained. Considered in the light of an earlier report made by her in relation to a non-cognizable offence, the second report lodged by her after a few days raises suspicion as to its truthfulness.”

(Emphasis Supplied)

20. The Supreme Court in *State of Rajasthan v. Babu Meena*, (2013) 4 SCC 206, has observed as under:

“9. We do not have the slightest hesitation in accepting the broad submission of Mr. Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.”

21. We may also note the following observations in *Mohd. Ali v. State of U.P.*, (2015) 7 SCC 272:

“29. 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 a 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.

30. True it is, the grammar of law permits that 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 does 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 appellant-accused for the alleged offences and the High Court has fallen into error, without reappreciating the material on record, by giving the stamp of approval to the same.”

(Emphasis Supplied)”

[See also *Sudhansu Sekhar Sahoo v. State of Orissa*, (2002) 10 SCC 743 (paragraph 18) *Krishan Kumar Malik v. State of Haryana*, (2011) 7 SCC 130 (paragraphs 24 and 31); and *State (Govt of NCT of Delhi) v. Jitender Kumar & Anr.*, CRL. L.P. 364/2017 dated 06.07.2017 (paragraphs 28-32)]

30. Further, the Apex Court in *Rai Sandeep v. State (NCT of Delhi)*, (2012) 8 SCC 21 reversed the conviction of the Trial Court and its confirmation by the High Court finding contradictions in the testimony of the prosecutrix and that the same was inconsistent with the remaining evidence of the prosecution. While doing so, the Supreme Court examined as to when the prosecutrix 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)

31. Applying the foregoing tests to the case at hand, the testimonies of the prosecutrices ‘A’ and ‘C’ are not of a sterling quality and could not have been relied upon by the Trial Court. Corroboration was required. In the MLCs of both the prosecutrices (Ex.PW-10/A and Ex.PW-10/B), their hymens were found to be intact and there were no fresh marks of injury. We may note that although the rupturing of the hymen is not necessary in all cases of rape as even slightest penetration would constitute the offence of rape, but no support can be drawn from such a MLC [See ***Ranjit Hazarika v. State of Assam***, (1998) 8 SCC 635 (paragraph 5); ***Aman Kumar and Anr. v. State of Haryana***, (2004) 4 SCC 379 (paragraphs 6 and 7); and ***Mohinder Singh Bhatti v. State (NCT of Delhi)***, MANU/DE/3457/2009 (paragraphs 26 and 27)].
32. Further, nothing has come in the forensic examination [FSL Report (Ex.PW-11/A)] as no semen was detected on the exhibits. Hence, there was no corroborating piece of evidence.

33. Accordingly, when the testimonies of the prosecutrices ‘A’ and ‘C’ were plagued with contradictions, inconsistencies and improvement, they could not have been relied upon to convict the accused/respondent; corroboration was required, here there was none and thus, no fault can be found with the judgment of the Trial Court acquitting the respondent.
34. Another aspect to be noticed is the delay in the lodging of the FIR. The complaint was made by ‘S’ on 21.03.2013 at 8:40 PM, while the incident pertained to 19.03.2013 at 3 PM. No satisfactory explanation has come forth. The explanation that the maternal grandmother ‘S’ of prosecutrix ‘C’ raised suspicion by seeing the Rs.10/- note is dubious as it had come in evidence that the note was thrown away. Further, ‘C’ (PW-6) had deposed that the threats were extended on the next day and thus, there was no reason for the prosecutrices to not having disclosed the incident on the same day, i.e. 19.03.2013. This opens the gate for embellishments and tutoring.
35. Even otherwise, it is settled law that the appellant 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); *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 (paragraph 42); *Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450 (paragraph 73); and *Muralidhar @ Gidda v. State of Karnataka*, (2014) 5 SCC 730 (paragraph 12)].

36. Accordingly, we find no ground to interfere in the judgment of the Trial Court. The bail bond and the surety under Section 437-A Cr.P.C. are discharged.
37. The leave to appeal is dismissed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 19, 2017

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