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

+ CRL.L.P. 590/2019

STATE (NCT OF DELHI)

..... Petitioner

Through: Ms Kusum Dhalla, APP for State with
SI Jasmer Singh, PS Jahangir Puri.

versus

DEVENDER

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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01.11.2019

CRL.M.A. 39409/2019

1. Allowed, subject to all just exceptions.

CRL.L.P. 590/2019

2. The State has filed the present petition seeking leave to appeal against the judgment dated 03.09.2019 passed by the learned ASJ-1/Special Judge: POCSO Act: North: Rohini/Delhi, acquitting the respondent of the offences under Sections 354/354A of the IPC and Section 10 of the Protection of Children from Sexual Offences Act (POCSO Act).

3. The said case relates to FIR No. 844/2015 under Sections 354/354A of the IPC and Section 12 of the POCSO Act registered with PS Jahangir Puri. The said FIR was registered at the instance of the victim's father. The victim is hereafter referred to as 'M'. It is the prosecution's case that 'M', her parents, her siblings and her maternal aunt (*mausi*) were residing in a

rented accommodation in Jahangir Puri. It is stated that on 24.09.2015 'M' and her *mausi* were sleeping on the terrace of the house and at about 2:30 AM, the accused (the respondent herein) had jumped over the terrace wall from the adjoining house. He laid down beside 'M' and misbehaved with her. It is alleged that he had gagged her mouth with one of his hands and had touched her breast inappropriately. 'M' mustered up courage and raised an alarm and the accused ran away from the spot using the stairs. On hearing the screams of the 'M', her parents and certain other persons went to the roof. She stated that she did not know the accused but would be able to identify him.

4. The next day, 'M''s father had caught hold of the accused and produced him before 'M'. She identified the accused as the person who had misbehaved with her. Other persons who had gathered at the spot beat up the accused. The matter was reported to the police. On the statement made by 'M', the FIR in question was registered. The accused was arrested on the same date at about 3:00 PM.

5. It is seen that the Trial Court had evaluated the evidence obtaining in the case and found that the evidence was insufficient to convict the accused and therefore, acquitted him. The Trial Court had noted that there were material inconsistencies in the testimonies of the material witnesses. The prosecution had examined 06 witnesses which included 04 material witnesses – 'M', her parents and her maternal aunt (*mausi*). 'M' had testified that she was sleeping on the roof of the house with her *mausi* and her parents were sleeping inside the house. After 12 midnight a person had come from the adjacent roof and had laid down beside her. She awaked and

was about to raise an alarm but the accused gagged her mouth and she got scared. She stated that he has put his hand on her shoulder and had placed his hand on her breast. After mustering courage, she raised an alarm and the accused ran away from the spot. She deposed that her father had asked her about the description of the accused and she had informed him that she could identify him. She stated that in the morning, her father had caught the accused and she had identified him, thereafter. She stated that her father had called the police. She also stated that persons from the public gathered at the spot and had beaten the accused. In her cross-examination, she stated that she was sleeping with her *mausi* at the time of the incident. The other family members had gone inside the room after electricity was restored. She stated that there was no light at the roof. She denied a suggestion that it was totally dark or that she could not see the accused.

6. The Trial Court noted that her testimony was not consistent with her statement recorded under Section 161 of the CrPC and Section 164 of the CrPC in all aspects. In her statement recorded under Section 164 of the CrPC, 'M' had stated that her father had gone out in search of the accused and thereafter, her father had asked her to called the landlord (uncle) and he had stated that they would search for the accused in the morning. She stated that the son of the landlord had produced the accused. This was in variance with her statement that her father had produced the victim on the next date. However, the Trial Court had also noted that the testimony of 'M' was consistent with her earlier statements insofar as the description of the incident is concerned.

7. The aforesaid case was not supported by M's maternal aunt (*mausi*).

She had denied that she was sleeping next to 'M' at the material time. She stated that she had also gone inside the room after the electricity was restored. She stated that she came out of the room on hearing the alarm raised by the victim. In the cross-examination, she also denied that the accused identified the victim in her presence. She could not identify the accused.

8. The Trial Court also noted that the testimony of 'M's mother presented a different version. She testified that her neighbours had noticed the boy who is residing in the vicinity escaping from the spot. None of the other witnesses had deposed to the aforesaid effect. Further, none of the neighbours had been examined. The Trial Court also noted that the testimony of M's mother (PW-3) was also in variance with the testimony of M's father who had deposed as PW-2. He did not mention that any neighbours had collected at the spot at the material time. On the contrary, he stated that he took assistance of one "uncle ji" who is residing on the first floor of the house. He had called the landlord. He also stated that the nephew of the accused was sleeping on the roof of the adjacent house but he did not question the nephew of the accused.

9. Apart from material inconsistencies in the testimony of material witnesses, the Trial Court also reasoned that at the material time 'M' could not have given accurate description. The Trial Court also observed that since electricity had been restored, there would have been some movements in the area resulting from persons who were sleeping outside waking up and going back inside the house. The court reasoned that there would be a large number of such persons and there is high possibility that some of them were

awake at the material time. In the circumstances, it is strange that the accused was not spotted by any other person; even the maternal aunt of the victim had denied seeing the accused.

10. In addition to the above, there is also a controversy as to 'M's age at the material time. She had deposed that she was twelve years old at the material time. Her mother (PW-3) had deposed that she was eleven years old at the material time. However, the school records produced by the Manager of the school in which 'M' studied (PW-6) indicated M's date of birth as 24.07.2000. Thus, 'M' would have been more than fifteen years old at the date of incident.

11. It is clear from the impugned order that the Trial Court has carefully evaluated the evidence obtaining in this case and concluded that the prosecution has been unable to establish its case beyond reasonable doubt. This Court concurs with the impugned order and finds no reason to interfere with the said judgment.

12. In view of the above, the petition is rejected.

VIBHU BAKHRU, J

NOVEMBER 01, 2019
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