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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 05th November 2019

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CRL.L.P. 48/2019

STATE (GOVT NCT OF DELHI)

..... Petitioner

Through: Mr. Amit Gupta, APP for the State with
Insp. Pankaj and SI Ram Pratap, PS
Punjabi Bagh

versus

TALIB

..... Respondent

Through: Mr. Jitendra Kumar, Advocate with
Mr. Aparbal Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J (Oral)

1. By the present Leave Petition filed under Section 378 (1) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') the State seeks leave to appeal against the judgment dated 15.09.2018 passed by the learned Trial Court in Sessions Case No. 57436/16, whereby the respondent (accused before the Trial Court) was acquitted of the charges punishable under Section 376(I)(N)363/366/506 of the Indian Penal Code (hereinafter referred to as 'IPC') and under Sections 4/6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO').

2. The brief facts of the case, as mentioned by the learned Trial Court are reproduced as under:

“3. Accused Mr. Talib has been prosecuted on the allegations that on 08.09.2013 at about 07:00 pm at the house of Ms. X, the minor prosecutrix aged about 12 years (name and address mentioned in the file and withheld to protect the identity of the minor prosecutrix) Madipur, Delhi, he had kidnapped the prosecutrix Ms. X; kidnapped her with the intention that she would be compelled to illicit intercourse; threatened her with threat to her life; and committed penetrative sexual assault upon her during the period from 08.09.2013 and 15.09.2013.

4. The name, parentage, address etc. of the prosecutrix are mentioned in the file and are withheld to protect her identity and she is hereinafter addressed as Ms. X, a fictitious identity given to her. Her mother is given a fictitious identity of Mr.Y and her father is given a fictitious identity of Mr.Z in order to protect the identity of the minor prosecutrix.”

3. In order to bring home the guilt of the accused person, the incriminating evidence and circumstances were put to the accused person during his statement recorded under Section 313 of Cr.P.C, wherein he claimed to have been falsely implicated in the present case and chose not to lead any evidence in his defence.
4. Mr. Amit Gupta learned counsel appearing for the State contended that the impugned judgment dated 15.09.2018 passed by the learned Trial Court was perfunctory in nature, full of conjectures and surmises, ignoring the well-settled proposition of law that the sole testimony of the victim of sexual offence is sufficient to base conviction of the accused. He further contended that the impugned

judgment is a case of legal defects and the trial court has failed to appreciate the testimony of the prosecutrix in its correct perspective, and therefore is liable to be set aside.

5. Learned APP for State further contends that the Learned Trial Court has failed to appreciate that the prosecutrix was minor at the time of the incident. He further states that the Trial Court completely ignored the fact that the testimony of the prosecutrix is consistent, cogent and there are no major omissions and contradictions in her testimonies. He further submits that the Trial Court failed to appreciate that there is a presumption under Sections 29 and 30 of POCSO Act against the respondent-accused and it is for the respondent-accused to prove to the contrary.
6. Per contra, Mr. Jitendra Kumar, learned counsel for the respondent contends that there is no infirmity in the impugned judgment passed by the learned Trial Court and no interference is called by this Court. He further contends that the testimony of prosecutrix is bristled with lot of contradictions, inconsistencies and improvements. She has given different versions in her statements recorded at different stages. The Learned Counsel however did not dispute the fact that the sole testimony of the prosecutrix in a case of rape is sufficient to convict the accused subject to condition that the same inspires confidence of the Court, but in instant case, the sole testimony of the prosecutrix is not sufficient to establish the case of rape against the respondent.
7. We have heard the learned counsel for the parties and carefully examined the impugned judgment and the material available on record as well.

8. The Trial Court in the impugned judgment while dealing with the matter has held that the testimonies of prosecutrix are inconsistent and there are material contradictions in her statements/testimonies recorded at various stages. The relevant portion of the impugned judgment is reproduced herein below:-

*“43. As per the prosecution version, Ms. X, the prosecutrix (PW2) was kidnapped from her house but in her statement under section 164 of the Cr.P.C. (Ex.PW2/C) she has stated that she had gone to her brother’s shop when the accused had come, gestured to her and she had gone with him. In her evidence before the Court, she has deposed that **“At about 7 pm, I was alone at home when a boy had come there.....At his instance and on his threats, I had gone with him to Karol Bagh in an auto. Accused had called me from my house to Sabji Mandi.....”***

44. Three different versions are coming forth in the different statements of the prosecutrix regarding the place from where she was kidnapped by the accused and no explanation for the same is given by the prosecution for the same which makes the place of incident unclear and consequentially, the prosecution story doubtful.

45. It is also important to mention that Ms.X, the prosecutrix (PW2) has failed to lead the police and identify the godown or the factor or the room where she was allegedly confined and raped by the accused. The places where the alleged offences were committed by the accused against the prosecutrix have neither been identified nor located nor detailed by the prosecution which also makes the prosecution version doubtful.

46. As the place from where the prosecutrix was kidnapped and the places where she was taken, confined and raped have not been proved by the prosecution, the prosecution story becomes unbelievable.

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74. *In her statement under section 164 of thye(sic) Cr.P.C (Ex.PW2/C), Ms.X, the prosecutrix (PW2) has stated that on a Sunday evening at 07:00 pm, she had gone to her brother's shop to bring vegetable. One boy was there who gestured her to come to him. She did not go anywhere except her house so she did not know where he had taken her. He took her in an auto and later she came to know that it was Karol Bagh. He used to stay opposite her house and used to tease her while going and coming. She believed him and sat in the auto with him. He took her to a godown and confined her there for two days. Then he took her to a room near the godown. He did the wrong act with her for a week. She did not know the way so she could not do anything. No one used to visit that room. Her family members searched for her and brought her back. The name of that boy is Talib and he is still in jail.*

75. *Ms. X, the prosecutrix (PW2) has deposed before the court as follows:*

“At about 7 pm, I was alone at home when a boy had come there. His name was Talib and he stayed in the house opposite my house. At his instance and on his threats, I had gone with him to Karol Bagh in an auto.

Accused had called me from my house to Sabji Mandi and when I reached there, he threatened to kill me in case I do not obey him. He then hired an Auto and took me to Karol Bagh. He took me to a factory (karkhana) where he confined me for three days. He took me to another room and removed my clothes. He did chedchad with me and also did balatkaar with me. He had put his private part into my private parts against my wishes. (apne susu karne wali jagah mere susu karne wali jagah me dal di). This happened only once.

There was one uncle in the factory but I do not know whether or not he was related to the Accused. There was no one else in the factory. I was confined in the factory for two days and the accused forcibly had physical relations with me.

Then the accused had taken a room near the factory and had kept me in confinement. I was not allowed by him to go out. If I tried to escape, he used to scold me.

I was confined for a week and the accused forcibly had physical relations with me several times. The same were without my consent.

Accused Talib had taken me to the house of his sister where my brother reached with the police. He tried to hide me but was not successful.”

76. It can be seen that there are several contradictions and inconsistencies in the two statements of Ms.X, prosecutrix (PW2) and the same are too major to be ignored. The same have neither been explained by the prosecutrix nor the prosecution and are blemishes which are fatal to the prosecution case indicating that the same is false. The prosecutrix and the prosecution have not been able to give any justification or explanation for the contradictions in her different statements. The contradictions are being tabulated below.

S. No.	Statement under Section 164 of the Cr.P.C (Ex.PW2/C)	Evidence before the Court
1.	<i>She had gone to her brother's shop to bring vegetable. <u>One boy was there who gestured her to come to him.</u></i>	<i>At about 7 pm, <u>I was alone at home when a boy had come there.</u></i>
2.	<i>She did not go anywhere except her house so she did</i>	<i>At his instance and on his threats, <u>I</u></i>

	<i>not know where he had taken her. <u>He took her in an auto and later she came to know that it was Karol Bagh.</u></i>	<i><u>had gone with him to Karol Bagh in an auto.</u></i>
3.	<i>No such mention.</i>	<i><u>Accused had called me from my house to Sabji Mandi and when I reached there, he threatened to kill me in case I do not obey him.</u></i>
4.	<i>No such mention.</i>	<i>He used to tease her while going and coming.</i>
5.	<i>She believed him and sat in the auto with him.</i>	<i>No such mention.</i>
6.	<i><u>He took her to a godown and confined her there for two days.</u></i>	<i><u>He took me to a factory (karkhana) where he confined me for three days.</u></i>
7.	<i>Then he took her to a room near the godown.</i>	<i>He took me to another room and removed my clothes.</i>
8.	<i><u>He did the wrong act with her for a week.</u></i>	<i>This <u>happened only once.</u></i>
9.	<i>No such mention.</i>	<i>There was one uncle in the factory but I do not know whether or not he was related to the Accused.</i>
10.	<i>No such mention.</i>	<i>I was confined in the factory for two days and the accused forcibly had physical</i>

		<i>relations with me.</i>
11.	<i>If I tried to escape, he used to scold me.</i>	<i>No such mention.</i>
12.	<i>No such mention.</i>	<i>Accused Talib had taken me to the house of his sister where my brother reached with the police. He tried to hide me but was not successful.</i>

77. Besides the above contradictions, improvements and inconsistencies, Ms. X, the prosecutrix (PW2) has made some deviations in her cross examination conducted on behalf of the accused. **Besides the above tabulated contradictions in the two statements of the prosecutrix, there are some more unbelievable versions coming forth in her cross examination, which also indicate that the accused has been falsely implicated in this case.**

78. It is also pertinent to appreciate the cross examination of the prosecutrix conducted on behalf of the accused. She has deposed in her cross examination that **“The accused had threatened to kill my brother and due to this reason, I was forced to go with him in the Auto to Karol Bagh. He did not threaten with knife or any other weapon. I did not shout for help and had accompanied the accused silently out of fear. I had not told the uncle in the factory that the accused had forcibly brought me there and was raping me repeatedly. Uncle used to give us food while we were in the factory. When I was confined in the room, accused used to bring food from some hotel and he used to lock me from outside. Accused had covered my face when he had taken me from the factory to the room. I did not shout for help as the accused had threatened to kill my brothers. The room did not have any window. I did not**

try to escape from the room or shout for help or contact the residents of the neighbouring rooms out of fear as the accused had threatened to kill my brothers. Accused had taken me to the house of his sister and the police had come there after we have reached his sister's house..."

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80. The prosecutrix has claimed that she was threatened by the accused. However, the effect of the alleged threats has not been disclosed anywhere. Neither the words used nor the impact of the threat have been furnished by the prosecution. Merely making a bald allegation that she was threatened does not suffice for convicting the accused as she remained in his association for a very long time and there was no reason why she could not have disclosed about the alleged threats to the Uncle in the Factory, to the people who met her while she was taken to the room, the neighbours of the room and others with whom she had come in contact with. **The fact that she chose to remain silent, only shows that there was no danger nor any threat. There should be some positive corroborating evidence. Her conduct, on the other hand, shows that she herself was in the company of the accused with her consent so much so that she went with him on his asking her, went to the factory/godown, went to the room and even the house of his sister.**

81. It is clear from the cross examination of Ms.X, the prosecutrix (PW2) that there was an Uncle in the factory who provided food to her. However, the prosecution has not been able to give any explanation as to why, she did not disclose to that Uncle that she was kidnapped by accused Mr.Talib, confined and raped by him. If she was so much suffering at his hands, why she did not tell about the same to the Uncle. The fact makes the prosecution version very doubtful.

83. *The prosecutrix apparently did not raise any alarm or shout for help or try to escape from the clutches of the accused despite due opportunities and no explanation for the same is coming forth from the prosecution. A normal reaction would have been to immediately shout for help or approach the persons available and telling them about such an incident. The same indicates that the prosecutrix had gone with the accused with her free consent.*

84. *Also, it cannot be ignored that in the leading question asked to her by the Additional Public Prosecutor, she has deposed that “It is wrong to suggest that the Accused was taking me to shopping in Karol Bagh when the Police had come.” and the same is contrary to her version in her statement under section 161 of the Cr.P.C dated 15.09.2013 (Ex.PW2/A).”*

9. It is a settled principle of law that conviction can be based on the sole testimony of the victim of sexual assault without corroboration from any other evidence and where the testimony of a victim of sexual assault instills confidence in the Court the same can be relied upon for conviction of the accused. It is also a well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the victim is not a requirement of law but a guidance to prudence under the given circumstances. In ***Mohd. Ali @ Guddu Vs. State of Uttar Pradesh***, reported in (2015) 7 SCC 272, the Apex Court has observed as under: -

“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 [Criminal Appeal No. 602 of 2006, decided on 25-3-2009 (All)] , 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.”

10. In view of the settled law, we shall now examine whether the evidence adduced by the prosecution, particularly the testimony of the victim is trustworthy, credible and can be relied upon or not. From the perusal of the statement/testimony of the prosecutrix we find that in her statement recorded under Section 164 of the Cr.P.C, she deposed *‘voh hume karkhana main leh gaya aur **doh din tak** karkhana main band rakha. **Doh din baad** usne dusra kamra liya jo karkhana keh paas tha. Usne mere sath **ek hafte tak galat kaam kiya. Hume rasta patah nahi that toh kuch nahi kar paye. Uss kamre main koi aatah jaatah nahi tha.**’* It is also pertinent to note, that in her statement recorded under Section 164 Cr.P.C, there are no specific allegations of penetrative sexual assault against the respondent however, in her deposition before court, she has altered her version and has stated that *‘he took me to a factory (karkhana) where **he confined me for three days. He took me to another room and removed my clothes. He did ‘chedchad’ with me and also did balatkar with me. He had put his private parts into my private parts against my wishes (apne susu karne wali jagah mere susu karne wali jagah me dal di). This happened only once. There was one uncle in the factory but I do not know whether or not he was related to the accused.**’* Moreover, as per the statement/testimony of the

prosecutrix the accused threatened her and took her in an auto and locked her inside a godown for 2-3 days, however, the prosecutrix neither took any steps to free herself from illegal confinement, nor did she raise any alarm while travelling in the auto or at the godown to gain attention of the passersby and neighbors or took any steps to approach the police authorities.

11. Further, the learned trial court has precisely taken the view that the medical evidence does not support the case of the prosecution because as per the medical examination (*i.e. MLC of the prosecutrix*) her hymen had an old tear with no external injuries on the body of the prosecutrix. Thereupon, even the FSL report does not support the version of the prosecution because the FSL report was concluded with the following datum:

“No male DNA was found in the source exhibits ‘1b’ & ‘1c’ (Vulval swab) ‘1d’ & ‘1e’ (Vaginal swab)”

12. As far as the age of the prosecutrix is concerned, we find from the perusal of the record that as per the school records, the date of birth of the prosecutrix is 22.07.2002. However the father of the prosecutrix as well as the Principal of the school failed to produce the application form of the school filled by the father, affidavit given by father of the prosecutrix at the time of taking admission in the school or any other documentary evidence such as records of Village panchayat, Municipal authorities, hospital record, Aadhar Card or ration card, to prove the age of the prosecutrix. Consequently, in our opinion the prosecution has failed to prove the age of the prosecutrix. Be that as it may, the presumption under Sections 29 & 30 of the

POCSO Act would be attracted, in the present case. However, the contradictory versions of the prosecutrix on material points at various stages of the proceedings create a serious doubt about the truthfulness of the statement/testimony of the prosecutrix.

13. Undoubtedly there is no dispute with the legal submission of the learned APP for State that conviction in a rape case can be based on the sole testimony of the prosecutrix if the same is consistent, credible and trustworthy. However, in the present case on cumulative reading and appreciation of the entire evidence on record we are of the considered view that the evidence adduced by the prosecution is unworthy of acceptance as the same is found to be replete with infirmities and found not to be supported by the testimony of any other witness. The testimony of the victim has large number of contradictions, inconsistencies, concealments, improvements and exaggerations which cast a shadow of doubt and does not inspire confidence. Therefore the prosecution has failed to establish the charges against the appellant/accused and consequently, this Court is of the opinion that the trial Court in the impugned order has correctly concluded as under:-

“128. The prosecution has failed to furnish any explanation in respect of the numerous contradictions, infirmities and inconsistencies in the statements of the prosecutrix and the prosecution witnesses. The inherent infirmities and inconsistencies strike at the very root of the prosecution story making it unbelievable and improbable.

129. Although in her examination in chief, Ms. X, the prosecutrix (PW2) ostensibly has supported the prosecution case but the above discussion shows that no

reliance can be placed upon her evidence. She neither shouted for help nor raised alarm nor made noise when the alleged offence was committed. She did not tell anyone about the alleged offence. No explanation from the prosecution is coming forth regarding the same.

130. In the instance case, the evidence of Ms. X, prosecutrix (PW2) suffers from such infirmities, inconsistencies and the improbabilities due to which the prosecution has come out with a story, which is highly improbable. The overwhelming inconsistencies are too major to be ignored and they strike a fatal blow to the prosecution version. In fact what emerges from the evidence of the prosecutrix and other prosecution witnesses is that the accused has not committed the alleged offences. There is no medical or forensic evidence against the accused.

131. The evidence of the other prosecution witnesses is not sufficient for convicting the accused as the evidence of Ms. X, the prosecutrix (PW2) is not reliable and trustworthy and the other witnesses are of official or formal nature.

132. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had committed the offences. In fact, it is borne out of the record that the defence of the accused appears to be correct that he is innocent.

133. Since the evidence of Ms.X, the prosecutrix (PW2) is neither reliable nor believable as there are overwhelming infirmities and inconsistencies in her different statements as well as in totality with the other evidence on record, the conscience of this Court is completely satisfied that the prosecution has not been able to bring home the charge against the accused. The prosecution story does not inspire confidence and is not worthy of credence.

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136. Consequently, no inference can be drawn that the accused is guilty of the charged offences as the

testimony of the prosecution witnesses is unreliable and unworthy of credence.

137. Onus is always on the prosecution to prove and accused is entitled to the benefit of reasonable doubt. Case of the prosecution is to be proved beyond reasonable doubt and cannot take support from weakness of case of defence. In case the evidence is read in totality and story projected by the prosecution is found to be improbable, prosecution case becomes liable to be rejected. Here, the presumption of guilt against the accused under the POCSO Act also stands rebutted.

138. If the prosecution evidence is read and considered in totality of circumstances along with other material on record, in which offence is alleged to have been committed, the deposition does not inspire confidence and is unreliable and unworthy of credence and in the absence of special circumstances, no conviction can be based on such evidence. Prosecution has not disclosed true genesis of crime.

139. The charge framed against the accused is under section 6 of the POCSO Act also and the presumption of guilt of the accused is against him. However, he has been able to successfully rebut the presumption of guilt, as discussed above.

140. The prosecution has miserably failed to prove that on 08.09.2013 at about 07.00 pm at the house of Ms.X, the minor prosecutrix aged about 12 years (name and address mentioned in the file and withheld to protect the identity of the minor prosecutrix) Madipur, Delhi, he had kidnapped the prosecutrix Ms.X; kidnapped her with the intention that she would be compelled to illicit intercourse; threatened her with threat to her life; and committed penetrative sexual assault upon her during the period from 08.09.2013 and 15.09.2013.

141. All the above facts indicate that there is no veracity in the prosecution case in respect of the offence of committing repeated penetrative sexual assault upon the prosecutrix after kidnapping and threatening her by

accused Mr.Talib and the accused merits to be acquitted for the offences under sections 363, 366 and 506 of the IPC and under section 6 of the POCSO Act.

142. Therefore, in view of above discussion, the conscience of this Court is completely satisfied that the prosecution has failed to bring home the charge against the accused Mr. Talib.

143. **Accordingly, Mr.Talib, the accused, is hereby acquitted of the charge for the offences of kidnapping the prosecutrix, with intention that she would be compelled to illicit intercourse, of threatening her to kill her brothers and of repeatedly committing penetrative sexual assault upon her punishable under section 363, 366 and 506 of the IPC and under section 6 of the POCSO Act.**

14. It is settled law that while deciding a leave to appeal petition filed by the State, in case two views are possible, the High Court must not grant leave, if the trial court has taken one of the plausible views, in contrast thereto in an appeal filed against acquittal. Upon re-appraisal of evidence and relevant material placed on record, in case, the High Court reaches a conclusion that another view can reasonably be taken, then the view, which favour's the accused, should be adopted unless the High Court arrives at a definite conclusion that the findings recorded by the trial court are perverse, the High Court would not substitute its own views on a totally different perspective.
15. Having regard to the principles laid down by the Apex Court in the case of ***Ghurey Lal vs. State of U.P.*** reported at ***2008 (10) SCC 450***, we do not find that there is any perversity in the reasoning given in

the impugned judgment and for the abovementioned reasons, this Court does not find any reason to interfere with the same.

16. Accordingly, the present leave petition, being bereft of merit, is dismissed.
17. Trial Court record be sent back along with a copy of this order.

SANGITA DHINGRA SEHGAL, J

MANMOHAN, J

NOVEMBER 5, 2019
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