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

Date of Decision: 19th March, 2019

+ **CRL.LP. 337/2018**

STATE(GOVT OF NCT OF DELHI)

....Appellant

Through: Mr. Tarang Srivastava, APP for State
with W/SI Manisha, PS New Friends
Colony

Versus

SHANKAR KAMAT

...Respondent

Through: None

CORAM:

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J (ORAL)

CRL. L. P. 337/2018

1. By the present Leave Petition filed under Section 378 (1) of the Code of Criminal Procedure (hereinafter referred as 'Cr.P.C.') the State seeks leave to appeal against the judgment dated 09.03.2018 passed by the learned Additional Session Judge-01, Special Court (POCSO) South East District, Saket Courts Complex, New Delhi, whereby the respondent (accused before the Trial Court) was acquitted of the charge punishable under Section 8 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO').

2. Brief facts of the case are as under:-

“(i) That DD No. 39-A was registered at Police Station New Friends Colony on 21.05.2014, in receipt of the information that a minor girl, Baby 'A' aged about 9 years has been sexually

assaulted, the said DD was marked to SI Seema(PW-6) and accordingly SI Seema along with ASI Shivraj arrived at the spot. The statement of the victim was recorded by SI Seema wherein she stated that on 21.05.2014, at about 12:00 pm, accused Shankar Kamat called her to his jhuggi, lifted her frock and sucked her breast. Consequently, she requested the accused to leave her, but despite her continuous requests the accused did not leave her and instructed her to not raise her voice.

(ii) Based on her statement recorded by SI Seema, FIR No. 212/14 was registered at Police Station New Friends Colony. During the course of investigation, the statement of the victim U/s 164 Cr.P.C was recorded on 22.05.2014 and the accused Shankar Kamat was arrested on 18.04.2015 vide arrest memo (Ex.PW6/4).

(iii) After the completion of investigation, the charge sheet was filed and after committal, arguments on the point of charge were heard and charges U/s 8 of the POCSO Act 2012 (hereinafter referred to as the "Act"), were framed against the accused, to which he pleaded not guilty and claimed trial."

3. To bring home the guilt of the respondent, the prosecution has examined 6 witnesses in all. Statement of the respondent was recorded under Section 313 of Cr.P.C. wherein he denied the charges framed against him and claimed to have been falsely implicated in the case. The respondent chose not to lead any evidence in his defence.
4. After hearing the counsels for both sides and on appreciation of entire evidence available on record, the learned Trial Court acquitted the accused for the charged offences.

5. Mr. Tarang Srivastava learned counsel appearing for the State contended that the impugned judgment dated 09.03.2018 is based on conjectures, surmises and the learned Trial Court has not appreciated the testimony of the prosecutrix in its right perspective ignoring the well-settled proposition of law that the sole testimony of the victim in the case of sexual assault is sufficient to base conviction of the accused.
6. Learned counsel for the State further contended that the learned Trial Court has placed undue weightage on the minor discrepancies in the testimony of the PW-1 (*the victim*) and PW-4(*mother of the prosecutrix*) contrary to which both the statements are consistent and corroborative in nature and there are no major omissions and contradictions in their testimonies. He further contended that the learned Trial Court had erred in disregarding the MLC of the victim, which categorically reveals that the victim was subjected to sexual assault. Counsel for the State has lastly urged that the trial court has not correctly appreciated the facts and circumstances of the case; hence, the impugned judgment is liable to be set aside.
7. I have given my anxious consideration to the submissions advanced on behalf of counsel for the State and also perused the material available on record.
8. Returning to the facts of the present case, the moot point involved for consideration in present leave petition is whether evidence adduced by the prosecution, particularly the testimony of the victim (PW-1) is trustworthy, credible and worthy of reliance.

9. From the perusal of the record it transpires that there are material contradictions in the testimony of the victim recorded by the police and the statement recorded under Section 164 of the Cr.P.C. As per her initial statement recorded by the police, she has emphatically stated that *“aaj dinank 21.05.2014 ko samay 12.00 baje, mere baba jo hamareh ghar se thora dur hei jhuggi main rehteh hain mujhe apni jhuggi main bulaya aur mere baba naih meri frock uthayi meri chatti par hath laganeh lageh aur meri chatti seh donoh taraf seh muh lagahkar dudh peeneh lageh. Joh maine apne baba seh kaha ki mujhe dard ho raha hain mujhe chor doh. Kafi der tak usne mujhe nahi chora aur mujhe kaha ki shor mat machana, main dard ki vajah seh roneh lagi tab mere baba naih mujhe chora aur kaha ki yeh baat ghar meh kissi ko mat batanah. Kuch der baad meri mummy mujhe dhundte hue vaha aayi aur mujhe vaha seh leh gayi. Maine dar keh karan apni mummy ko kuch nahi bataya. Jab meri mummy naih meri chatti dekhi aur mujhe pucha toh maine unhe bataya ki mujhe dard ho raha hain aur baba naih meri chatti par dant maar diya hain.”* However, when her statement was recorded under Section 164 of the Cr.P.C, she has altered her version and has stated that *“main bacho keh sath khel rahi thi. Maine apni mummy ko dekha to meh dar gayi. Main ghar meh aakar chup gayi. Aur jo mere sath chupeh thae unhoneh mujhe noch liya. Aur kuch nahi hua. Mujhe Nandu aur Lado neh nocha. Meri chatti par nocha.”* It is also to be given a vital concern, that in her initial complaint, there are specific allegations of sexual assault against the accused Shankar Kamat, but in her statement recorded

under Section 164 Cr.P.C she reveals that it was Nandu and Lado who have given teeth bites on her breast and assaulted her.

10. The prosecutrix was examined as PW-1 and during her examination-in-chief she deposed as under:-

"I made a statement to the police that my grandfather had molested me. I made the said statement upon asking of my mother. Against said no my mother did not ask me to say this and I stated to the police what happened with me. I do not remember the exact day but when I was studying in class IVth one day my grandfather Shankar touched my breast. It was evening again said it was noon. My grandfather is residing in separate house from us which is situated near to my house. He touched my breast in his house. I asked him to leave me and he left me. I started weeping and returned to my home where my mother asked me the reason for weeping and I narrated the incident to her. My relative Priyanka called the police. I do not know how she came to know about the incident.

X

X

X

My grandfather did nothing with me except touching my breast on that day."

11. During her cross examination she deposed as under:

"It is correct that on the day of incident I had worn frock. My grandfather did not suck my breast on that day. It is correct that my mother reached on that day at the house of my grandfather. It is correct that did not tell about the incident to my mother as my grandfather threatened me not to tell anything to anybody.

X

X

X

I was brought to the court for my statement by the police after the registration of the case and I made my statement before judge. I had stated true facts before the judge. It is correct that in 21.05.2014 at about 12.00 noon I was playing near my house

with children, it is correct that my mother came there and after seeing her I became frightened and hide myself. Nandu and Ladu bite me on my breast and I received teeth marks due to their biting. It is wrong to suggest that the complaint was made against my grandfather falsely on the instance of Priyanka. Vol. The complaint was made by me in anguish against my grandfather. It is correct that my grandfather did not touch on my breasts."

12. Accordingly, as per the testimony of prosecutrix she has deposed that she was sexually assaulted by the accused Shankar Kamat (*her grandfather*), but in her cross examination she deposed that her grandfather had not sucked her breast and the initial complaint against her grandfather was lodged because of anguish. Further during her cross examination, she has deposed that her statement which was recorded by the magistrate U/s 164 Cr.P.C. bears true facts and circumstances, wherein it is relevant to quote that in her aforesaid statement the prosecutrix altered her version and leveled specific allegations of sexual assault against her friends Lado and Nandu.
13. Ms. SD (*mother of the prosecutrix*), stepped into the witness box as PW-4 and deposed that:

"Baby 'A' is my daughter. Accused, Shankar Kamat, present in the court today, is my father-in-law. On 21.05.2014 Baby 'A' was playing with Lado and Nandu near a temple while I was washing clothes on the first floor. During play, Lado and Nandu gave scratch marks to Baby 'A' with nails and teeth bites on her breast. Baby 'A' told me that Lado and Nandu gave me scratch marks."

14. During her cross examination she deposed as under: -

“It is correct that on 21.05.2014 in the evening Baby ‘A’ complained me of pain in her breast and when I checked her, I found cut marks on her breast. It is wrong to suggest that when I asked her where she was in day time, she told me that she was with Baby ‘P’ or that I had stated so to the police. (Confronted with statement Ex.PW-4/PX-1 where it is so recorded at Point-A to A). It is correct that Baby ‘P’ made a call at 100 number. It is wrong to suggest that when I asked Baby ‘A’, she told me that at about 12 noon the accused gave cut marks on her breast and did wrong act with her or that I had also stated so to the police. (Confronted with statement Ex.PW-4/PX-1 where it is so recorded at Point-B to B). It is wrong to suggest that I had stated to the police that my father-in-law i.e. accused did wrong act with my daughter Baby ‘A’. (Confronted with statement Ex.PW-4/PX-1 where it is so recorded at Point-C to C).”

15. After examining the testimony of both the prosecution witnesses with regard to the alleged incident, it is observed that the story of the prosecution has a lot of astonishing defects from its inception. PW-4 (*mother of the prosecutrix*) has deposed that on 21.05.2014, her daughter was playing with Lado and Nandu near a temple and they both have given her nails and teeth bites on her breast and these facts were narrated to her by her daughter. Further during her cross examination she was confronted with her initial statement recorded vide Ex.PW-4/PX-1 and deposed that her father-in-law has not sexually assaulted her daughter and she has not lodged any complaint against him.

16. Having discussed the testimony of the victim and other prosecution witnesses in detail, I deem it appropriate to examine whether the ocular testimony of the prosecutrix finds any support with the medical evidence adduced by the prosecution. Dr. Deepika, Senior Resident, OBS and Gynae Department, AIIMS Hospital, New Delhi appeared on behalf of Dr. Kavita Khoiwal AIIMS Hospital, who had examined the victim on 22.05.2014 and proved her report as Ex.PW5/1 and opined that *'bruises were present over both breast surrounding area'* with *'no bleeding'* and the *'lesion appears due to teeth bite'*. She stepped into the witness box as PW-5 and deposed that:

"I have been deputed by the Medical Superintendent of the hospital authority to prove the MLC of victim 'AK' D/o Sh. 'GK' bearing number 10044/2014 dated 22.05.2014 prepared by Dr. Kavita Khoiwal who has left the hospital and her present whereabouts are not known and I am well conversant with her hand writing and signature as I have seen her during writing and signing the documents in official course. After seen the abovementioned MLC, I identified her hand writing and signatures upon the same. MLC is Ex.PW5/1 bearing the signature of Dr. Kavita Khoiwal at point A."

17. Perusal of the MLC of the prosecutrix (Ex.PW5/1) shows that bruises were present over both breasts surrounding area with presence of teeth bites. But since the testimony of the prosecutrix is inconsistent and is not trustworthy, no reliance can be placed on the MLC of the prosecutrix. With regard to the evidentiary value of the medical evidence, the Hon'ble Supreme Court of India in a very recent judgment titled as ***Balvir Singh Vs State of Madhya Pradesh*** (Crl. A.

1115/2010) decided on **19.02.2019**, has specified that oral evidence always has supremacy over medical evidence as the latter can only be considered as opinionative in nature. Relevant part from the aforesaid judgment is extracted below:

“26. It is well settled that the oral evidence has to get primacy since medical evidence is basically opinionative. In RamanandYadav v. PrabhuNathJha and others (2003) 12 SCC 606, the Supreme Court held as under:-

“17. So far as the alleged variance between medical evidence and ocular evidence is concerned, it is trite law that oral evidence has to get primacy and medical evidence is basically opinionative. It is only when the medical evidence specifically rules out the injury as is claimed to have been inflicted as per the oral testimony, then only in a given case the court has to draw adverse inference.”

The same principle was reiterated in State of U.P. v. Krishna Gopal and another (1988) 4 SCC 302, where the Supreme Court held “that eyewitnesses’ account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

18. Retracing the version of the Hon’ble Apex Court in the case of ***Yogesh Singh vs. Mahabeer Singh and others*** reported in ***AIR 2016 SC 5160***, it has been held that the medical evidence is only corroborative in nature and not conclusive. The germane portion of ***Yogesh Singh (Supra)*** is extracted below:

“In any event, it has been consistently held by this Court that the evidentiary value of medical evidence is only corroborative and not conclusive and, hence, in case of a conflict between oral evidence and medical evidence, the former is to be preferred unless the medical evidence completely rules out the oral evidence. [See

SolankiChimanbhaiUkabhai Vs. State of Gujarat, (1983) 2 SCC 174; Mani Ram Vs. State of Rajasthan, 1993 Supp (3) SCC 18; State of U.P. Vs. Krishna Gopal&Anr., State of Haryana Vs. Bhagirath, (1999) 5 SCC 96; DhirajbhaiGorakhbhaiNayak Vs. State of Gujarat, (2003) 5 SCC 223; Thaman Kumar Vs. State of U.T. of Chandigarh, (2003) 6 SCC 380; Krishnan Vs. State, (2003) 7 SCC 56; Khambam Raja Reddy &Anr. Vs. Public Prosecutor, High Court of A.P., (2006) 11 SCC 239; State of U.P. Vs. Dinesh, (2009) 11 SCC 566; State of U.P. Vs. Hari Chand, (2009) 13 SCC 542; Abdul Sayeed Vs. State of M.P., (2010) 10 SCC 259 and Bhajan Singh @ Harbhajan Singh &Ors. Vs. State, 2011) 7 SCC 421].

19. In view of the above, the medical examination report also does not lend any support to evidence of the prosecutrix. There is no dispute with the proposition sought to be urged by counsel for the State that there is no bar in law to convict the accused on the basis of the sole testimony of the victim, however, the Court must be satisfied that the testimony of the victim is of sterling quality and inspires confidence.
20. In the present case, on a cumulative reading and appreciation of the entire evidence on record, I am of the considered view that the evidences on record have been held to be unworthy of acceptance because the same is found to be replete with infirmities. There are considerable inconsistencies and discrepancies in the statement of the witnesses, which consequently makes it fabricated and unreliable. Therefore, the prosecution has failed to disclose the true genesis of the crime and establish the charges against the accused punishable under the POCSO Act.

21. It is a 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 there to 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 favor'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.
22. 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**, I do not find that there is any illegality or perversity in the reasoning given in the impugned judgment. The learned trial court has taken a holistic view in the matter and carefully analyzed the evidence of all the witnesses. Accordingly, no ground to interfere with the impugned judgment is made out and the leave petition is disposed of.
29. Trial Court Record be sent back along with a copy of this order.

SANGITA DHINGRA SEHGAL, J

MARCH 19, 2019
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