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

Date of Decision : 10th May, 2019

+ CRL.L.P. 484/2018

STATE

..... Petitioner

Through: Ms.Aashaa Tiwari, APP for State

versus

SANJAY

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J

1. The present leave petition has been filed under Section 378(3) of the Criminal Procedure Code, 1973 (hereinafter referred to as 'Cr.P.C') challenging the judgment dated 24.03.2018 passed by the learned Additional Sessions Judge, Special Courts (POCSO), North West, Rohini Courts, New Delhi, acquitting the respondent-accused in FIR No. 458/2014 registered with Police Station, South Rohini under Sections 376(2)(i)(l) & (n) of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 6 of POCSO Act.
2. Brief facts of the case, as noticed by the learned Trial Court, are as under:-

“On 10.06.2014, victim N was sleeping in the jhuggi at about 2:00 pm. The complainant came out of the jhuggi to go for bathroom and her younger sister M was playing outside the jhuggi. She went in the jhuggi to sleep and immediately came out and told the

complainant that Sanjay Chacha (accused) is doing something with victim. She entered the jhuggi and saw victim lying on the bed and her pajama was removed. The accused had opened the zip of his pant and he was holding the legs of the victim and was inserting his sus wali jagah in the susu wali jagah of the victim. He immediately locked the zip and the victim also put on her pajama. When she asked as to what accused was doing, he said that he was repairing the fan. The complainant immediately went to the jhuggi of accused and shouted at his mother and sister as to what the accused is doing with the victim. They immediately came to her jhuggi and started scolding the accused. The accused earlier also had done wrong act with the victim on two occasions but the mother of the victim had pardoned him as the wife of the accused has already expired. This was third time that accused has done this act with the victim and hence his complaint was lodged.”

3. On 12.06.2014, the statement of the victim under Section 164 Cr.P.C was recorded with the help of one teacher from the deaf school, Sector -4, Rohini, Delhi wherein she stated that he removed her salwar when she was sleeping and forcibly made physical relationship.
4. During the course of investigation, the accused was arrested and he was medically examined and pending report, the charge sheet was filed and charges for the offence punishable under Section 6 of POCSO Act and in the alternative offence punishable under Section 376(2)(l) and(n) of the IPC were framed against the accused to which he pleaded not guilty and claimed trial. In order to bring home the guilt of the accused, the prosecution has examined 17 witnesses in all.

5. Statement of the accused was recorded under Section 313 of Cr.P.C wherein he denied all the incriminating evidence against him. Accused claimed that he is innocent and he has been falsely implicated in this case. He further deposed that a complaint has been lodged by mother of the accused against the mother of the victim and thereafter the present story was cooked up to falsely implicate the accused.
6. Learned counsel for the State has contended that the impugned judgment dated 24.03.2018 passed by the learned Session Judge is based on conjecture and surmises and the same is liable to set aside; that the trial court has failed to appreciate that the testimony of PW-4 (prosecutrix) in correct perspective and has ignored the settled provision of law, that in a rape case conviction of the accused can be solely based on the testimony of the prosecutrix; that the trial court failed to appreciate that the testimonies of eye witnesses, PW-8 (Megha/younger sister of the victim) and PW-9 (Complainant/sister of the victim) have fully supported the case of prosecution and have also proved that the victim was deaf and dumb both; that the trial Court ignored the Scientific and Medical evidence on record which proves the guilt of the accused person beyond reasonable doubt.
7. None appeared on behalf of the Respondent.
8. Heard learned counsel for the State and perused the material available on record.
9. It is a settled principle of law that conviction can be based on the sole testimony of the victim of sexual assault and if the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars.

At the outset, we deem it appropriate to examine the testimonies of material witness i.e. PW-4 (Prosecutrix), PW-8 (Megha/younger sister of the victim), PW-9 (Complainant/sister of the victim) and PW-13 (Mother of the victim). As per the story of the prosecution the prosecutrix is deaf and dumb and the statement of prosecutrix under Section 164 Cr. P.C. (**Ex.-PW-3/A**) was recorded with the help of PW-3 (Rita Kanojia/Assistant Teacher) interpreter, brought by the Investigating Officer, which reads as under:-

- “1 - Apka naam kya hai?
A - Neha.
2. - Kya Hua aapke saath?
A - Usne Meri Salwar Utari jab mei so rahi thi aur Jabardasti sharirik sambandh banae.
3. - Kahan so rahi thi?
A - Ghar mei.”

The prosecutrix during her examination-in-chief deposed as under:-

“At this stage, Ms. Rita Kanojia has also been requested to assist the Court.

Q - Batao accused ne apke sath kya kiya tha?

Ans. - The witness has made gesture which has been interpreted by Ms. Rita Kanojia who stated that the witness is stating that ‘ki mein so rahi thi, accused ne pajami nikal di’.

At this stage, the witness has been shown slugs (legging) which Ms. Kanojia is wearing and the witness has responded by nodding her head, the gesture has been interpreted by Ms. Rita Kanojia who state that the witness was wearing a legging which was removed by accused.

Q. - Uske baad kya hua tha?

Ans. - The witness has made gesture which has been interpreted by Ms. Kanojia by stating that the younger sister of the child (other than child K) had seen the incident and that the said child went to call others.”

10. PW-8 (Megha/younger sister of the victim) during her examination in chief deposed as under:-

“Q. Phir kya hua?”

Ans. Maine ghar me Sanjay ko dekha.

Q. Sanjay kya kar raha tha?

Ans. Sanjay meri behein Neha ko kheech raha tha.

Q. Aur kya kar raha tha?

Ans. Sanjay meri behein Neha ke sath gandhi harkat kar raha tha.

Court Ques. Sanjay apki behein ke sath kya gandhi baat kar raha tha?

Ans. Sanjay ne apni pant ki chain kholi hui aur meri behein ki pajami uttari huyi thi.

Court Ques. Apki behein ki pajami kaisi thi?

Ans. Who elastic (slacks) wali pajami thi.

Q. Phir kya hua?

Ans. Usne meri behein ka muah bandh kar rakha tha aur apna susu karnewala uske susu karnewali jagah par dal raha tha.

Q. Phir kya hua?

Ans. Usne pankhe (fan) ka tar (wire) nikal liya tha.

Q. Phir kya hua?

Ans. Mein uski (Sanjay) ki maa ko bulane gayi thi”

11. PW-9 (Complainant) during her examination in chief deposed as under:-

“Mein apni choti behein Megha Ke sath ghar ke bahar 10.6.2014 ko khel rahi thi. Uss samay 02:00 PM the. Maine Megha Ko bola ki tu andar (inside the house) chali ja aur so ja (go to sleep). Uss samay meri badi behein Neha ghar par akeli thi aur so rahi thi. Meri behein Megha ghar ke andar gayi aur darr gayi. Woh kar mujhse boli ki dekho Sanjay Chacha kya kar rahe hai. Meri behein Megha ne mujhe bataya tha ki Sanjay Chacha ne apni pant ki chain kholi thi aur Neha ki slacks uteri huyi thi (objected to being hearsay). Megha ne bataya ki

Sanjay apni susu karnewala Neha ki susu karnewali jagah par dal raha tha. Mein ghar ke andar gayi aur maine bhi yeh sab dekha tha.

Court Ques. Beta apne kya dekha tha?

Ans. Maine dekha ki Sanjay apni susu karnewala Neha Ki susu karnewali jagah par dal raha tha.

Woh (Sanjay) mujhe dekh kar darr gaya tha. Usne apne sir par towel dala (he put towel on his head) aur bola ke keh dena ki mein pankha (fan) thi karne (repair) aaya tha.”

During her cross-examination the witness deposed as under:-

“Yeh baat sahihai ki mein apne aas pados ke ghar me rehnewale logo ko janti hu. Ghatna ke samay aur uske baad maine apne aas padosiyo ko nahi bulaya tha. Uss din meri mummy kaam se sham ko 4 baje aa gayi thi.

XXXX XXX XXXX XXX

Mere ko policewali aunty ne ek paper padne ko diya tha. Uss par maine jo bayan (statement) police ko di thi woh likhi thi. Meri behin Megha ko bhi policewali madam ne bataya tha ki aaj kya bolna hai.”

12. PW-13 (Mother of the prosecutrix) during her examination in chief deposed as under:-

“On 10th day of 6/7th month of year 2014, I and my husband went to our respective work places. Our all three daughters remained at home. My eldest daughter N was sleeping inside the Jhuggi and my daughters K and M were playing outside the jhuggi. My daughter K told child M to go inside the jhuggi to sleep. When child M went inside the room, she came out immediately and informed child K that ‘dekho andar Sanjay chacha kya kar raha hai’. Child M informed child K that Sanjay chacha was doing wrong act with child N.

Ques: What do you mean by wrong act?

Ans: Sanjay ne apni susu child N ki susu me dal di thi.

Child M came to call me at my work place and she informed me about the aforesaid incident (objected to being hearsay). Thereafter I reached home. I slapped accused and his mother and sister started quarelling with me. Accused fled away from there. Earlier also on two occasions, accused had committed wrong act with my daughter N but due to social stigma matter was not reported to the police.”

13. From the perusal of the aforesaid testimonies it transpires that there are various contradictions and inconsistencies in the statement of these material witnesses:-

- a. The prosecutrix during her testimony stated that ‘*Usne Meri Salwar Utari jab mei so rahi thi aur Jabardasti sharirik sambandh banae*’ however during her examination-in-chief she failed to depose who removed her pajami.
- b. PW-8 (Megha/younger sister of the victim) during her examination-in-chief deposed that ‘*Sanjay ne apni pant ki chain kholi hui thi aur meri behein hi pajami uttari hui thi. Woh elastic (slacks) wali pajami thi. Usne poankhe (fan) ka tar(wire) nikal liya tha. Mein uski (Sanjay) ki maa ko bulane gayi thi*’ to the contrary PW-9 (Complainant/sister of the victim) deposed that ‘*Meri behein Megha ne mujhe bataya tha ki Sanjay Chacha ne apni pant ki chain kholi hui thi aur Neha ki slacks uteri hui thi (objected to being hearsay). Megha ne bataya ki Sanjay apni susu karnewala Neha ki susu karnewali*

jagah par dal raha tha. Mein ghar ke andar gayi aur maine bhi yeh sab dekha tha'. The version of the both the sisters are inconsistent. As per PW-8 on seeing her, the accused stopped the alleged act and pretended to be repairing the fan, however, as per PW-9 when she was informed by PW-8 about the alleged offence, she entered the jhuggi and she herself saw the accused committing the same act with the victim. The prosecution failed to explain that once on seeing PW-8, the accused had stopped the alleged sexual assault then how PW-9 saw the alleged sexual assault again.'

- c. PW-8 (Megha/younger sister of the victim) during her examination-in-chief deposed that 'Mein uski (Sanjay) ki maa ko bulane gayi thi' but nowhere PW-8 has deposed in her examination-in-chief that she had informed about the alleged incident to PW-9.
- d. As per the testimony of both the witnesses i.e. PW-8 and PW-9, they were playing outside the Jhuggi and their sister (prosecutrix) was sleeping inside the Jhuggi. The version of both the witnesses appears to be at variance, as in their testimonies they failed to disclose when the accused gained entry inside the Jhuggi, while they were playing outside.

14. Having discussed the testimony of the prosecutrix and other prosecution witnesses, we deem it appropriate to examine the medical and scientific evidence adduced by the prosecution. Dr. Priyanka

Dahiya, Senior Resident (OBS and Gynae), Dr. B.S.A. Hospital, Delhi appeared on behalf of Dr. Ritwika Kaushik, who had examined the victim on 11.06.2014 at 09:40 pm and proved the MLC as (Ex.PW-6/A) and opined that 'the patient did not have any injury on her genital area, though her hymen was found torn'.

Mr. V. Sankaranarayanan, Sr. Scientific Officer, FSL, Rohini entered into the witness box as PW-15 and proved the FSL report as (EX.-PW15-A) and (Ex.PW-15/B), the relevant portion of the FSL report (Ex.PW-15/B) reads as under:-

“ **CONCLUSION**

*The DNA (Star analysis) profiling performed on the source of Exhibit '1m (ii), i.e. micro-slide (of victim Neha) and Exhibit '3' i.e. gauze cloth piece (of accused Sanjay) was sufficient to conclude that the DNA profile of source of Exhibit '3', i.e. gauze cloth piece (of accused Sanjay) is **dissimilar** to the DNA profile from the source of Exhibit '1m (ii)', i.e. micro-slide (of victim Neha)'*

15. Perusal of the MLC of the prosecutrix (Ex.PW-6/A) does not show any forcible sexual assault on the prosecutrix. Moreover, the FSL report (Ex.PW-15/B) also failed to establish the case of the prosecution as the report clearly opined that 'the DNA profile of source of Exhibit '3', i.e. gauze cloth piece (of accused Sanjay) is **dissimilar** to the DNA profile from the source of Exhibit '1m (ii)', i.e. micro-slide (of victim Neha)'.
16. In view of the above, the medical examination report and scientific report does not lend any support to evidence of the prosecutrix. The testimony of the PW-4 (Prosecutrix), PW-8 (Megha/younger sister of

the victim), PW-9 (Complainant/sister of the victim) and PW-13 (Mother of the victim) are inconsistent and contradictory to each other. Moreover, as per the testimony of PW-2 (father of the prosecutrix) and PW-13 (mother of the prosecutrix) on 10.06.2014 in the evening, there was a quarrel between PW-13 and mother of the accused and on 11.06.2014 in the morning the mother of the accused had lodged a complaint against both PW-2 and PW-13. Hence, the defence raised by the accused that he has been falsely implicated in the present case as her mother had filed a complaint against PW-2 and PW-13 cannot be lost sight of as the FIR in the present case has been lodged on 11.6.2014 at 11:30 pm, approximately after 24 hours of the incident.

17. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are 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 unreliable. Therefore, the prosecution has failed to establish the charges against the accused punishable under 376(2)(i)(l) & (n) of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and Section 6 of POCSO Act.
18. 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.

19. 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 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.
20. Accordingly, no ground to interfere with the impugned judgment is made out and the leave petition is dismissed.
21. Trial Court Record be sent back along with a copy of this order.

SANGITA DHINGRA SEHGAL, J

MANMOHAN, J

MAY 10, 2019
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