

#J-2

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

**Judgment Reserved On: 11.03.2019**

**Judgment Delivered On: 29.04.2019**

**CRL.L.P 589/2018**

**STATE (NCT OF DELHI)**

..... Petitioner

versus

**JITENDER SHARMA**

..... Respondent

**Advocates who appeared in this case:**

For the Petitioner : Mr. Ravi Nayak, APP with SI Sandeep, PS- Begumpur, Inspector  
Suman Kumari, Community Policing Cell, Outer District  
For the Respondent : Mr. Manu Sharma, Ms. Mahima Wahi and Mr. Kartik Khanna,  
Advocates

**CORAM:**

**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL  
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**J U D G M E N T**

**SIDDHARTH MRIDUL, J.**

1. There can be no manner of doubt that a conviction for committing penetrative sexual assault can be sustained on the sole testimony of the prosecutrix. [Ref: State (GNCT Of Delhi) vs. Vicky @ Karan & Anr. reported as **2019 (1) JCC 322**; State (GNCT Of Delhi) vs. Kuldeep @ Kallu

& Anr. reported as 2019 (1) JCC 298 (Del); Boby vs. State, CrI.A 1119/2014; Vishnu (alias) Undrya vs. State of Maharashtra reported as (2006) 1 SCC 283; State of M.P vs. Dayal Sahu, reported as (2005) 8 SCC 122)]. However, it is equally well established that, the testimony of the prosecutrix must be creditworthy and inspire confidence.

2. The State has instituted the present petition seeking grant of leave to assail the judgment dated 30.05.2018, in Session Case No.21/2013, arising out of FIR No.19/2013 (hereinafter referred to as the 'subject FIR') under sections 376 Indian Penal Code, 1860, read with sections 04 of Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO') registered at Police Station-Begumpur, Delhi; whereby the respondent Jitender Sharma was acquitted of the aforementioned charges.

3. The gravamen of the charge, for which the appellant has been convicted, is for having committed rape upon his own daughter/the prosecutrix, a girl aged about 13 years, at the time of commission of the offence.

4. The facts of the case as borne out from the record are that on 17.01.2013 vide DD No.26A, on a PCR call was recorded regarding rape by father with his daughter, aged 8 years at H.No B-1970, Kashmiri Block, Jain Nagar, Delhi. SI Dinesh along with Ct. reached the house where the mother

of the victim met and reported rape by her accused husband with two minor daughters V aged 8 years and M aged 13 years. NGO was called and victims were taken to SGM hospital where they were medically examined and the complainant S gave her statement that she is a house wife and has four daughters and a son and her husband runs a factory. On 11.01.2013, her husband committed wrong act with daughter V after taking her to some other room and also threatened her not to tell anything to anyone or else she will be killed. On 13.01.2013 when she was cleaning the house, she found one blood stained underwear of victim V under the bed. On inquiry, she told that her father lifted her from the bed in the night and lied her on a sofa and gave her some tablet after which she was feeling sleepy and then he inserted his *'shushu wali jagah in her shushu wali jagah'* and when she was feeling pain then her father again brought her back to the bed. She was conferring about this incident with her family members and did not report the commission of the offence to the police, but when her elder daughter M who was living with her maternal grandmother came and informed that, her father committed wrong act with her, as well, which the former did not disclose because of fear, the complainant came to Police Station and lodged the FIR. After medical examination of the victim M, her statement u/s 164 Cr.P.C. was recorded. IO collected the date of birth proof of the victim and sent

sample (cotton wool swab on a wooden stick of victim M ) to the Forensic Science Laboratory (hereinafter referred to as 'FSL'). The accused was arrested in between and was medically examined and while awaiting FSL result, the present chargesheet was filed.

5. By way of order dated 20.05.2013, a charge was framed against the appellant for the commission of offences u/s 4 of POCSO Act read with u/s 376IPC and u/s 328 IPC along with section 506 IPC to which the appellant pleaded not guilty and claimed trial.

6. In order to prove the charges against the accused, prosecution examined as many as 15 witnesses, whereafter the statement of the accused u/s 313 Cr.P.C was recorded, wherein he claimed himself to be innocent and stated that he had been falsely implicated in the case by his wife, the mother of the child victim M, due to matrimonial dispute. The Appellant chose to examine three witness in his defence including himself.

7. There is no gainsaying the fact that, the star witness of the prosecution is the victim M. The complainant PW-13 (mother of prosecutrix), it is observed, subsequently turned hostile.

8. It would, therefore, be necessary and appropriate to extract the victim's testimony in extenso:

“Q. Beta batao kya hua tha ?

Ans. Papa ne galat kaam kiya tha

Q. Kab kiya tha ?

Ans. Raat ko jab hum so rahe the .

Q. Kya galat kaam kiya tha ?

Ans. Papa ne apni toilet wali jagah meri toilet wali jagah me dal di.

Q. Phir kya hua ?

Ans. Kuch nai.

Q. Apko kuch pareshani hui ?

Ans. Dard hua

Q. Apne kisi ko batay?

Ans. Nahi. Mummy ko baad me batay.

Q. Mummy ko tab kyu nahi bataya ?

Ans. Papa ne dhamkaya tha ki who hume jaan se mar denge..

Q. Kisko mar denge?

Ans. Mujhe aur mummy ko.

Q. Kya papa ne pehle bhi kabhi aisa galat kaam apke sath kiya tha ?

Ans. Kai bar

Q. Kya aap pehle bhi court me aaye the ?

Ans. Ha

Q. Kya tab bhi apne yeh sab bataya tha ?

Ans. Ha

**[ At this stage, the witness has been shown her statement u/s 164 Cr.P.C Ex-PW-2/B and after reading the same, she states that said statement was given by her . she also identifies her signatures at point “A” thereupon. ]**

XXXX By Sh. Ravi Kant Singh, Learned counsel for accused.

Q. Aap Kashmiri colony se pehle kaha rehte the ?

Ans. Shastri nagar

Q. Aapko waha ka pura address pata hai ?

Ans. WZ-45, Nimri Village .

Q. Who ghar aapka apna tha?

Ans. Ha

Q. Woh ghar kyun bechna pada?

Ans. Pata nahi

Q. Aapko mummy jyada pyar karti hai yah papa ?

Ans . Mummy

Q.Aap kiska kehna jyada mante ho papa ka yah mummy ka?

Ans. Mummy

Q. kya apke mummy papa me jhgada hota tha ?

Ans. Kabhi kabhi hota tha

Q. Kisbaat par hota tha ?

Ans. Pata nahi

Q.Jab mummy papa ka jhagda hota tha toh kya who kabhi police station bhi gaye the ?

Ans. Nahi

Q. Apke papa apke sath kab se galat kam kar rahe hai /

Ans. Pichle saal se (2012)

Q. Kya aap ko mummy ne kabhi koi dawai dil wayi thi?

Ans. Jab bimar hote the tab dawai dil wati thi

Q.kya aapka kabhi operation hua hai ?

Ans. Ha, harniya ka

Q. kya Vanshika ka bhi harniya ka operation hua hai ?

Ans. Pata nahi

Q.Kya apne Vanshika ke paith par operation ka Nishan dekha hai ?

Ans. Nahi

Q. Kya aap sab bhai behein school jate hai ?

Ans . Ha

Q.Apka school kitne baje shuru hota hai ?

Ans. Garmiyo me 7 baje sur sardiyo me 7:30 baje.

Q.School jane ke liye apko kaun tyar karta hai. Mummy yah papa ?

Ans. Mein khud tayarhoti hu

Q.Aapke bhai behen ko kaun tayar karta hai ?

Ans. Who bhi khud tayar hote hai.

Q.Savere ka khana kaun banata hai ?

Ans. Mummy

Q.Kya apko ghar ka kaam aata hai ?

Ans. Ha

Q. Kya kya kaam aata hai ?

Ans. Sab kaam aata hai, zaroo pocha bartan par kapde nahi doti.

Q. Ghar ka kaam kaun karta hai?

Ans. Mummy karti thi. Aap mummy bimar rehti hai toh mere se choti behein maddad kerti hai.

Court Ques. Aap maddad nahi kerte ho ?

Ans. Mein nani ke har rehti hu.

Court Ques. Aap nani ke ghar kab se reh rahe ho ?

Ans. August, 2012.

Court Ques. Toh papa galat kaam kab karte the ?

Ans. Uss se pehle( august, 2012 se pehle)

Q. Jab papa galat kaam karte the tab mummy ke alawa ghar me kisi aur bade ko apne bataya ?

Ans. Ghar me mummy ke alawa aur kisi ko bataya nahi tha

Q.Kya papa ne shastri nagar ke ghar me bhi galat kam kiya tha?

Ans. Nahi

Q.kya papa apko nashe ki goli khilate the ?

Ans. Nahi.”

(Emphasis supplied )

**9.** On a conspectus of the material evidence on record, there are two issues that arise for consideration in the present leave petition.

**10.** The first issue that needs determination is, as to whether the prosecution has been able to establish the date of birth of the victim, so as to bring home the guilt of the accused under the ambit of the provisions of the POCSO Act.

**11.** The second issue upon which the determination of the present leave petition hinges, is as to whether the testimony of the victim can be said to be creditworthy and reliable.

**12.** Insofar as, the first question is concerned, it is an admitted position that, the IO (PW-15) has proved on record the date of birth certificate issued

by Municipal Corporation of Delhi qua victim M [Ex.Pw-15/L]. As per the certificate, the date of birth of victim M is 27.12.1999. Evidently no cross - examination of the IO on behalf of the accused in respect of the said document. The prosecution has therefore proved that the victim was a minor at the time of commission of the alleged sexual assault, by the accused.

**13.** Insofar as, the more significant second issue is concerned, the learned Trial Court, after examining the material evidence on record and in particular the testimony of the victim and after hearing counsel for the parties, found that there were substantial material improvements in the statement of victim M, i.e. PW-4, which have the effect of rendering her testimony highly unreliable.

**14.** In her statement made to the police on 18.01.2012 Ex.PW-15/D victim M stated that her father took her to another room, removed her clothes, touched her here and there and threatened to kill her mother. However, in her statement recorded under Section 164 Cr.P.C., as well as, her testimony in Court, the victim M gave an altogether different story. In her statement made under Section 164 Cr.P.C. to the learned MM she asserted that her father had committed wrong acts with her on numerous occasions, after removing their clothes and that he used to insert his *peshab wali jagah* in her *peshab wali jagah*. In her subsequent testimony in Court, she made

considerable improvement and contradicted herself by specifically stating in her cross-examination that her father had never given her any intoxicating medicine or tablet, which belies her earlier testimony to the effect that he used to administer some tablets to her.

**15.** Mr. Ravi Nayak, learned Additional Public Prosecutor would vehemently urge that, based on the testimony of the victim, the offences for which the accused was charged, by the prosecution had been proved beyond a reasonable doubt.

**16.** Mr. Ravi Nayak, learned Additional Public Prosecutor has taken us through the testimony of the prosecutrix in Court as hereinbefore extracted, as well as, her statement made under section 161 of Cr.P.C at the concerned police station on 18.01.2013 [Ex.Pw-15/d]; and before the Magistrate concerned under section 164 of Cr.P.C on 18.01.2013 [ Ex.Pw-2/B], to urge that, the same is cogent, consistent and creditworthy.

**17.** *Per Contra*, The counsel for the respondent would submit that there are substantial material improvements in the statement of Victim M which renders her testimony highly unreliable as, in her statement to police she stated that accused fondle her here and there, whereas in her statement to Ld.MM u/s 164 Cr.P.C stated that her father had committed wrong act with her many times after removing his and her clothes and he use to insert “his

*peshab wali jagah (penis) in her peshab wali jagah (vagina)”. Also, victim M categorically denies administration of any soporific tablet/medicine to her by the respondent.*

**18.** The counsel for the respondent would also urge that the victim M is stated to have been residing with her maternal grandmother post the alleged incidents of sexual assault, and the latter who could have been a material witness has not been examined by the prosecution.

**19.** Further, the Forensic Science Laboratory (FSL) result [Ex.Pw-PX] is not conclusive. In this regard, it would be apt and necessary to extract relevant finding in it as hereunder:

“Exhibit ‘1c’: Cotton wool swab on wooden stick( of Prosecutrix Mansi)

Exhibit ‘5’: Brown Gauze cloth piece described as ‘Blood sample’ ( of accused)

**RESULTS**

Exhibit ‘1c’, i.e.: Cotton wool swab on wooden stick ( of Prosecutrix Mansi)

it could not be compared with that of exhibit ‘5’, i.e. blood stained gauze cloth piece (of accused ).”

(Emphasis supplied)

**20.** In view of the foregoing discussion, in our considered view, the prosecution has established the guilt of the appellant beyond reasonable doubt. There is no gainsaying in position of law and there can be no quarrel with the proposition that when the testimony of the prosecutrix is

unimpeached and beyond reproach, the conviction of the appellant can be sustained based solely on it. However, in the instant case the statement of the prosecutrix is shaky, inconsistent and cannot be relied upon in addition to the incident itself being reported 6 months after the alleged commission of the crime. Further the report of FSL report is inconclusive and does not in any manner establish the commission of the offence by the respondent.

21. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are of the considered view that the evidence of the prosecution is unworthy of acceptance, since the same is found to be replete with infirmities and not supported by the medical evidence on record.

22. There is no gainsaying the legal position that when two views are possible, the appellant court should not reverse a judgment of acquittal, merely because another view was possible. [Ref: K. Prakashan vs. P.K. Surenderan, reported as (2008) 1 SCC 258] Where two views are reasonably possible from the very same evidence, the prosecution cannot said to have prove its case beyond reasonable doubt. [Ref: T. Subramanian vs. State of Tamil Nadu reported as (2006) 1 SCC 401] If the High Court on reappraisal of the evidence considers the possibility of another view being reasonably be plausible, then the view which favours the accused should be adopted unless the High Court returns a definite conclusion that the findings

recorded by the trial court are perverse and against the weight of the evidence on record. [Ref: **Ghurey Lal vs. State of U.P.** reported as **2008 (10) SCC 450**].

**23.** In view of the facts and circumstances of the case and having regard to the principles laid down by the Apex Court in the decisions afore-cited, we are of the considered view that there are no substantial and compelling reasons to differ with the findings arrived at by the learned trial court, based upon just appreciation of the material evidence available on record in the case. The learned trial court has taken a holistic view in the matter after carefully considering and analysing the evidence including the testimony of victim M on the record.

**24.** In view of the foregoing discussion, we see no ground to interfere with the impugned judgment. The leave petition is accordingly dismissed.

**SIDDHARTH MRIDUL  
(JUDGE)**

**MANOJ KUMAR OHRI  
(JUDGE)**

**APRIL 29, 2019**  
*dn/di*