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

+ **CRL.L.P. 255/2017 & CRL.M.A. 7080/2017**

STATE GOVT OF NCT OF DELHI

..... Petitioner

Through: Mr Amit Gupta, APP for State
with ASI Krishanpal, PS Ashok
Vihar. .

versus

PRAHLAD

..... Respondent

Through

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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11.03.2020

VIBHU BAKHRU, J

1. The State has filed the present petition impugning a judgment dated 05.04.2016 whereby the respondent was acquitted of the charges under Sections 3 (a) and 4 of the Protection of Children from Sexual Offences Act, 2012 (hereafter 'the POCSO Act') and in the alternate, under Section 377 of the Indian Penal Code, 1860 (IPC).

2. The respondent was prosecuted pursuant to the registration of an FIR bearing no. 431/2014 under Section 377 of the IPC and Section 4 of the POCSO Act, registered with PS Ashok Vihar. The said FIR was registered on the statement made by the child victim – a boy aged about fourteen years. He had stated that he was a student of the IXth standard. He stated that while he was sleeping on the terrace of his 'jhuggi' the respondent had come to his terrace at about 2.00 a.m. (on 24.07.2014).

The respondent removed his underwear and had started stroking his penis (*peshab wali nali*). He alleged that the respondent had inserted his penis in his anus and had repeatedly engaged in anal sex (*aaage peeche karne laga*). He stated that after some time, he left him. The complainant stated that he, thereafter, went downstairs to ease himself and at that stage, his anus started hurting and he informed the same to his mother and his mother called the police. He stated that thereafter, he went in the police van (*police ki gadi*) along with his parents to BJRM Hospital and after his examination, he returned home with his parents.

3. His above statement, on the basis of which the FIR in question was recorded, is Ex. PW 3/A.

4. His statement under Section 164 of the CrPC was recorded by the learned MM (North East) on 30.07.2014. In his statement, he stated that on the night of 24.07.2014, he was sleeping on the terrace of his *jhuggi*. At night, one man came and laid down beside him. He removed his shorts and started stroking his penis. Thereafter, he inserted his penis in his anus (*meri latrine wali jagah*) and started thrusting it back and forth. He stated that despite his asking him not to do so, he did not refrain. He stated that he called his family (*ghar walon ko awaz di*) and that man was caught and handed over to the police.

5. The child victim was examined as PW 3. His statement of the incident is more or less similar to his statement recorded under Section 164 of the CrPC. Whereas in his statement under Section 164 of the CrPC he had stated that he had called his family, in his testimony before the Court he stated that he called for his parents (*mummy papa ko bulaya*). He reiterated that police had taken him to the hospital for his

examination and after examination, they had recorded his statement (Ex. PW 3/A) which was shown to him and he identified his signatures on the said statement. In his cross-examination, he stated that on the date of the incident he was sleeping on the roof of his *jhuggi*; his father was sleeping in the room below; and his mother was sleeping on the terrace of the adjoining house which belonged to his paternal grandfather. He also stated that several other people were also sleeping on the terraces of the adjoining houses.

6. It is apparent from the above that there is a material inconsistency in the victim's statement, as recorded after the incident (Ex. PW 3/A), his testimony before the Trial Court and the statement recorded under Section 164 of the CrPC. Whereas, in his initial statement, the complainant (child victim) had stated that after the incident the assailant had let him go, he had then gone down to urinate and at that stage, he was experiencing pain in his anus and then he his mother about the incident; however, in his statement before the Trial Court as well as his statement recorded under Section 164 of the CrPC, he has stated that he had asked his assailant not to do the act but the assailant had not refrained from doing so and he had thereafter, called out to his family (parents). The Trial Court had considered the aforesaid testimony and concluded that since the prosecution's case rested almost entirely on the testimony/statement of the child witness, any material inconsistency in his statements would be fatal to the prosecution's case.

7. This Court finds no infirmity with the aforesaid view considering that the other evidence obtaining in the case does not establish the case of the prosecution. The MLC Ex. PW 7/A of the victim did not disclose

any injury to the child victim although it merely indicated that there was mild anal tenderness. However, that does not indicate that the child victim has been sexually assaulted.

8. Dr Ruchi Sharma, Junior Forensic/Chemical Examiner, Biology Division, FSL, Rohini, Delhi was examined as PW 8A. She testified as to the biological report Ex. 8/A and testified that no semen was detected on any of the exhibits, namely, underwear of the victim, anal swab of victim, glans swab of accused and knickers of the accused and therefore, the inner examination was not conducted. Thus, the FSL report also does not establish that the child victim was sexually assaulted.

9. The victim's mother was examined as PW 4. She stated that on the date of the incident (24.07.2014), her son (the child victim) was sleeping on the roof of the house and at about 2.00 – 3.00 a.m. at night he had called out to her husband as "*papa papa*". She deposed that on hearing this, she and her husband, who both were sleeping downstairs in the *Jhuggi*, rushed to the roof and saw that one person was sleeping beside her son. She stated that her husband made inquiries from him and her son informed them that person had committed a wrong act with him. The said person was identified as the respondent. In her cross-examination, she stated that her father's *jhuggi* was also located on the rear side *gali* of her *jhuggi* and one could go to her father's *jhuggi* from her *jhuggi* by going through the roofs of other *jhuggis*. She stated that one Ms Suman and her children were sleeping on the roof of the *Jhuggi* of her father. She also stated that there is a tin shed on the second floor of the *jhuggi*.

10. Her testimony is also inconsistent with the testimony of the child

victim. According to PW 3, his mother was sleeping on the roof of the *Jhuggi* of his maternal grand-father, but according to PW 4 she was sleeping downstairs. She deposed that the roof of her *jhuggi* is a tin roof, the child victim had stated that it was a cemented roof. Further, her cross-examination is inconsistent with her examination-in-chief. Whereas, PW 4 has stated in her examination-in-chief that she and her husband had rushed to the roof and had seen that one person (the respondent) was sleeping beside her son. In her cross-examination, she stated that when she went upstairs along with her husband, she saw only her son in his underwear. She further stated that when she reached the roof, the accused (respondent) had already gone to sleep on the roof of his house where 5-6 other persons were sleeping. She stated that her son had pointed specifically to the respondent as a person who had done the offending act (*galat kaam*) with him.

11. In her cross-examination, she testified that she was sleeping on the roof of her *jhuggi* along with her daughter at some distance from her son and her husband was sleeping on the roof of the house of her father. She stated that at the time when her son (the victim) called her, other persons who were sleeping on the roof also woke up. As is apparent, the statements made by PW 4 in her cross-examination are inconsistent with her examination-in-chief as well as the statements made by the child victim.

12. The child victim's father was examined as PW 5. His examination-in-chief is consistent with the examination in chief of his wife (PW 4). He also stated that he and his wife were sleeping downstairs on the date of the incident and they had rushed to the roof

on hearing the child victim calling out to him as “*papa papa*”. However, in his cross-examination he stated that his wife and the remaining three children were sleeping on the roof of his father-in-law on the date of the incident. He stated that the child victim had informed his mother about the incident and she had narrated the incident to him. He stated that when he reached the roof, the respondent had already left the spot and had gone to the roof of his *jhuggi* and was sleeping amongst other persons. He was pretending to be asleep although he was not so.

13. Considering the aforesaid, this Court finds no infirmity with the decision of the Trial Court in concluding that the prosecution failed to establish that the respondent was guilty of the offence for which he was charged beyond reasonable doubt. In view of the above, this Court finds no reason to allow the present petition.

14. The same is, accordingly, dismissed. The pending application is also disposed of.

MARCH 11, 2020

pkv

VIBHU BAKHRU, J