



#S-7

NEUTRAL CITATION NO: 2022/DHC/001411

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

*Judgment Delivered On: 07.04.2022*

**CRL.L.P. 7/2022**

**STATE OF NCT OF DELHI**

..... Petitioner

versus

**ARUN KUMAR YADAV**

.....Respondent

Advocates who appeared in this case:

For the petitioner : Mr. Ashish Dutta, Additional Public Prosecutor for  
the State with S.I. Amit Bhardwaj, P.S.: Chhawala.

For the respondent : None.

**CORAM:**

**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

**HON'BLE MR. JUSTICE SUDHIR KUMAR JAIN**

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

**SIDDHARTH MRIDUL, J. (OPEN COURT)**

**CRL. M.A.99/2022 (Exemption)**

Exemption granted, subject to all just exceptions.

The application is disposed of accordingly.

**CRL. M.A.100/2022 (Delay)**

The present application under Section 5 of the Limitation Act, 1963, has been filed on behalf of the State/petitioner seeking condonation of 34 days' delay in filing the leave to appeal petition.

In view of the reasons stated in the application, which is duly supported by an affidavit, the same is allowed. The delay of 34 days in filing the accompanying leave to appeal petition is condoned.

The application is disposed of accordingly.



1. The present criminal leave to appeal petition under Section 378 of the Code of Criminal Procedure, 1973, has been instituted on behalf of the State/petitioner assailing the impugned judgment and order dated 12.12.2019 passed by learned Additional Sessions Judge-05, South-West District, Dwarka Courts, Delhi, in S.C. No.165/2018, case FIR No.560/2017, under Sections 451/376 of the Indian Penal Code, 1860 (in short 'IPC'); and Section 6 read with Section 5 (m) of the Protection Of Children from Sexual Offences Act, 2012 (in short 'POCSO Act'), registered at Police Station Chhawla; whereby Arun Kumar Yadav, the sole respondent, was acquitted of all the charges.
2. In a nutshell, the case of the prosecution was that Arun Kumar Yadav, on 25.12.2017 between 12 noon and 2 p.m., broke the netting (*jalli*) of the door of the house of the complainant and after breaking into the said house, inserted a finger into the vagina of the 05-year old victim 'K'. Arun Kumar Yadav was alleged to have then inserted his penis into the vagina of the victim as well as put his mouth on the vagina of the victim 'K'.
3. Upon receipt of information at 3:45 p.m. on 25.12.2017 by the control room, on phone, it was recorded *vide* DD No.20A to the effect that "*caller ki ladki ke saath batamiji ki hai*". WSI Shiksha reached the spot and recorded the statement of the complainant Ex. PW 2/A wherein the involvement of Arun Kumar Yadav was recorded.
4. *Inter alia*, it was stated by the complainant that at about 12 noon on the date of the commission of the offence, she along with her son had gone to Janakpuri for some work leaving behind her youngest child, the victim 'K', after putting a lock on the netting of the door at the entrance of her house; and that when she returned and entered her



home, she saw that the clothes of the victim 'K' were removed. Upon a query from the complainant/mother, the child victim 'K' is stated to have told her that after they had left home, Arun Kumar Yadav, who is a neighbour, entered the dwelling and after removing her *pyjama*, committed rape upon her, as elaborated hereinabove.

5. PW-8 WSI Shiksha prepared *rukka* Ex. PW 8/B and got the subject FIR registered for the offences punishable under Sections 451/376 of the IPC as well as Section 6 read with Section 5 (m) of the POCSO Act.

6. The victim 'K' was thereafter escorted for the MLC Ex. PW 1/A to the DDU Hospital. The statement of the victim 'K' was also recorded under Section 164 Cr.P.C. before the learned Metropolitan Magistrate Ex. PW 1/B and the respondent, Arun Kumar Yadav, was arrested on 27.12.2017. Upon completion of investigation, the subject charge-sheet was submitted before the court of competent jurisdiction. The prosecution examined 10 witnesses including PW-1, the victim 'K' as well as PW-2, her mother.

7. The two issues that arose for consideration before the learned trial court were (i) whether the victim 'K' had been subjected to sexual assault and molestation, as alleged; and (ii) whether Arun Kumar Yadav was the perpetrator of the alleged crime.

8. In this behalf, it would be relevant to observe that Dr. Gunjan Chaudhary, Senior Resident (OBGY), DDU Hospital, New Delhi, PW-7, who had medically examined the victim 'K' on 25.12.2017, recorded in the MLC Ex. PW 1/A that there was neither any swelling nor injuries, bruises, abrasion, scratches, nail marks over labia majora, labia minora, perineum and no bleeding, tear in fourchette, was present on the victim 'K'. In addition, there was no discharge or



injury on the vulva. PW-7 also observed that no fresh injury/bleeding on the person of the victim 'K' was detected and speculum examination, P/V examination of vagina and cervix was not done owing to the circumstance that the complainant was unwilling and refused to permit the doctor to conduct internal examination of the victim 'K'.

9. In this behalf, it is relevant to extract the findings recorded by the trial court in relation to the first issue, which read as follows :-

*"20. Child victim PW 1 was medically examined at 11 p.m. on 25.12.2017 vide MLC Ex. PW1/A by Doctor PW7 and the examining Doctors had observed that there was no external or internal injuries even in her gynecological examination nor were the labia majora, labia minora swollen nor bearing any injury marks whereas it was also interalia observed therein that neither the victim had changed her clothes after the incident nor washed her genitalia. Even PW2 at the time of examination of child victim PW1 by Doctor PW7 had given brief description of incident including the facts that there was no history of fingering/penetration and it had been asserted that the offender had touched the private parts and had put saliva over private parts of the child victim PW1. Overleaf Ex. PW1/A, there is mention by the examining Doctor that the mother of the child victim was not willing for sampling. In the case of aggravated penetrative sexual assault, in the manner stated by child victim in statement Ex. PW1/B, if the samples were lifted during medical examination of child victim, then they would have of course aided the investigating agency in connecting the offender with the crime in question. Unwillingness of mother PW2 of child victim PW1 for giving of aforesaid samples resulted in loss of scientific evidence.*

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24. *MLC Ex. PW1/A of child victim PW1 is bereft of mention of facts of (1) insertion of finger by offender in vagina of child victim PW1 and (2) insertion of penis in vagina of child victim PW1 by offender. Per contra there is mention of PW2, mother of child victim PW1 having told the examining Doctor PW7 that there was no history of fingering/penetration and she was not even willing for sampling from person of child victim PW1. There were no external or internal injuries seen on the person of child victim PW1 even during course of her gynecological examination. In the case of happening of events as asserted by child victim PW1 in statement Ex. PW1/B, there was every probability of 5 years old child victim sustaining injuries in her genitalia and/or bleeding therein or nearby. Nothing of the sort was there.*

25. *In this fact of the matter, in the absence of any injuries, external or internal on the person of child victim PW1; child victim PW1 having categorically asserted of it was not the accused but some other person who had come at her home and committed the offences in question; there are several material contradictions, severe infirmities and inherent improbabilities embedded in the version of child victim PW1 which go to the root of the matter to check and shake the basic version and core of the prosecution case and even the version of child victim PW1 is not of sterling quality, nor suffices in itself to place implicit reliance thereon to reach the conclusion of accused having committed the offences charged. Testimony of child victim PW1 is not unimpeachable nor in itself sufficient to rest the conviction of the accused on it, even by invocation of section 29 of POCSO Act, moreso when PW1 herself states before my Ld. Predecessor that accused was not the one who had tress passed into her home or committed aggravated penetrative sexual assault on her person on the fateful day."*

10. Insofar as more significant issue of Arun Kumar Yadav being the perpetrator of the alleged crime is concerned, the learned trial court, after having examined the evidence on the record and heard



learned counsel appearing on behalf of the parties, recorded as follows:-

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"18. By the elicited school record documents of child victim i.e. admission form Ex. PW5/ A, entry Ex. PW5/B in admission register, birth certificate Ex. PW5/C, certificate Ex. PW5/D of principal it had been proved that date of birth of child victim PW1 is 11.09.2012. Accordingly, as on 25.12.2017, the date of commission of alleged offence, child victim PW1 was 5 years 3 months and 14 days of age and was minor.

19. Case of the prosecution rest upon the testimony of sole cited and examined, star and material prosecution witness, the child witness, PW1 of age about 5 years, then student of 1<sup>st</sup> class, examined before my Ld. Predecessor. PW1 stated that one day Arun uncle came to her house after cutting jali (net), when she was alone, watching TV and said Arun uncle touched her susu (private part) after opening her legs; Arun uncle touched her susu with his mouth and also put his susu in her susu; thereafter, Arun uncle had left and PW1 told the incident to her mother PW2. In statement Ex. PW1/B under section 164 Cr.P.C. recorded in proceedings Ex. A1 before Ld. M.M., the child victim PW1 narrated the sequence of events at a variance stating when she was alone at home in the morning of 25.12.2017 after her mother went for some work after putting lock from outside, then "samne waale uncle jaali torkar hamare ghar ke ander aa gaye; uncle ne bahut ganda ganda kaam kiya; unhone meri susu mey apani ungli daal di; muje bahut dard hua; uske lambe baal the or lambi daadi thi; us uncle ne meri susu par aapne baal rakhe or appni thuk daali; phir us uncle ne appni susu meri susu ke ander bhi daali; phir un uncle ne appna muh meri susu me daala; main rone lagi; unhone apni eyes aur naak bhi meri susu mey daali thi; phir bole aab mai aaram karunga; phir vo apane ghar vaapis chale gai; meri mammi jab aai to maine mammi ko bataya; meri mammi ko maine batana ki meri susu bhi beech mei nikal gai thi, jab uncle ne gandhi harkatey ki thi. "

.....



21. *In the course of her statement in court before my Ld. Predecessor, child victim PW1 was shown the accused through video conferencing in the vulnerable witness court complex in Dwarka Courts, but the child victim PW1 failed to identify the accused as offender. Again my Ld. Predecessor had asked child witness PW1 as to whether the person on the TV had come to her house and touched her susu ? ; to which child victim PW1 denied. Again my Ld. Predecessor asked the question to child victim PW1 whether the person in the TV was Arun uncle? Child victim PW1 then stated to my Ld. Predecessor that the person in the TV was not Arun uncle and some other person had come to her home. Ld. Addl. P.P. for State cross examined PW1 before my Ld. Predecessor and even then despite suggestion of Ld. Addl. P.P. for the State, child victim PW1 denied of accused to be the person who had come to her home by breaking/cutting the net or having touched her susu and did wrong thing. In cross-examination of the defence counsel, again child victim PW1 admitted that accused who was then shown to her on TV that day before my Ld. Predecessor, had neither come to her home by breaking net nor touched her susu nor did any wrong act with her.*

22. *PW2 mother of child victim testified before my Ld. Predecessor that PW1 was her youngest child of 5 years age amongst her three children and on day of incident at about 10.30 a.m. after locking the mesh door she had gone with her to market and on return to home at about 1 p.m., she found the mesh of the gate was broken and then child victim PW1 had told her (PW2) that Arun uncle had come and removed pyjama and touched her susu after which PW2 called her 17 years old son and 16 years old daughter; later PW2 made call at number 100 at police came. As per PW2, she and PW1 were taken to PS where her statement Ex. PW2/A was recorded and they were taken to DDU Hospital where medical examination of child victim PW1 was conducted.*

23. *Neither broken mesh (jali/net) was seized nor its photographs were taken nor finger/hand impressions were lifted therefrom to bring scientific evidence on record and to nail the offender. On this facet of the matter, investigation is shoddy and not above board."*



11. We have examined the evidence on the record and bestowed our careful consideration to the impugned judgment.

12. In our view, both the issues framed hereinabove have been correctly answered in the negative by the learned trial court, which in its clear and cogent finding, is recorded in the relevant paragraphs, which are reproduced *in extenso*, as follows :-

“25. In this fact of the matter, in the absence of any injuries, external or internal on the person of child victim PW1; child victim PW1 having categorically asserted of it was not the accused but some other person who had come at her home and committed the offences in question; there are several material contradictions, severe infirmities and inherent improbabilities embedded in the version of child victim PW1 which go to the root of the matter to check and shake the basic version and core of the prosecution case and even the version of child victim PW1 is not of sterling quality, nor suffices in itself to place implicit reliance thereon to reach the conclusion of accused having committed the offences charged. Testimony of child victim PW1 is not unimpeachable nor in itself sufficient to rest the conviction of the accused on it, even by invocation of section 29 of POCSO Act, moreso when PW1 herself states before my Ld. Predecessor that accused was not the one who had tress passed into her home or committed aggravated penetrative sexual assault on her person on the fateful day.

26. Elicited evidence on record is shorn of any fact proved of (1) accused having tress passed into the house of complainant; (2) accused having committed aggravated penetrative sexual assault on person of child victim PW1 and (3) accused having raped child victim PW1. In this fact of the matter for want of aforesaid evidence, prosecution has failed to prove its case against the accused and the accused is entitled for acquittal. Accordingly, accused is held not guilty for offences under section 451/376 IPC; 6 r/w s 5 (m) POCSO Act and consequently, he is acquitted of the said offences.”



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13. Having heard Mr. Ashish Dutta, learned Additional Public Prosecutor appearing on behalf of the State, who has painstakingly taken us through the evidence on the record, we are of the view that the prosecution has failed to prove its case against Arun Kumar Yadav for commission of the offences under Sections 451/376 of the IPC; and Section 6 read with Section 5 (m) of the POCSO Act.

14. The conclusions arrived at by the learned trial court in the impugned judgment, therefore, do not call for or warrant any interference. Resultantly, the present leave to appeal petition is devoid of merit and is accordingly dismissed.

**SIDDHARTH MRIDUL  
(JUDGE)**

**SUDHIR KUMAR JAIN  
(JUDGE)**

**APRIL 07, 2022/'AA'**

[Click here to check corrigendum, if any](#)