

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

+ CRIMINAL LEAVE PETITION No. 62/2015

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Date of decision: 09th February, 2015

STATE (GOVT. OF NCT OF DELHI)

..... Appellant

Through : Mr.Feroz Khan Ghazi, APP for the State

versus

MULLAH MUZIB

.....Respondent

Through : None

CORAM :

HON'BLE MR. JUSTICE G. S. SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

G. S. SISTANI, J.

1. By the present criminal leave petition filed under section 378(i) of the Code of Criminal Procedure, the State seeks leave to appeal against the judgment dated 04.12.2014 passed by the learned Additional Sessions Judge in sessions case No. 204/2013 whereby the respondent (accused before the trial court) was acquitted of the charges punishable under section 377 of Indian Penal Code read with section 6 and 10 of the POCSO Act.
2. The facts of the case, as noticed by the learned trial court, are as under :

"1. Briefly stated facts of prosecution case are that on October 29, 2013 at about 2 PM, complainant along with his friend Tausif and nephew i.e. victim went to the Police Station Jama Masjid and informed the police that accused Mullah Muzib had committed galat kaam with the victim. Accordingly, SI Suresh Pal made an inquiry from the victim, who confirmed the allegations of galat kaam. Accordingly, victim was sent to hospital in the custody of Const. Bittoo Kumar for medical examination. SI Suresh Pal (PW8) also reached the hospital and collected the MLC of victim. After medical examination, he recorded the statement of victim (since, the victim is a child of sexual assault, his identity is withheld and hereinafter he is

referred to as victim). In order to conceal the identity of victim, identity of his maternal uncle is also withheld and hereinafter he is referred to as maternal uncle.

(i). It was alleged that victim in his statement Ex.PW1/A alleged that his mother left him with his maternal uncle so that he could learn some work. He was working at the tools shop. It was alleged that about 6-7 months ago, when he was sleeping in the parking, accused Mullah Muzib, who ran puncture shop, took him below a tree and asked him to sleep underneath a tirpal, thereafter, he put off his pant and when he refused, accused threatened him by stating to remain laid silently and thereafter he put off his pant and half pant of the victim and inserted his penis in his anus, he felt pain. Thereafter, accused asked him not to disclose the incident anyone otherwise he would kill him. It was alleged that accused repeated the same acts 2-3 times after the first incident. It was further alleged that on October 27, 2013 at about 10 PM when he went to public toilet to ease himself, accused followed him and entered the toilet and thereafter he bolted the door from inside. It was alleged that accused put off his pant and thereafter committed galat kaam in the same manner in which he committed earlier. It was alleged that he became perturbed from the acts of accused, consequently, he informed his maternal uncle and Tausif at whose shop he was working, accordingly, they took him to the police station.

(ii). On his statement, an FIR for the offence punishable under Section 377 of Indian Penal Code (in short IPC) read with Section 6 & 10 of Protection of Children from Sexual Offences (in short POCSO) Act was got registered.

2. During investigation, accused was arrested and victim was produced before CWC. His statement under Section 164 of Code of Criminal Procedure (in short Cr. P.C.) was got recorded. Accused was got medically examined and during medical examination, he was found fit to perform sexual intercourse. After completing investigation, challan was filed against the accused for the offence punishable under Section 377 IPC read with Section 6 & 10 of POCSO Act.

3. After complying with the provisions of Section 207 Cr. P.C., a charge for the offence punishable under Section 377 IPC read with Section 6 of POCSO Act was framed to which accused pleaded not guilty and claimed trial.”

3. The prosecution examined 9 witnesses to bring home the guilt of the respondent. The respondent was examined under Section 313 of the Code of Criminal Procedure wherein he denied all the incriminating evidence led by prosecution and submitted that he had been falsely implicated in this case.
4. The learned counsel for the State submits that the judgment and order on acquittal passed by the learned trial court are contrary to the facts and law so the same is liable to be set aside the respondent be convicted under Section 377 of the Indian Penal Code read with Sections 6 & 10 of POCSO Act.
5. The learned counsel for the State further submits that the learned trial court failed to appreciate the evidence led by the prosecution and acquitted the respondent even though the material witnesses supported the case of the prosecution.
6. The learned counsel for the state also submits that the trial court has failed to appreciate that there are no major contradictions in the testimony of the witnesses warranting acquittal of respondent and the minor contradictions, discrepancies, variations and improvements are bound to occur in detailed narration of facts by a witness.
7. The learned counsel for the state submits that the learned trial court has erred on relying on minor contradictions and discrepancies occurring in the prosecution witnesses regarding delay in lodging the FIR and also erred in recording the finding to the effect that delay in lodging the FIR had not been properly explained by the IO PW-8 SI Suresh Pal and PW-4 ASI Jai Kishan.

8. It is also submitted by the learned counsel for the state that the learned trial court failed to appreciate that PW-1 victim and PW-2 the uncle of the victim have fully supported the case of the prosecution and identified the respondent in court and also explained the role of the respondent.
9. The learned counsel for the state adds that the learned trial court also erred in not believing the testimony of PW-1 and PW-2 that there were some stains on the back portion of the underwear and the underwear was not washed either by PW-1 and PW-2. It was the duty of PW-8 to seize the said underwear and send the same to FSL but he did not discharge his duty properly which accrued a benefit to the accused. Further it is a settled law that the accused person should not be allowed to take advantage and benefit of defective investigation.
10. We have heard the counsel for the State and examined the evidence on record.
11. In regard to medical evidence placed, the learned trial court has rightly taken the view as mentioned in para 11, which is as follows :

“11. Prosecution has set up a case that accused had committed carnal intercourse with the victim several times and lastly committed on October 27, 2013. During investigation, accused and victim were medically examined. Victim was medically examined by PW3 Dr. Varun Patel and PW9 Dr. Junaid. PW3 deposed that he did not find any external injury on the body of patient and when a specific question was asked from him whether there would be any chance of sustaining injury at the anus of a minor boy aged about 15 years, if the allegations are that an adult person aged about 55 years inserted his penis forcibly in his anus and victim alleged that he felt pain at that time; PW3 deposed that he could not say anything about the same because it is beyond his expertise. PW9 again examined the victim and deposed that he had not seen any external injury on the body of victim except one scab on his right buttock. But clarified in his cross-examination that the above scab has no relation with the alleged sexual assault. Thus, it

becomes clear that prosecution has failed to produce any medical evidence which may even suggest that the victim was sexually assaulted.

12. Similarly, accused was examined by PW5 Dr. Manju Nath and found that accused was capable to perform sexual intercourse and clarified that there was no injury on the penis of accused. When a specific question was asked from him what would be chances of having injury on the penis of an adult if a minor boy aged about 15 years alleged that an adult person aged about 55 years inserted his penis forcibly in anus. PW9 deposed that though there was no standard guidelines in this regard, yet there are possibility of having some injury. Admittedly, no injury was found at the male organ of accused. Mere fact that accused was found capable to do intercourse, in the absence of any other evidence, is itself not sufficient to draw an adverse inference against the accused.”

12. In ***Mirro v. Emperor, reported at AIR 1947 All 97***, it was held that in a case of completed offence under section 377 IPC medical evidence could and should be definite against the accused.
13. In ***Channabasappa s/o Shanmukhappa v. State of Honnali Police, reported at 2010(2)KCCR 1385***, it was opined that since there was no penetration and medical evidence didn't support the prosecution version, conviction was set aside.
14. In ***Kailash Laxman v. State of Maharashtra, reported at 2010CriLJ3255***, it was observed that as no injuries were found in the medical evidence; prosecution failed to prove its case beyond reasonable doubt.
15. In ***Phool Singh v. State, reported at 2011(3)JCC2235***, it was held that the prosecution case did not corroborate with the medical evidence. Hence the conviction of the accused was set aside.
16. In the present case, PW-8 SI Suresh Pal, the Investigating Officer admitted in his testimony that he had not seized the undergarments of the victim and in order to justify his version he deposed that PW1 told him that he had washed his clothes on October 28, 2013 which is contrary to the version of

the victim. If there was any stains marks as deposed by PW-2, it was the duty of PW-8 to seize the same and send the same to FSL. Had the semen of accused be found at the underwear of the victim, it would have amount to a cogent piece of evidence in support of the victim.

17. In ***Devi Das (1928) 10 Lah 794***, it was opined that in a charge of sodomy stains of semen constitute important evidence. Great weight must be attached to the Chemical Examiner's report.
18. In ***Crl. A. 52/03 and 628/2003 titled Rai Singh Vs. State, Hon'ble Division Bench of this court comprising HMJ B.N.Chaturvedi and HMJ Rajiv Shakdher*** has held that since scientific evidence on which reliance was placed by prosecution does not erringly conclude that sodomy has been committed hence benefit of doubt should be given.
19. Thus we are of the opinion that the prosecution has failed to produce any significant medical and scientific evidence and therefore any adverse inference to prove the allegations of carnal intercourse cannot be conclusively drawn against the accused.
20. The learned trial court has rightly pointed out the material contradictions in the testimony of PW1 and PW2 in its judgment under the para 18, which is as follows:

“18. PW1 in his examination-in-chief deposed that accused had committed the galat kaam with him all the times below peepal tree except at one occasion i.e. on October 27, 2013 when he committed galat kaam with him in public toilet. Initially, he deposed that he used to sleep in the parking where his maternal uncle (PW2) was working. But later on he deposed that since he used to get up late in the morning, Tausif asked him to sleep below the tree and he would awake him daily and further deposed that Tausif used to awake him at about 8 AM. Thus, PW1 intended to show that earlier he used to sleep in parking where his maternal uncle was used to work, but he started to sleep below tree where he was sexually assaulted by the accused.

(i). However, his testimony is not corroborated by PW2 who in his cross-examination deposed that PW1 used to sleep in night at parking every day and in the morning he used to go to the shop of Tausif. He further clarified that PW1 used to come parking between 9 PM to 10 PM and thereafter used to go to the shop of Tausif at about 9 AM and further clarified that PW1 never slept alone at the pavement. Thus, there is a material contradiction between the testimony of PW1 and PW2 because as per the testimony of PW1 he also used to sleep alone underneath the tree whereas as per the testimony of PW2, PW1 always used to sleep at parking and he never slept at pavement alone.”

21. The learned trial court has rightly relied on the following precedents as mentioned under para 24 of the Judgment, which is as follows:

*“24. In **Dattu Ramrao Sakhare v. State of Maharashtra**, (1997) 5 SCC 341 at page 343 it was held:- The entire prosecution case rested upon the evidence of Sarubai (PW 2) a child witness aged about 10 years. It is, therefore, necessary to find out as to whether her evidence is corroborated from other evidence on record. A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other*

dependable evidence on record. In the light of this well-settled principle we March proceed to consider the evidence of Sarubai (PW 2).

*(i) In **Panchhi v. State of U.P.**, (1998) 7 SCC 177 at page 181 Shri R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.*

*(ii) In **Hamza v. Muhammedkutty**, (2013) 11 SCC 150 at page 161 The learned counsel for the State is right that the consistent version of PW 1 is that A-1 and A-2 have committed murder of the deceased. But the High Court has rightly relied on the observations of this Court in **Suresh v. State of U.P.** [(1981) 2 SCC 569 : 1981 SCC (Cri) 559] that children mix up what they see and what they like to imagine to have seen. Glanville Williams says in his book *The Proof of Guilt*, 3rd Edn., published by Stevens & Sons: “Children are suggestible and sometimes given to living in a world of make-believe. They are egocentric, and only slowly learn the duty of speaking the truth.” Hence, the proposition laid down by the courts that as a rule of practical wisdom, the evidence of child witness must find adequate corroboration. (**Panchhi v. State of U.P.** [(1998) 7 SCC 177 : 1998 SCC (Cri) 1561])”*

22. Also, PW-2 has deposed that the accused had committed the carnal intercourse with the victim 5-6- times but the same finds no mention in his complaint Ex.PW1/A. Although in the complaint, he alleged that the accused had sexually assaulted him 2-3 times previously in the park and

had threatened him not to disclose the incident to anyone otherwise he would kill him. This clearly suggests that improvements have been made in deposition. The respondent had deposed in his testimony that there was an altercation between him and PW-2 in relation to removing his thaiya and alleged that PW-2 has falsely implicated him in the present case.

23. We are of the opinion that in normal circumstances PW-1 would have shouted and called the people around as it was an open area and there is no evidence that the accused had gagged his mouth. Also, PW-1 has nowhere mentioned in his testimony about the same.
24. In *Emperor v. Sain Dass, as reported at AIR 1926 Lah 322*, it was opined that a charge of attempting to commit sodomy is very easy to bring and very difficult to refute, the evidence in support of this charge has to be very convincing in order to convict the accused.
25. In *Bal Mukundo Singh (1935) 39 CWN 1051*, it was observed that it is unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed, unless for any reason that testimony is entitled to special weight.
26. In the case of *Swaran Singh Ratan Singh Vs. State of Punjab AIR 1957 S.C. 637*, it was held that in criminal cases mere suspicion, however, strong, cannot take place of proof.
27. In *Dilip Maheshwari v. State of M.P., as reported in 1995 Cr LR 80 (MP)* it was held that where there was prosecution for sodomy and there exist delay in filing the FIR and where delay was not explained, evidence was not reliable and there was also non-corroboration of medical evidence, the accused was held entitled to benefit of doubt.
28. In *Sekaran S/o. Munusamy Vs. State of Inspector of Police, as reported in 2010CriLJ2341* it was held that conviction under section 377 of IPC on the basis of uncorroborated testimonies can lead to miscarriage of justice.

29. The Apex Court in ***Govindaraju @ Govinda Vs. State & Anr. (2012) 4 SCC 722***, court has discussed in detail the scope and power of the appellate court and reiterated that the presumption of innocence of an accused is reinforced by the order of acquittal. Relevant portion of the judgment reads as under:

“11. Besides the rules regarding appreciation of evidence, the Court has to keep in mind certain significant principles of law under the Indian Criminal Jurisprudence, i.e. right to fair trial and presumption of innocence, which are the twin essentials of administration of criminal justice. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefits of such presumption which could be interfered with by the courts only for compelling reasons and not merely because another view was possible on appreciation of evidence. The element of perversity should be traceable in the findings recorded by the Court, either of law or of appreciation of evidence.

12. The Legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 Cr.P.C. This is an indication that appeal from acquittal is placed at a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 Cr.P.C. has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate Court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-sections (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the Courts.

13. Under the scheme of the Cr.P.C., acquittal confers rights on an accused that of a free citizen. A benefit that

has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the Appellate Court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law.”

30. In light of the above discussion, we are of the opinion that in the presence of such material contradictions in the testimonies of PW-1 and PW-2, the evidence placed before the court is not cogent enough to prove that the accused had carnal intercourse with the victim. Thus the prosecution has failed to convincingly establish the guilt of the accused beyond the shadow of all reasonable doubt.
31. Further we agree with the view taken by the learned Trial Court that prosecution has failed to produce cogent evidence against the accused and is not sufficient to convict him, taking the same into consideration, no case under Section 29 of POCSO can be made out.
32. For the reasons stated above, the judgment of acquittal recorded by the learned Trial Court does not call for any interference. The Leave Petition is meritless, the same is accordingly dismissed.

G. S. SISTANI, J.

SANGITA DHINGRA SEHGAL, J.

FEBRUARY 9, 2015

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