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

+ CRL.L.P. 63/2017

STATE (GNCT OF DELHI)

..... Petitioner

Through: Ms. Radhika Kolluru, APP for the
State with SI Ramesh Kumar, PS
Sultanpuri.

versus

SUSHIL KUMAR

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

01.02.2017

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Crl. M.A. No. 1844/2017

Exemption allowed, subject to all just exceptions. The application stands disposed of.

CRL.L.P. 63/2017 & Crl. M.A. No. 1843/2017

The State has preferred the present leave petition to seek leave to appeal against the judgment dated 27.04.2016 passed in SC 44/2015 arising out of case FIR 50/2015 registered at PS Sultanpuri, whereby the respondent/accused has been acquitted of the offence u /s 354 IPC read with section 10 of POCSO Act. The petitioner also seeks condonation of 167 days delay in filing the present leave petition.

Since I have perused the impugned judgment and the testimonies relied upon and heard counsel for the petitioner, and I am not inclined to issue notice on the leave petition, no purpose would be served in issuing

notice in the delay application.

The case of the prosecution is that the accused who is a drunkard and was living separately from his wife and children for about two months prior to the date of incident i.e. 01.01.2015, had come to the house of the prosecutrix on the said date; had asked for a glass of water, which the prosecutrix had got for him; thereafter touched her body and her breasts. She raised her voice and hearing the commotion, her mother had come and scolded the accused. The same led to a quarrel and thereafter the accused left the home of the prosecutrix. The FIR got registered by the mother of the prosecutrix on 10.01.2015 i.e. after 10 days of the incident. She claimed that she was drying clothes on the terrace and when she heard the noise and came down, the prosecutrix narrated to her as to what had transpired.

The evidence of the mother was recorded as PW-3, wherein she stated that she was working in the kitchen when the incident took place and when she heard the noise, she came from the kitchen. In his defence, the accused produced two witnesses DW-1 (brother of the prosecutrix' mother i.e. the mama of the prosecutrix) and DW-2 (sister of the accused).

The trial court has acquitted the accused after taking into account, firstly, the delay in filing the complaint leading to the registration of the FIR and, secondly, on account of the contradiction in the stand taken by the mother PW-3.

As noticed above, in the FIR PW3 claimed that she was drying clothes on the terrace when she heard the noise and commotion, whereas in her testimony she stated that she was working in the kitchen. I may observe that the incident is of 01.01.2015 and the testimony of the mother was recorded on 30.07.2015 i.e. just about 7 months later.

The defence of the accused was that false allegations had been made against him by the prosecutrix on account of the matrimonial dispute between her parents. The further defence of the accused was that the accused had chastised the prosecutrix on account of her relationship with a boy of which he did not approve.

The submission of learned APP, firstly, is that in cases of sexual assault, the delay cannot be considered as fatal. In this regard, she has placed reliance on *State of Punjab v. Gurmit Singh & Ors.*, (1996) 2 SCC 384.

Gurmit Singh (supra) was a case involving abduction and rape of the prosecutrix in a village setting. The FIR was got registered only after the father of the prosecutrix learnt of the same from his wife and after he had raised the issue with the village panchayat. In this background, the Supreme Court held that, firstly, there was no delay and even if there was delay, the same was natural. The Supreme Court observed:

“8. The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. The prosecution has explained that as soon as Tirllok Singh PW 6, father of the prosecutrix came to know from his wife, PW 7 about the incident he went to the village Sarpanch and complained to him. The Sarpanch of the village also got in touch with the Sarpanch of Village Pakhowal, where in the tubewell kotha of Ranjit Singh rape was committed, and an effort was made by the panchayats of the two villages to sit together and settle the matter. It was only when the Panchayats failed to provide any relief or render any justice to the

prosecutrix, that she and her family decided to report the matter to the police and before doing that naturally the father and mother of the prosecutrix discussed whether or not to lodge a report with the police in view of the repercussions it might have on the reputation and future prospects of the marriage etc. of their daughter.”

In the present case, the context is somewhat different. The setting is not a village setting. The mother of the prosecutrix had claimed that the incident was reported to the sister and brother of the accused on the very next day. However, the brother of the accused was not produced as a witness and the sister who had been produced as a defence witness, did not support this version of the prosecution.

Ms. Kolluru submits that DW-1 produced by the defence was unreliable inasmuch, as, DW-1 was not present at the time of the incident in the house of the prosecutrix. No suggestion was given to – either PW-2 or PW-3, during their examination with regard to presence of DW-1.

It is the case of the prosecution that DW-1 had deposed against his own niece on account of a property related dispute between the mother of the prosecutrix and DW-1 i.e. her brother.

Even if the testimony of DW-1 were to be disregarded, the fact remains that the parents of the prosecutrix were having an estranged relationship and the accused was not residing with his family for two months prior to the date of the incident. In fact, the mother of the prosecutrix had also filed a divorce case against the accused.

Ms. Kolluru has also placed reliance on *State of Himachal Pradesh v. Asha Ram*, (2015) 13 SCC 766. This was a case of a father being charged with rape of his own daughter. In this case, the testimony of the prosecutrix

was well corroborated by the testimony of his sister PW-2 and mother PW-3 as also the medical evidence on record. The same cannot be said of the facts in the present case.

Ms. Kolluru has, lastly, argued that a statutory presumption existed against the accused of having committed aggravated sexual assault by virtue of section 29 of POCSO Act, since the prosecutrix is a minor. She submits that the offence in question was covered by section 9 (n) of POCSO Act.

Even if the submission of the prosecutrix were to be accepted, the said presumption, in my view, was rebutted in the facts of the present case inasmuch, as, the parents of the prosecutrix were in a matrimonial dispute and the prosecutrix was living with her mother; the father was separated and not living with the family for two months prior to the date of the incident; the version of the mother PW-3 with regard to her location when the offence was allegedly committed was contradictory, and; the prosecution could not satisfactorily explain the delay in the FIR and did not even produce the brother of the accused, to whom the incident was allegedly reported on the very next day. As noticed above, the sister of the accused DW-2 had not supported the case of the prosecution that the incident was reported to her on the following day of the incident.

In view of the aforesaid, I am of the view that the impugned judgment does not call for interference since the view taken by the Trial Court is a plausible view. Dismissed.

VIPIN SANGHI, J

FEBRUARY 01, 2017

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