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

RESERVED ON : DECEMBER 06, 2016

DECIDED ON : JANUARY 04, 2017

+ **CRL.REV.P. 173/2016 & CrI.M.B.411/2016**

RAJESH

..... Petitioner

Through : Mr.Gaurav Gaur with Mr.Narendra
Gautam, Advocates.

versus

STATE (NCT OF DELHI)

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present revision petition has been preferred by the petitioner- Rajesh to challenge the legality and correctness of a judgment dated 27.01.2016 of learned Additional Sessions Judge in CrI.A.No.53/2/14 whereby the judgment dated 27.06.2014 of learned Metropolitan Magistrate in case FIR 482/98 registered at Police Station Paschim Vihar was set aside. The petitioner was held guilty for committing offence under Section 377 IPC and was sentenced to undergo rigorous imprisonment for five years with fine ₹2,000/-.

2. Briefly stated the prosecution case, as reflected in the charge-sheet, was that on the night intervening 27/28.07.1998, the accused committed carnal intercourse against the order of nature with a boy 'X' (assumed name), aged around 11 years. The information about the incident was conveyed to the police at 6:10 a.m. and Daily Dairy (DD) No. 29 (Ex.PW8/A) came into existence at Police Station Paschim Vihar. The petitioner was specifically named to have outraged the modesty of the child 'X'. The investigation was assigned to Head Constable Bua Lal who with Constable Ved Pal went to the spot. The Investigating Officer after recording statement of victim's father (Ex. PW-3/B) lodged First Information Report. The victim was medically examined. The accused was arrested and taken for medical examination. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the petitioner for commission of offence under Section 377 IPC. In order to establish its case, the prosecution examined ten witnesses. In 313 Cr.P.C. statement, the petitioner pleaded false implication and denied his involvement in the crime. On appreciation of the evidence and after considering the rival contentions of the parties, the Trial Court by judgment dated 27.06.2014 acquitted the petitioner. The State, thereafter challenged the acquittal in appeal which was allowed by a judgment dated 27.01.2016. Aggrieved by the said judgment, the petitioner has filed the instant revision petition.

3. I have heard the learned counsel for the parties and have examined the record. Admitted position is that the victim lived in the

petitioner's neighborhood. Apparently, he was minor on the date of occurrence.

4. The incident took place at around 02.00 a.m. on the night intervening 27/28.07.1998. The police machinery was set in motion at around 6.10 a.m. vide DD No. 29 (Ex.PW-8/A) in which the petitioner was named to be the perpetrator of the crime. Soon thereafter, the statement of victim's father (Ex. PW-3/B) was recorded and rukka (Ex. PW-9/A) was sent to lodge FIR at 8:45 a.m. 'X' was taken for medical examination at Deen Dayal Upadhyay Hospital. MLC (Ex.PW-1/A) was prepared where the arrival time of the patient has been recorded as 6.50 a.m. The alleged history records 'sexual assault'. In the complaint (Ex.PW-3/B), the victim's father Ram Prasad gave graphic detail of the occurrence and disclosed as to how the petitioner had committed carnal intercourse with his child aged around 11 years when he was sleeping on the roof of his house. Since the FIR was lodged without delay, whatsoever, there was least possibility of the complainant to fabricate a false story.

5. Crucial testimony to infer the petitioner's guilt is that of the victim 'X'. In his court statement as PW-2, he categorically implicated the petitioner for the crime. He deposed that on the day of occurrence, he had gone to play at house of his sister-in-law. After playing, he slept on the roof of the petitioner's house. At about 2.00 a.m, the petitioner put off his underwear and committed 'wrong' act with him. On his raising alarm, the accused shut his mouth. Thereafter, he came to his father weeping and narrated the occurrence to him. His father called the police in the morning and he was taken to hospital for medical examination. In the cross-examination, he disclosed that his sister-in-law used to live in a rented

accommodation there for the last about a month. The time of occurrence i.e. 2.00 a.m. was noted by him when he had gone down stairs to narrate the incident to his father. He elaborated that when he realized of the 'wrong' act, he attempted to cry but his mouth was shut by the accused. He further disclosed that there was no light on the roof. He explained that he had seen the petitioner's face clearly. The roof on which he was sleeping was adjacent to the rented accommodation of his sister-in-law and people could come and go. He explained that due to late night, the complaint could not be lodged at that point of time. They had reached the police station at around 4/4.30 am. He denied that the accused was falsely implicated due to some monetary dispute between the accused and his father.

6. Analyzing the testimony of the little child, it transpires that despite lengthy cross-examination, no material infirmities or discrepancies could be extracted to suspect his version. No ulterior motive was assigned to the child witness to make false allegations against the petitioner. Nothing has emerged on record to show if prior to the incident, there was any animosity or ill-will between the parties prompting 'X' to falsely rope in the accused for the heinous offence. The petitioner alleged false implication due to occurrence of a minor dispute in past. However, he did not elaborate as to when and why such a dispute had arisen and how much money was due. For a petty dispute over money transaction, victim's father was not imagined to level serious allegations against the petitioner to defame a little child. Unless such an occurrence has really been occurred, parents or relatives of a little child would be highly reluctant to make such allegations. No compelling reasons exist to disbelieve X's testimony and to throw away the prosecution case overboard. Why a child of tender age would come forward in a Court

just to make a humiliating statement against his honour? He would not tarnish or damage his own reputation and image by volunteering to falsely claim that he had been defiled. Soon after the occurrence, 'X' narrated the incident to his father. The petitioner was named at the earliest in the initial information conveyed to the police vide DD No. 29 (Ex.PW-8/A) recorded at around 06.10 a.m. The victim is consistent throughout.

7. The evidence of a child witness cannot be rejected per se, but the court as a rule of prudence is required to consider such evidence with close scrutiny and if it is convinced about the quality thereto and the reliability of the child witness it can record conviction based on his testimony. If after careful scrutiny of the testimony of child witness the court comes to the conclusion that there is impress of truth in it then there is no reason as to why the court should not accept the evidence of child witness.

8. The position of law relating to evidence of child witness was succinctly stated by the Supreme Court in the decision reported **as (1997) 5 SCC 341 Dattu Ramrao Sakhare vs. State of Maharashtra** in the following terms:-

"A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In 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 demeanor must be like any other competent witness and there is no likelihood of being tutored.

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

9. Victim's statement has been corroborated by PW-3 (Ram Prasad), his father, in its entirety without any major variations. The FIR was lodged at the statement given by him. In his statement (Ex.PW-3/B), the complainant gave detailed account as to how and under what circumstances, the petitioner had sexually assaulted his son. In his court statement also, he deposed that he came to know about the incident when he saw the victim coming downstairs weeping on 28.07.1998 itself. He enquired as to what had happened; only then he came to know about X's ordeal. Despite searching cross-examination, nothing material could be elicited to dent his version.

10. Undoubtedly, when 'X' was medically examined vide MLC (Ex.PW-1/A), no external or internal injuries were found on her body. Settled legal preposition is that absence of injuries on the body of the victim

does not give rise to an inference that he was consenting party. Absence of injury or mark of violence on the private part on the person of the victim is of no consequence when the victim is minor and would merely suggest want of violent resistance on his part. Absence of violence or stiff resistance may as well suggest helpless surrender to the inevitable due to sheer timidity. In the instant case, the victim was a child aged about 11 years. When he tried to raise alarm his mouth was gagged by the accused.

11. Minor inconsistencies and infirmities highlighted by the petitioner's counsel are not material to disbelieve the complainant and victim's version. Merely because in the FSL report, 'semen' could not be detected on the underwear of the victim, it cannot be inferred with certainty that no such incident had taken place. FSL report (Ex.PW-9/C) further reveals that human semen was detected on Ex.2. It is well settled proposition of law that to constitute offence under Section 377 IPC, penetration is sufficient and no seminal discharge is required and it is not at all necessary that there should be complete penetration with emission of semen. Even partial or slightest penetration with or without any emission of semen would be quite enough for the purpose of Section 377 IPC.

12. The impugned judgment is based upon fair appreciation of the evidence and setting aside the acquittal order of Trial Court suffers from no infirmity. The appeal lacks merits and is dismissed.

13. The petitioner was sentenced to undergo rigorous imprisonment for five years with fine ₹2,000/-. Nominal roll dated 04.05.2016 reveals that the petitioner has undergone three months and twenty eight days incarceration besides remission for four days as on 04.05.2016. He is not a previous convict and is not involved in any other criminal case. His overall

conduct in jail is satisfactory. His age recorded in the nominal roll is 40 years. The incident pertains to the year 1998. He got acquittal from the Trial Court but in appeal, the said acquittal was set aside. Apparently, the petitioner has suffered agony of trial/appeal for about 18 years. The offence under Section 377 is triable by the court of Metropolitan Magistrate and the maximum sentence that could have been awarded to him by the said court was rigorous imprisonment for three years. Since the petitioner in appeal was convicted by the court of Sessions, he was granted rigorous imprisonment for five years. The sentence order records that the petitioner is sole bread earner of the family consisting of his old aged mother, wife and four minor children including one blind daughter.

14. Considering these circumstances, the sentence order is modified to rigorous imprisonment for three years with fine ₹2,000/-, the default sentence being simple imprisonment for one month. Other terms and condition of the order are left undisturbed.

15. The revision petition stands disposed of in the above terms.

16. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

JANUARY 04, 2017/sa