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

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Date of Judgment: 18th July, 2017

+ **CRL.L.P. 501/2016**

STATE (GNCT OF DELHI)

..... Appellant

Through : Mr. Rajat Katyal, APP

versus

ALEEM

..... Respondent

Through : Appearance not given

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

Crl.M.A. 14631/2016 (delay)

1. This is an application under Section 5 of the Limitation Act filed by the appellant seeking condonation of 68 days' delay in filing the present leave to appeal.
2. We find the reasons so mentioned in this application to be stereotyped and although, there are no cogent reason which would convince us to condone the delay, but since we have heard the matter on merits, the delay is condoned.
3. The application stands disposed of.

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4. The present leave to appeal has been filed by the State under Section 378(1) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the judgment dated 30.03.2016 passed by the Additional Sessions Judge, Karkardooma Courts in SC 44638/2015.
5. The case of the prosecution as noticed by the Trial Court is as under:

“1. On 13.1.2013, DD No. 12A was assigned to IO/SI Monika who reached the spot, i.e. A-62, Gali No. 2, 1st floor, Sriram Colony, Khajuri Khas, Delhi, where she met the minor victim – a girl aged about 15 years alongwith her mother Smt. Pushpa and after getting the victim medically examined at GTB Hospital, IO recorded her statement. The victim raised allegations against the accused stating that he used to follow her whenever she went to school. She further alleged that on 11.1.2013, at about 12 midnight while she was sleeping alone in her room, accused came in her room and entered her quilt and then pressed her mouth and thereafter, he removed her pajami as well as his own pant and then forcibly committed sexual intercourse with her and before going, he threatened her of being killed if she disclosed about it to anyone. Thereafter, matter was reported to the police and present case was registered for the offences under Section 376/452/506 IPC and Section 4 of the POCSO Act”

6. After completion of investigation, chargesheet was filed against the accused for the offences punishable under Section 376/452/506 of the Indian Penal Code, 1860 ('IPC') and Section 4 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').
7. After hearing arguments, charge for the offences punishable under Section 450/376/506 IPC and Section 4 of the POCSO Act was framed by the Trial Court against the accused/respondent, to which he pleaded not guilty and claimed trial.
8. In order to bring home the guilt of the respondent, the prosecution examined 13 witnesses in all. Statement of the respondent was recorded under Section 313 Cr.P.C. wherein he denied all the incriminating circumstances put to him and claimed that he had been falsely implicated in the case. The respondent claimed that the victim/prosecutrix was major and was in a love affair and had falsely implicated the accused/respondent at the instance of her mother, who objected to their friendship. No evidence was led by the defence.

9. The Trial Court found the testimony of the prosecutrix (PW-2) and her mother (PW-1) to be unreliable and in the absence of any corroboration by medical or forensic evidence, extended the benefit of doubt to the accused/respondent herein. Aggrieved by the judgment, the state has filed the present leave to appeal.
10. Learned counsel for the State submits that the Trial Court has based the judgment on surmises and conjectures and acquitted the accused without taking into consideration that the prosecution has been able to prove its case beyond any shadow of doubt. Mr.Katyul submitted that the Trial Court has failed to consider that the prosecutrix (PW-2) was consistent in all her statements and her statement was duly corroborated by medical evidence as the MLC (Ex.PW-4/A) stated that her hymen was torn. It was next contended that the absence of injuries or marks of violence on the private part of the prosecutrix are of no consequence as the same might even suggest the helpless surrender to the inevitable. Reliance is placed on ***Gurcharan Singh v. State of Haryana, AIR 1972 SC 2661: (1972) 2 SCC 749*** and ***Devinder Singh v. State of Himachal Pradesh, (2003) 11 SCC 488: AIR 2003 SC 3365***. It was contended that the Trial Court has erred in taking a negative inference in the absence of any alarm being raised or resistance shown by the prosecutrix.
11. It is next contended that there was no delay in the registration of the FIR as the incident took place at 12 midnight and the victim informed her mother at 12:45 AM and she inturn informed her husband at 1:15 AM and after the return of the father of the prosecutrix, the FIR was lodged. It is next contended that the prosecutrix has been consistent in the statements under Section 161 Cr.P.C., Section 164 Cr.P.C. and her deposition before the Trial Court and hence, her evidence was reliable

and sufficient to convict the respondent/accused. Reliance is placed on *State of Maharashtra v. Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550; AIR 1990 SC 658; *State of U.P. v. Pappu @ Yunus*, AIR 2005 SC 1248; (2005) 3 SCC 594 and *State of Himachal Pradesh v. Raghubir Singh*, (1993) 2 SCC 622. Mr. Katyal concluded that there is sufficient evidence in the form of oral testimonies, medical evidence and forensic evidence to convict the respondent/accused. In respect of contradictions, it is submitted that the same are minor and do not go to the root of the case of the prosecution and hence, the Trial Court should not have thrown out the case of the prosecution entirely.

12. We have heard the learned counsel for the State, perused the impugned judgment and examined the evidence placed on record. Since the case of the prosecution primarily revolves around the testimonies of the prosecutrix (PW-2) and her mother (PW-1), we deem it appropriate to examine their testimonies first.
13. The prosecutrix in her complaint (Ex.PW-2/A) alleged that on 11.01.2013, she had a confrontation with her younger sister aged about 13 years at that time and as such, she went to her mother in the kitchen where her mother used to sleep with her younger brother and slept there only. On the day at about 12:00 midnight, her neighbor/respondent came into her room and entered into her quilt. He closed her mouth and took off her *pajami* and also his pant and committed rape with her. He also threatened her while leaving the room that if she disclosed his acts to anyone, he would kill her. She further alleged that she told the incident to her mother as her father was a truck driver and had gone to Jaipur with the truck. Her mother informed her father who arrived at Delhi on 13.01.2013 and her father

called the Women Helpline at 181 who advised them to approach the police station and accordingly, they went there and lodged the complaint. In her statement recorded under Section 164 Cr.P.C., the prosecutrix reiterated the facts except for the confrontation with her younger sister.

14. Before the Trial Court, the prosecutrix (PW-2) deposed that she is studying in 10th standard and that her family consists of her mother, elder brother and her younger brother and sister. Her father expired on 26.01.2014 and was a truck driver. On 11.01.2013 at about 12 midnight, the respondent came into her room while she was asleep and alone there. The respondent entered into her quilt and pressed her mouth and held her tightly. PW-2 further deposed that the respondent took off his clothes and her wearing clothes and committed sexual intercourse with her against her will. Thereafter, the respondent left the room threatening her that if she disclosed the incident to anyone, he would kill her. At the time, her mother was sleeping in the kitchen alongwith her brother, which is situated outside her room. The prosecutrix (PW-2) then went to her mother and told her about the incident. At the time, her father was in Jaipur. Her mother called her father and talked to him. On the next day, her father came back and the prosecutrix also disclosed about the entire incident to him. Later, her father called up at 181 and the officials asked her father to go to the police station. Her father went to the police station and thereafter, some police officials had come to her house alongwith her father. She also deposed that the respondent used to follow her prior to the incident when she used to go to school.
15. The prosecutrix was thoroughly cross-examined wherein she stated that the area of her house is 65 sq. yds. The whole area of the ground

floor is covered by a single room; while on the first floor there is one room and a kitchen adjacent thereto and the remaining is an open area. The incident had taken place in the winter season. The respondent resides in the same vicinity and his house is adjacent to their house. From the roof of his first floor, the respondent can jump on out terrace after crossing a small wall. The main entrance gate of the house is closed at about 9-10 PM. She stated that there is a door in the room at the first floor, but the same cannot be closed properly. The door in the room makes some noise at the time of opening and closing. She also stated that she usually switches off lights while sleeping, but it is never completely dark as light enters the room through windows. PW-2 also stated that at the time of the incident, she was sleeping on a double bed. After lying on the bed, the door of the room is not visible, however, the door is visible for one who is lying in the kitchen. Additionally, it was also stated that the prosecutrix had informed her mother that the respondent used to stalk her, but no formal complaint was given to the police.

16. Smt.Pushpa (PW-1) deposed that the prosecutrix is her daughter and is about 15 years old at present. On the date of the incident, her two daughters Kanchan and the victim were sleeping in a room at the first floor of her house in the night. There occurred a quarrel between Kanchan and the prosecutrix. She deposed that at the time, she was sleeping in the kitchen along with her youngest son Bobby in order to take care of the gas cylinder from theft. Her eldest son was sleeping in the hall at the ground floor. Owing to the quarrel, Kanchan had also come and slept with her in the kitchen. At about 12:45 AM, the victim had come to PW-1 while weeping and told her that their neighbor respondent herein had committed rape with her forcibly. At

the time, her husband was in Jaipur and she telephonically informed him about the incident. To which, her husband said that he will come on the next day. On the next day, her husband came home and called up at 181 (helpline number); the official advised her husband to go and make a complaint at the concerned police station. Thereafter, she along with her husband and the victim went to the police station.

17. During cross-examination, PW-1 stated that her house comprises of two floors/*storey* i.e. ground floor and one room, one bath and kitchen on the first floor. There is one hall, one room and one bath room at the ground floor. There is a wooden door affixed in the room situated at the first floor, which can be bolted from the outside. There is no window in the room at the first floor. The victim had informed her of the incident on the same night at 12:45 AM and PW-1 had informed her husband telephonically at about 1:15 AM. The incident had also been informed to her son Piyush. She stated that she cannot tell the size of the kitchen, but it can accommodate one cot and cylinder. On the night of the incident, she heard a noise but suspected that it might be a cat. She also stated that she had not seen the respondent/accused entering into her house or doing any wrong act with her victim daughter.
18. The MLC (Ex.PW-4/A) has also been placed on record wherein a similar story of incident is recorded, however, there is no history of physical assault. It has also been stated that the hymen of the victim was torn; there was one linear scratch mark on the abdomen of the victim which was self-inflicted, according to the victim (PW-2) herself; and that the prosecutrix was not cooperating to the tests. In the forensic evidence (FSL Report), blood was detected on body fluid collection, in-between fingers, rectal examination, oral swab, culture,

vaginal secretion and breast swab, but no semen was detected nor was the blood sufficient for serological analysis. Further, there was no blood or semen detected on the clothes of the prosecutrix or the mattress/gadda.

19. There is no quarrel with the proposition that the sole testimony of the prosecutrix can be relied upon to base an order of conviction, but at the same time, such testimony should be of sterling quality and in consonance with the other prosecution evidence [*State v. Wasim & Anr*, 2017 SCC OnLine Del 8502 (paragraphs 19-21)]. The test as to when the testimony can be said to be of sterling quality was laid down in *Rai Sandeep v. State (NCT of Delhi)*, (2012) 8 SCC 21 as under:

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to

hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

(Emphasis Supplied)

[See also ***State (Govt of NCT of Delhi) v. Jitender Kumar & Anr.***, **CRL. L.P. 364/2017** dated 06.07.2017 (paragraphs 29-31)]

20. We may also notice, that it has been held by the Apex Court that the sole testimony can also not be relied upon, when the story fails to inspire confidence of the court as being improbable. In ***Tameezuddin v. State (NCT of Delhi)***, (2009) 15 SCC 566, the Supreme Court found it improbable that the husband of the victim of rape, after coming to know of the incident, would have gracefully told the accused/appellant therein that everything was forgiven and forgotten but had nevertheless lured him to the police station and thus, wanting supporting evidence. The relevant portion of the judgment reads as under:

“9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable.

10. We note from the evidence that PW 1 had narrated the sordid story to PW 2 on his return from the market and he had very gracefully told the appellant that everything was forgiven

and forgotten but had nevertheless lured him to the police station. If such statement had indeed been made by PW 2 there would have been no occasion to even go to the police station. Assuming, however, that the appellant was naive and unaware that he was being led deceitfully to the police station, once having reached there he could not have failed to realise his predicament as the trappings of a police station are familiar and distinctive. Even otherwise, the evidence shows that the appellant had been running a kirana shop in this area, and would, thus, have been aware of the location of the police station. In this view of the matter, some supporting evidence was essential for the prosecution's case."

(Emphasis Supplied)

[Also see *State (Govt. of NCT of Delhi) v. Mohd. Rihan*, 2017 SCC OnLine 8549 (paragraphs 27 - 29); and *Jitender Kumar & Anr. (Supra)* (paragraph 32-33)]

21. The prosecutrix (PW-2) herein fails the test of a sterling witness and also does not inspire the confidence of this Court. It is doubtful as to how the prosecutrix was able to identify the accused/respondent when she has deposed that she usually used to switch off all the lights while sleeping and light used to creep in from the windows, however, her mother (PW-1) deposed that there were no windows in the said room. In this background and owing to the fact that the incident took place in the winter season at about 12 midnight, it is hard to comprehend as to how the prosecutrix (PW-2) was able to identify the accused/respondent in absolute darkness. The story is also improbable as we are unable to believe that the incident could have taken place in a house of merely 65 sq. yds. (which also included the open area on the first floor) where the mother (PW-1) of the prosecutrix and her siblings were sleeping in the kitchen on the same floor having clear sight of the entry to the room. Additionally, there was no weapon of offence or any other instrument to stop the prosecutrix from raising

alarm apart from the closing of mouth by his hand and the room could only be bolted from outside. All these factors make the story of the prosecution highly improbable.

22. The failure on the part of the prosecutrix to raise an alarm also gains significance as there was no reason for her to passively surrender to the rape knowing fully well that her mother and siblings were in the next room and there was no weapon used to endure her silence.
23. Similarly, the testimony of the mother of the victim (PW-1) also fails to inspire confidence. Her rationale for sleeping in the kitchen is one which this Court cannot subscribe in. She deposed that she used to sleep in the kitchen *“in order to take care of the gas cylinder from its theft.”* We are unable to believe that a mother would not sleep in the company of her children, but in the kitchen allegedly to guard the gas cylinder, when the main gate of the house was closed at about 9-10 PM. It has also come in evidence that the kitchen was just large enough to accommodate one cot and the cylinder, then we are unable to comprehend as to how three persons, i.e. the mother (PW-1), Bobby and Kanchan, were able to sleep therein. This coupled with the fact that the victim (PW-2) had not stated so in her statement under Section 164 Cr.P.C. makes the factum of the prosecutrix (PW-2) having a confrontation with Kunchan doubtful. Further, the prosecutrix (PW-2) had deposed that she had informed her mother that the respondent/accused used to stalk her, however, no formal complaint was made to the police and there is no reason for the same.
24. Accordingly, we find no infirmity in the decision of the Trial Court in declining to convict the accused/respondent on the sole testimony of the prosecutrix. Corroboration was called for. The MLC (Ex.PW-4/A) merely shows that the hymen was torn, but there is nothing to

suggest that the same was a fresh tear. No injury was noticed on the body of the victim barring one linear scratch mark on the abdomen of the victim which was self-inflicted. There was no history of any physical assault. Even the forensic evidence (FSL Report) does not show any blood on the clothes of the prosecutrix as she had washed them after the incident. At the same time, there is no explanation for the absence of either blood or semen on the mattress seized by the police and no semen was traced on the exhibits collected from the prosecutrix, even though the samples were collected within time. The blood detected cannot be attributed to the incident of rape and in the absence of serological analysis, the origin of the blood is also unknown.

25. We are also unable to subscribe to the submission of Mr.Katyal that there was no delay in approaching the police. In the absence of any call records, the prosecution has been unable to prove that the father of the prosecutrix was infact in Jaipur and the delay was occasioned as PW-1 and PW-2 were waiting for his return. Accordingly, the delay not being satisfactorily explained raising a doubt on the story of the prosecution and opening the scope for embellishment or tutoring.
26. To conclude, the testimonies of the prosecutrix (PW-2) and her mother (PW-1) fail to inspire confidence and are on the whole improbable; and in the absence of any corroboration by medical or forensic evidence cannot be relied upon to convict the respondent/accused. In our view, the Trial Court correctly extended the benefit of doubt to the accused/respondent herein.
27. Even otherwise, it is settled law that the appellant court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so [See *Sheo Swarup v. King-Emperor*,

AIR 1934 PC 227 (2); *M.G. Agarwal v. State of Maharashtra*, AIR 1963 SC 200 (paragraph 16 and 17); *Tota Singh and Anr. v. State of Punjab*, AIR 1987 SC 108: (1987) 2 SCC 529 (paragraph 6); *State of Rajasthan v. Raja Ram*, (2003) 8 SCC 180 (paragraph 7); *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 (paragraph 42); *Ghurey Lal v. State of U.P.*, (2008) 10 SCC 450 (paragraph 73); and *Muralidhar @ Gidda v. State of Karnataka*, (2014) 5 SCC 730 (paragraph 12)].

28. Accordingly, we find no ground to interfere in the judgment of the Trial Court. The bail bond and the surety under Section 437-A Cr.P.C. are discharged.
29. The leave to appeal is dismissed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 18, 2017

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