

\$~5

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

+ **CRL. L.P. 287/2017**

%

Date of Judgment: 15th May, 2017

STATE (GOVT. OF NCT OF DELHI)

.... Petitioner

Through : Mr.Rajat Katyal, APP.

versus

MOHD RIHAN

.... Respondents

Through : *Nemo.*

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE REKHA PALLI

G.S.SISTANI, J. (ORAL)

Crl.M.A. 8057/2017 (Exemption)

1. Exemption allowed, subject to all just exceptions.
2. Application stands disposed of.

Crl.M.A. 7983/2017 (Condonation of Delay)

3. Although we do not find any sufficient ground to condone to delay, but since we have heard the leave to appeal on merits, delay of 166 days in filing the leave to appeal is condoned.
4. Application stands disposed of.

Crl. L.P. 287/2017

5. The present leave to appeal has been filed by the State under Section 378 (1) of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') being aggrieved by the judgment dated 22.08.2016 passed by the Trial Court in Sessions Case 44911/15 by virtue of which the respondent

has been acquitted for charges under Sections 457/376(2)(i)/506/354/354-A/354-B of the Indian Penal Code, 1860 (briefly the '*IPC*') and Sections 6/10 of the Protection of Children from Sexual Offences Act, 2012 (briefly the '*POCSO Act*').

6. In a nutshell, the case of the prosecution is that on 10.07.2014, the prosecutrix (PW-4), aged about 9 years, was sleeping on the terrace of her house with her parents and siblings. In the middle of the night at about 2:30 AM, the respondent herein working in the embroidery factory of the father of the prosecutrix (PW-7), came near her, took off her undergarment and tried to insert his finger into her vagina. The prosecutrix (PW-4) woke up and cried; on which, the respondent went downstairs. The prosecutrix approached her mother (PW-6), who told her to go to sleep as the prosecutrix had to attend school on the next day. On the next day, the prosecutrix went to her school and on returning, disclosed the incident to her mother. The mother of the prosecutrix then reported the matter to the police and the respondent herein was arrested.
7. After hearing arguments, charges under Section 457/376(2)(i)/506/354/354-A/354-B IPC and Sections 6/10 POCSO Act were framed against respondent, to which the respondent pleaded not guilty and claimed trial.
8. To bring home the guilt of the respondent, the prosecution examined 15 witnesses in all. Statement of the respondent was recorded under Section 313 Cr.P.C., wherein the respondent denied all incriminating evidence and pleaded innocence. He further stated that he was working with the father of the prosecutrix and also residing in the same household; but as he had sought permission to leave his job

owing to non-payment of dues, he was beaten and falsely implicated in the case. He had also alleged that the prosecutrix had been tutored by her parents.

9. After examining the evidence before it, the Trial Court acquitted the respondent. The Trial Court found improvements and contradictions in the testimonies of the prosecutrix (PW-4), her mother (PW-6) and her father (PW-7), which were not supported by any other evidence. Further, the whole story put forth by the prosecution was found to be improbable. Aggrieved, the State has filed the present leave to appeal against the judgment.
10. Mr.Katyal, learned APP for the State, submits that the impugned judgment is manifestly wrong, illegal and against the facts on record and thus, warrants interference by this Court. It is submitted that the Trial Court has erred in blindly relying upon the testimony of the accused/respondent herein and has not placed any reliance upon the testimony of the prosecution witnesses regarding the involvement of the respondent in the commission of the offence. The Trial Court had failed to consider that the testimony of the prosecutrix (PW-4), her mother Smt.Rizwana (PW-6) and her father Mohd. Mujahid (PW-7) were consistent during the investigation and trial. It is also contended that the Trial Court has failed to consider the consistency in the statements of the child witness, i.e. the prosecutrix. The prosecutrix had deposed in court in detail and all her statements were consistent, coherent and clear, thus, could have been made the basis of the conviction.
11. We have heard learned counsel for the State and have carefully examined the judgment of the Trial Court.

12. The only contention urged before us is whether the Trial Court erred in not relying upon the testimonies of the prosecutrix (PW-4), her mother Smt.Rizwana (PW-6) and her father Mohd. Mujahid (PW-7) to convict the accused/respondent?
13. As the Trial Court was of the view that the evidence of the prime witnesses was unworthy of credence, we deem it appropriate to analyse the statements of the prime witnesses.
14. In her first statement recorded under Section 161 Cr.P.C., the prosecutrix had stated that on 10.07.2014 she was sleeping on the terrace along with her mother and father as the electricity supply was off. The respondent came, laid beside her and started misbehaving with her. The prosecutrix woke up. The prosecutrix deposed that the respondent had taken off her undergarment and was touching her vagina with his hand trying to insert his finger into it. However, when the prosecutrix felt pain and cried, the respondent fled. She went to her mother and woke her up. Since her mother was unwell, she asked the prosecutrix to sleep and accordingly, the prosecutrix slept with her mother. Next morning, she herself got ready and went to the school and on coming back, she saw the respondent and being reminded of the incident, disclosed the same to her mother. She further informed that she was feeling irritation in her vagina. Her mother disclosed the fact to her father and the respondent also arrived at the time, who was apprehended and was also beaten by some public persons.
15. The prosecutrix made material improvements in her testimony under Section 164 Cr.P.C., wherein she deposed that she was sleeping with her mother, father and four brothers on the terrace. There was no electricity supply. While the prosecutrix was sleeping on the floor,

the respondent quietly came and laid besides her and started teasing her. The respondent removed her nicker and kissed on her lips and then put his hand in her rectum and then put his finger into her urinating part; as a result of which, the prosecutrix felt pain and cried, when the respondent fled. She then woke up her mother, who was unwell and asked her to drink water and sleep. On the next day, the prosecutrix went to school and after returning from there, saw the accused outside her house and got frightened and disclosed all the facts to her mother.

16. In the testimony recorded before the Trial Court, the prosecutrix (PW-4) deposed that on the day of the incident that she was sleeping with her parents and four brothers on the roof, when one uncle came who was working with her father on the ground floor. He put off her half pant and put his finger inside her private parts, i.e. from where she urinates and defecates. The prosecutrix cried and then the uncle went away. She approached her mother, who was sleeping nearby on the roof and tried to inform her about the incident, but she did not hear and then she slept with her. She further deposed that the next morning, the prosecutrix went to school and on her return, she got frightened upon seeing the same person and accordingly informed her mother all the facts. She also informed that she was feeling inflammation in her private parts.
17. During cross-examination, the prosecutrix admitted that the respondent used to stay in their house and take meals there; adding to say that he used to stay in the kitchen. She further deposed that she was sleeping on a cot alongside her four brothers, while her father was sleeping on the floor and mother was sleeping in the room built on the

terrace. She clarified that she was sleeping on the side of her brothers and not between them. She stated that on hearing her cries, only her mother woke up.

18. We may note that the Trial Court found inconsistencies, contradictions and improvements in the statements of the prosecutrix, we deem it appropriate to reproduce the same below:

“17. Thus in this statement [under Section 164 Cr.P.C.], she introduced two facts; firstly that her four brothers were also sleeping alongwith her and her both parents and that she was sleeping on the floor. She further introduced the fact that the accused had firstly kissed on her lips and then put his hand in her rectum. It is quite surprising that even hearing her cries neither her brothers nor her mother nor father woke up. She had woken her mother but none of other family members got awoke. It is further to be considered that if she was sleeping alongwith her parents and brothers, was it possible for the accused to have committed such an act after coming upstairs on the terrace?

...

20. A new fact has been introduced by the victim in her cross-examination. Earlier, she had stated that she was sleeping on the floor while in her deposition in the Court, she deposed that she was sleeping on the cot alongwith her four brothers. She did not state that the accused laid besides her as stated in her previous statements but simply stated that the accused came and put off her half pant. In the cross-examination, she further improved upon and deposed that her mother was sleeping inside the room whereas in her previous statements, she maintained that she was sleeping with her mother and father on the terrace. During her examination-in-chief, a court question was put to her as to whether the accused had put his fingers inside her rectum and vagina or had just touched it and moved his hands on those parts to which, she replied that she could not remember if his fingers were inside or outside which is again contradictory to her previous statements and even her deposition before the Court.”

(Emphasis Supplied)

19. The mother of the prosecutrix Smt.Rizwana (complainant/PW-6) deposed that on 10.07.2014 at about 11:00 PM, they went to the roof of their house for sleeping as there was no supply of electricity. Around 2:30 AM, when all the family members were sleeping, the prosecutrix came to her shouting “mummy-mummy”, but she asked her to sleep as she had to go to school in the morning; accordingly, the prosecutrix slept keeping her head on the body of PW-6. Next day, the prosecutrix went to school and came back around 11 AM, when PW-6 found her perplexed. On asking, the prosecutrix started crying and informed that last night about 2:30 AM, the respondent came to the roof, laid besides the prosecutrix and put his hand in her underwear and also put his finger in her vagina; due to pain, she cried and came to her. PW-6 further deposed that she told all the facts to her husband and at about 1:30 PM, the respondent came for collecting his clothes when he was confronted by her husband. The respondent threatened not to disclose the act to anyone or else he would kidnap the victim and would kill them.
20. In her cross-examination, PW-6 deposed that her two sons were sleeping on the cot and her other children were sleeping with the victim on the floor on a mat and she was herself sleeping on the mat on the floor along with her husband.
21. Mohd. Mujahid/father of the prosecutrix (PW-7) deposed that on 11.07.2014 at about 11:00 AM, the prosecutrix told the incident to the witness. The prosecutrix told that the respondent had put his hand under her underwear on the last night at about 2:30 AM and had

inserted his finger in her vagina. He further deposed that he had confronted the respondent, who had come to collect his clothes; at which point, the respondent threatened to kidnap the victim and kill them and then he called the police.

22. Again the Trial Court had found numerous contradictions and improvements in the testimonies of PW-6 and PW-7. We deem it appropriate to reproduce the relevant paragraphs of the judgment of the Trial Court in this regard in extenso below:

“23. In the cross-examination, PW-6 deposed that her two sons were sleeping on the cot and her other children were sleeping with the victim on the floor on a mat and she was herself sleeping on the mat on the floor as also her husband. This is totally contradictory to what was deposed by the victim who had deposed that she alongwith her four brothers was sleeping on the cot and her parents on the floor. PW-7 in this regard, in his cross-examination, deposed that they were all sleeping on the floor of the roof top at the time of the incident but could not remember the exact place where the victim was sleeping at that time.

24. Thus, there is a total contradiction in the testimony of the three material witnesses regarding a simple fact as to their sleeping arrangement. Furthermore, according to PW-6 and PW-7, the victim had told PW-6 that the accused had inserted his hand into her underwear and also put his finger in her vagina, contrary to the version given by the victim herself that the accused had pulled down her underwear and then put his hand on her rectum and tried to insert his finger into her vagina.

25. It is also noteworthy that PW-6 could give the exact time of the incident. She deposed that there was a wall clock inside the room and the electricity was on in the said room as they used to sleep with the lights on. Probably, while deposing this fact, she forgot that in her examination in chief she, as well as the victim had deposed that the electricity supply was off on that day. If that was so, how she could have seen the time? Also, as per her version and

that of the victim, she was unwell and when the victim approached, she asked her to sleep, therefore, there was no occasion for her to look at the watch at that time but still she deposed the time with impunity.

26. It has also come in the cross-examination of PW-6 that generally, she used to close the gate between the 3rd and the 4th floor on the stairs but then explained that on that day, the said door was open as her son had gone to take pencils at about 11.00pm and had not closed the door/gate. It is a clear improvement after she realised she had stated that the gate used to be remain closed. It is also worth-noting that the victim had four brothers who were sleeping with her but none of them has been cited or examined as a witness. Similarly, it has come in the testimony of PW-4, victim that the accused was apprehended and beaten by her father and other workers as well as neighbours but again, neither any neighbour or the co-worker has been examined who could have been an independent witness to the incident.”

(Emphasis Supplied)

23. It is also fruitful to examine the testimony of Dr.Priya Sinha (PW-8), who had proved the MLC (Ex.PW8/A) of the prosecutrix. As per the MLC (Ex.PW8/A), the hymen of the prosecutrix was intact, but there was slight redness around the introitus. Dr.Priya Sinha (PW-8) in her cross-examination stated that the redness might be attributable to a fall or not changing undergarments and thus, the medical evidence does not exclusively lead to the guilt of the respondent permitting reasonable doubt.
24. In the present case, it is clear that the prosecution had solely relied upon the testimony of the prosecutrix (PW-4) for proving the alleged incident of rape. The testimonies of the other two prime witness, i.e. the mother (PW-6) and father (PW-7), were relied upon to prove the surrounding circumstances of the incident.

25. As to relying upon the sole testimony of the prosecutrix is concerned, recently a coordinate bench of this Court, of which one of us (G.S. Sistani, J.) was a member, in **State v. Wasim & Anr., Crl.L.P. 242/2017** dated 24.04.2017 had observed as under:

“19. It is clear that the Trial Court found glaring inconsistencies and contradictions in the testimony of the prosecutrix (PW-2). Even though there is no quarrel with the proposition that conviction can be based on the sole testimony of the prosecutrix but at the same time, it must be unimpeachable and beyond reproach precluding any shadow of doubt over her veracity. We may only refer to few pronouncements of the Apex Court in this regard. In Ramdas v. State of Maharashtra, (2007) 2 SCC 170, it was held as under:

“23. It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality.

...

25. In the instant case there are two eyewitnesses who have been examined to prove the case of the prosecution. We have rejected outright the evidence of PW 5. We have also critically scrutinised the evidence of the prosecutrix, PW 2. She does not appear to us to be a witness of sterling quality on whose sole testimony a conviction can be sustained. She has tried to conceal facts from the court which were relevant by not deposing about the earlier first information report lodged by her, which is proved to have been recorded at the police station. She has deviated from the case narrated in the first information report solely with a view to avoid the

burden of explaining for the earlier report made by her relating to a non-cognizable offence. Her evidence on the question of delay in lodging the report is unsatisfactory and if her deposition is taken as it is, the inordinate delay in lodging the report remains unexplained. Considered in the light of an earlier report made by her in relation to a non-cognizable offence, the second report lodged by her after a few days raises suspicion as to its truthfulness.”

(Emphasis Supplied)

20. The Supreme Court in *State of Rajasthan v. Babu Meena*, (2013) 4 SCC 206, has observed as under:

“9. We do not have the slightest hesitation in accepting the broad submission of Mr Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.”

21. We may also note the following observations in *Mohd. Ali v. State of U.P.*, (2015) 7 SCC 272:

“29. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the

testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished a number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon.

30. True it is, the grammar of law permits that the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely does not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the appellant-accused for the alleged offences and the High Court has fallen into error, without reappreciating the

material on record, by giving the stamp of approval to the same.”

(Emphasis Supplied)”

26. In the present case, the testimony of the prosecutrix (PW-4) cannot be said to be of sterling quality as the same is plagued with contradictions and improvements and thus, cannot be the sole basis to convict the respondent. In such a case, corroboration is required. Neither medical evidence nor the testimonies of PW-6 and PW-7 come to the aid of the prosecution as the former permits reasonable doubt and the latter being merely hearsay in respect of the incident. Even the testimonies of the prosecution (PW-4), her mother (PW-6) and her father (PW-7) in respect of surrounding circumstances are exaggerated, improved and contradictory. Hence, it would be extremely imprudent to rely upon the testimonies of the witnesses and the Trial Court did not err in acquitting the respondent in the absence of supporting evidence.
27. Another reason, the testimony of the prosecutrix (PW-4) could not be relied upon without corroboration is as the story is 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 of gracefully tell 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)

28. Coming to the case at hand, the story led by the prosecution is also unbelievable and contrary to logic. This was summed up by the Trial Court in paragraph 30, which reads as under:

“30. ...The manner of the alleged incident as deposed by the witnesses, considering the contradictions appearing in their testimonies and the improvements appearing in the testimony of the victim is otherwise not possible. A person totally stranger in Delhi would not dare to commit such an act that too, when the family members of the victim were sleeping together and around her. The conduct of the victim in approaching her mother at the night time can be understood as a girl is more attached to her mother but when according to her, the mother was unwell, she could have easily raised cry to draw the attention of her brothers and father but she did not and slept with her.”

29. To sum up, the Trial Court was correct in not convicting the respondent based upon the testimonies of the prosecution witnesses being plagued by inconsistencies, contradictions and exaggerations as well as being on a whole, improbable. Some supporting evidence was required, but none was led by the prosecution.
30. Therefore, we are not inclined to grant the present leave to appeal. 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); and *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 (paragraph 42)].
31. Accordingly, we find no illegality or infirmity in the judgment of the Trial Court warranting interference. The bail bonds and sureties under Section 437-A Cr.P.C. are discharged.
32. The leave to appeal is dismissed.

G. S. SISTANI, J.

REKHA PALLI, J.

MAY 15, 2017 //