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

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Judgment dated: 29th May, 2017

+ **Crl. L.P. 339/2017 & C.M. No.9322-9323/2017**

STATE

..... Petitioner

Through: Mr. Rajat Katyal, APP for the
State

Versus

MAHENDER SAHNI

..... Respondent

Through: None

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J. (ORAL)

CRL.M.A.9322/2017(delay)

1. This is an application seeking condonation of 248 days delay in filing the present leave to appeal.
2. For the reasons stated in the application and since we have considered the leave to appeal on merits, the delay in filing the leave to appeal is condoned.

The application stands disposed of.

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3. The present leave petition has been filed under Section 378(1) of the Criminal Procedure Code (Cr.P.C.) praying for leave to assail the judgment dated 6th June, 2016 whereby the Trial Court had acquitted the respondent for commission of the offence by which he

was charged in a case being SC No.65 of 2014 arising out of FIR No.552 of 2013 registered by Police Station Shalimar Bagh under Section 376 of the Indian Penal Code (IPC) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO Act”).

4. An FIR was registered on the basis of a complaint made by the father of a girl child (referred to as ‘N’) aged about 12 years alleging that the respondent-Mahender Sahni (residing near the rented house of the minor ‘N’) to whom ‘N’ used to refer as “Chacha”, had called her on 12th December, 2013 at about 2.30 p.m. to his house and after pulling her inside the room, bolted the door. It is further stated in the FIR that after bolting the door, the respondent had forcibly removed the clothes of ‘N’ as well as his own clothes whereafter he committed rape upon her. The minor ‘N’ thereafter managed to push him; put on her clothes and ran after opening the door. It was further alleged that in the evening when her mother came back from work, she narrated the entire incident to her and the mother of ‘N’ went to the house of respondent at about 9.00 p.m. but he was not found there.

5. It was further alleged that upon not finding the respondent in his house, the mother of ‘N’ kept mum for the sake of family honour and it is on 15th December, 2013, the father of ‘N’ made a call to the police which was recorded as DD No.35A at 8.55 p.m. with regard to commission of rape upon ‘N’ by the respondent. Thereafter, the statement of ‘N’ was got recorded through a counsellor from NGO i.e. “Sampurna” and the FIR was registered based upon which the respondent was arrested on the same day.

6. After completion of investigation, charge-sheet was filed and charges against the respondent were framed under Section 342 IPC read with Section 4 of the POCSO Act. An alternate charge was also framed under Section 376(2)(i) IPC against the respondent. The respondent pleaded not guilty and claimed trial.

7. To bring home the guilt of the respondent, the prosecution examined as many as fourteen witnesses. The statement of the respondent under Section 313 of the Cr.P.C. was recorded wherein he claimed to be innocent and having been falsely implicated in the case by 'N' at the instance of her mother because of a monetary dispute between him and his brother on the one side and the mother of 'N' on the other.

8. The respondent produced two defence witnesses in his defence namely DW 1 Smt.Manju and DW 2 Mohd.Azmal who both deposed about the monetary dispute between the parties. The Trial Court acquitted the respondent which has led to the filing of the present petition seeking leave to appeal.

9. The Trial Court after scrutiny of the entire evidence with special emphasis on the statement of 'N' who had been examined as PW 4, had come to a conclusion that the prosecution had miserably failed to prove the charged offences against the respondent. The relevant paras of the Trial Court judgment read as under:-

“24. I have duly considered the law laid down in the aforesaid judgments and if, the same is applied to the facts of the present case then it would be evident that the place of alleged incident i.e. the tenanted house of accused was situated at the first floor of the

building where there were other tenants in other rooms and at the ground floor there was a meat shop of DW-2 Mohd. Ajmal but none of them saw either going or coming out from the house of accused on the said date. It is also evident that PW-8 had gone to the house of accused at about 9 p.m. on 12.12.2013 itself but the accused could not be found there. There is nothing on record that from 12.12.2013 till 15.12.2013 whether PW-8 or her husband had again gone to the house of accused. It is also not clear as to how all of a sudden on 15.12.2013 the father of N had made up his mind to report the matter to the police. Therefore, possibility of a coloured version having come on record cannot be ruled out on account of the aforesaid unexplained delay in reporting the matter to the police.

25. The medical and forensic evidence does not support the case of prosecution. N has levelled clear allegations of accused having committed penetrative sexual assault per vaginum upon her yet in the examination kit for victims of sexual abuse neither any kind of injury on the body of N or on her internal private parts was noticed. Her hymen was found completely intact suggestive of the fact that she had not been subjected to any kind of assault.

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27. In this case, the unexplained delay in reporting the matter to the police and the medical evidence being not supportive of the version of N puts her testimony in jeopardy and makes it either a tutored or false version and as such it would be highly unsafe to rely upon the same.

28. The accused has taken the defence of false implication on account of a monetary dispute between father of N and him. The accused has

examined two defence witnesses to prove the same. Strangely the father of N was cited as a prosecution witness but he was not examined in the matter despite he being available as a consequence whereof a material prejudice has been caused to the accused as the father of N would have been the best witness to whom the accused would have put his defence. Therefore, adverse inference is liable to be drawn against the prosecution on this account.”

10. While acquitting the respondent, the Trial Court was duly conscious of the fact that it is settled law that the conviction could be based on the sole testimony of child victim provided it appears to the court to be truthful and believable but after examining the entire evidence including the testimony of PW 4, it came to a conclusion that it would be highly unsafe to rely upon the same and, therefore, held that the respondent deserved to be acquitted.

11. Mr.Rajat 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. He further submits that the Trial Court has failed to appreciate the testimony of PW 4 as a child victim and overlooked the fact that she had been consistent through the trial as well as during the investigation and her statement could not be dented during cross-examination which duly proved the case of the prosecution regarding the commission of the offence and, thus, the Trial Court has erred in acquitting the respondent.

12. We have heard learned APP for the State and carefully examined the testimony of the witnesses and the impugned judgment

rendered by the Trial Court. The question which arises for our consideration is as to whether the Trial Court has erred in not relying upon the statement of the child victim to convict the respondent.

13. To deal with the submissions on behalf of the State, it would be relevant to analyse the testimony of the victim. The child victim was examined in the Court as PW 4 wherein she deposed in her examination-in-chief that as the respondent was from her village, he was like her “chacha” (uncle) and on 12th December, 2013, when she was going to call her father for lunch, she met the respondent who called her to his house. PW 4 further states that after giving food to her father, she went to the house of the respondent at around 2.30 p.m. when he pulled her inside and bolted the door. She further deposed that he forcibly removed her clothes and his clothes and committed rape upon her forcibly and when she tried to make noise, he held her hands and pressed her mouth forcibly. She further deposed that as soon as she got a chance, she pushed the respondent; wore her clothes; opened the door and ran back to her own house. PW 4 in her testimony further deposed that she narrated the entire incident of rape to her mother at night who went to the respondent’s house at 9.00 p.m. but he was not present at home. Later at night, the entire incident was narrated by her mother to her father but due to family honour, they did not report the incident to the police.

14. PW 4 further stated that on 15th December, 2013, she asked her parents to report the incident to the police and after reporting the incident to the police, a woman Sub-Inspector reached the house of ‘N’, got her counseled through a counselor from NGO, and then

recorded her statement. Thereafter, the victim was taken to a hospital in Jahangir Puri where her medical examination was conducted and she narrated the entire incident to the doctor also. During her cross-examination, she reiterated her statement in chief and added that the clothes which she was wearing on the date of the incident, had been washed by her mother.

15. Undoubtedly, conviction can be based on the sole testimony of the victim provided that it is trustworthy. However, in case the Court has reason not to accept the version of victim, it may look for corroboration. The evidence has to be read in its totality and if the court comes to a conclusion that the statement of victim is either tutored or a false version, it would be unsafe to rely upon the same to convict the accused.

16. It is also settled proposition of law that in case evidence read in its totality and the story projected by the prosecutrix is found to be improbable, her version is liable to be rejected. The Apex Court in ***Narender Kumar versus State (NCT of Delhi)***, reported at (2012) 7 SCC 171, has held as under:

"20. It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances.

Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

21. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: **Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr.**, (2003) 3 SCC 175; and **Vishnu v. State of Maharashtra**, (2006) 1 SCC 283.

22. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: **Suresh N. Bhusare & Ors. v. State of Maharashtra**, (1999) 1 SCC 220.

23. In **Jai Krishna Mandal & Anr. v. State of Jharkhand**, (2010) 14 SCC 534, this Court while dealing with the issue held:

"4.....the only evidence of rape was the statement of the prosecutrix herself and when

this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed."

24. In *Rajoo & Ors. v. State of Madhya Pradesh*, (2008) 15 SCC 133, this Court held:

"10.....that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary."

The court however, further observed:

"11.....It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

25. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009) 15 SCC 566, this Court held 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.”

17. The Hon’ble Supreme Court in ***State of Rajasthan v. Babu Meena*** reported at (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.”

18. While deciding the present leave petition, the afore-stated principles culled out by the Apex Court, are to be kept in view. In the present case, the following circumstances which stood established are noteworthy:-

(i) The tenanted house of the respondent was situated at the first floor of the building where there were other tenants in other rooms and at the ground floor, there was a meat shop of DW 2 Mohd Azmal but none of them saw the child either going or coming out from the house of the respondent on the said day.

(ii) There is no justification for the unexplained delay in reporting the matter to the police and there is nothing on record as to what action had been taken by the parents of 'N' from 12th December, 2013 till 15th December, 2013 and it is not clear as to how all of a sudden on 15th December, 2013, the father of 'N' had made up his mind to report the matter to the police

(iii) The medical and forensic evidence does not support the case of the prosecution at all though 'N' had levelled clear allegations of the respondent having committed penetrative sexual assault per vaginum upon her yet there was no kind of injury at her body or on her internal parts. On the other hand, the hymen of the victim was found completely intact. It was suggestive of the fact that she had not been subjected to any kind of assault.

(iv) It is an admitted fact that the father of 'N' was cited as a prosecution witness but was not examined in the matter despite his availability.

19. As far as the contention of Mr.Katyal regarding the justification given by the mother of 'N' for the delay in reporting the matter to the Police is concerned, the same has to be rejected.

20. In the present case, on a cumulative reading and appreciation of the entire evidence on record, we are of the considered view that the testimony of the child victim is not reliable to bring home the guilt of the respondent. We are satisfied that given the evidence led by the prosecution during the trial, the findings of the Trial Court cannot be assailed on the grounds raised by the counsel for the State.

21. Even otherwise, it is settled law that the appellate 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)].

22. We find no infirmity in the findings and conclusions of the Trial Court.

23. The leave to appeal and application being C.M. No. No. 9323/2017 are accordingly dismissed.

REKHA PALLI, J.

G. S. SISTANI, J.

MAY 29, 2017

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