

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

% Decided on: 17th March, 2017

+ **CRL.A. 1113/2016**

STATE (NCT OF DELHI)

..... Appellant

Represented by: Ms. Rajni Gupta, APP for the
State.

versus

RAMAN KUMAR

..... Respondent

Represented by: Mr. Tarun Khanna and Ms.
Saahila Lamba, Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The respondent was tried for offences punishable under Sections 366/342 IPC and Section 6 of the Protection of Children from Sexual Offence Act, 2012 (in short 'POCSO Act') and acquitted vide impugned judgment dated 21st November, 2014. Hence the present appeal by the State after leave to appeal was granted.

2. In her deposition before the Court the child victim PW-1 stated:

"On 13.01.2013 again said 23.01.2013, I was going alone at around 5.00 p.m. to my maternal grandmother's house, which is at the distance of two streets away from my house. Accused met me at the corner of the street. My father was not at home on that day and he was on his duty. Accused told me that he will take me to my father. Thereafter accused took me to his house. No one was present at the house of accused. At the house accused told me that he had taken a photograph of my mother while she was taking bath. Accused kept me at his house for two days and thereafter he left me in Shukra Bazar. Accused told me while leaving me at Shukra Bazar that this

fact should not be told to the police, otherwise, he will again kidnap me. From Shukra Bazar, I came to my house with some unknown person and told the entire facts to my parents. My father called the police. Police took me to DDU hospital, where I was medically examined.

When I was in the captivity of the accused, he used to talk to me in filthy language and had also touched my private part (SUSU). The accused had also made me suck his organ used for urination. All these facts were told by me to the police uncle.

My statement was recorded before the Ld. Magistrate.

At this stage, one envelop with the seal of RS is taken out from judicial file. After breaking the seal, proceedings U/s 164 Cr.P.C. is taken out. Same is shown to the child victim. Child victim correctly identified her signature on her statement at point A and proceedings U/s 164 Cr.P.C. is now Ex.PW-1/A.

At this stage the child victim has been asked to identify the accused, who kidnapped her (The accused is standing behind a curtain and is unable to see the child victim and he has been further asked to close his eyes. However, child victim has been asked to identify the accused from the parting between the curtain).

After seeing the accused through the parting between the curtain, child victim has correctly identified the accused present behind the curtain.”

3. FIR No. 47/2013 under Section 363 IPC was lodged at PS Dabri, Delhi on the complaint of the father when the child victim was found missing since 6.30 PM on 23rd January, 2013. Despite search being made the child victim was not traceable. On 25th February, 2013 at 2.30 PM the complainant received a call from his wife stating that the child victim had returned home, whereafter she was taken to police station and for medical examination. No statement of the prosecutrix/child victim was recorded immediately. The respondent was arrested in another case where he stated to

have allegedly made disclosure statement in respect of the present case. Thus he was produced before the Court and an application was made for test identification parade which the respondent refused stating that he had been taken at various places and shown to number of persons. It is only after the arrest of the respondent and his alleged disclosure statement that the statement of the prosecutrix was recorded under Section 161 Cr.P.C. and 164 Cr.P.C. for the first time though she returned home within two days of her missing from her house. Though the father says that the prosecutrix returned on 25th February, 2013 however, as per the prosecutrix she came back on 26th January, 2013 at 2.00 PM on her own and nobody met her on the way. She knew the location of her house and though she met her family members, she did not disclose them anything but disclosed the fact only for the first time to the police uncle. As noted above the statement of the victim was recorded after nearly two months of the incident after the respondent was arrested in the other case. In her cross-examination the victim admitted that whatever she deposed was as told to her by the police uncle. In her cross-examination she further stated that she was at her house with her parents prior to 25th January, 2013 and nothing had happened to her.

4. The reasoning of the learned Trial Court in acquitting the respondent is noted as under:

“36. In the present case, the reliability and credibility of PW1 Child victim has been shaken in the light of her cross examination wherein she has admitted that whatever she has deposed before this court in her examination in chief including the identification of accused, was done at the instance of police officials meaning thereby that she was a tutored witness. In the light of PW1 Child victim being a witness, who was tutored by police prior to her evidence,

her credibility is shaken and it is not safe to rely upon her testimony.

- 37. Further, there are inconsistencies in evidence of child victim. In her examination in chief, child victim has deposed that accused met her at the corner of the street when she was going to her maternal grandmother's home on 23.01.2013. However, in the testimony of PW2 Father of child victim, it has come on record that mother of child victim had apprised PW2 Father of child victim that child victim had gone missing when she was playing outside her house. Even in the cross examination, child victim has admitted that she was playing outside her house with her sister and two other kids and her mother was inside the house. Therefore, evidence of child victim that she was going to her grandmother's house when accused had met her at the corner of the street, is not believable which also makes the testimony of child victim unreliable.*
- 38. Secondly, it is not believable that accused will take away the child victim while she was playing with her sister and two other children and her sister will not apprise the mother of child victim, who was in the house. This fact also makes the evidence of child victim unreliable and untrustworthy.*
- 39. Further, it has come in the cross examination of child victim that she was being taken away by accused from the street on foot and lot of shops were on the way and shopkeepers were also known to her. However, she did not raise any alarm to any of the shopkeepers that she was forcibly being taken by accused. This unnatural conduct of PW1 Child victim also makes her evidence unreliable and untrustworthy as no child on being taken forcibly by some unknown person, will not raise alarm or apprise the neighbours, who are known to her to seek their help*

40. *It has also come in the cross examination of child victim that she stayed at the house of accused for two days and during her stay, she used to play with kids of neighbourhood and used to talk with neighbours and accused also used to take her to a hotel for food. Even then she did not apprise any of the neighbours or children that she was forcibly kept by accused in his house. Although child victim had volunteered by stating that accused had threatened her to prick her with a needle if she would disclose this fact but that was an improvement made by child victim as in the statement made before the Ld. Magistrate u/s 164 Cr.P.C. Ex.PW1/A, no such fact was deposed. It is not believable that the child victim who has been taken forcibly against her wishes to the house of accused will not apprise the kids or neighbours regarding her plight. This fact also makes the testimony of child victim unreliable.*

41. *Further, in the present case, evidence of child victim could have been corroborated by independent witnesses, who had witnessed her captivity in the house of accused. Since it has come in the evidence of child victim that she used to play with the children in the neighbourhood of accused's house and used to talk to neighbours and one aunt as per her statement u.s 164 Cr.P.C.Ex.PW1/A, therefore, it was incumbent upon the IO to have examined the neighbours of accused and children residing in the vicinity of accused's house to lend credence to the version of child victim. However, despite availability of witnesses, they were not examined by the IO for the reasons best known to him which also creates a doubt in the prosecution story. No efforts were made by IO during the course of investigation to have taken the child victim to the house of accused and to identify neighbours and children, who had seen child victim in the company of accused. Even child victim was not taken to the hotel where it is alleged that she had been taken by accused for the purpose of meal. When evidence is available and is*

not collected then it creates a doubt regarding the prosecution case, benefit of which has to go to accused.

- 42. In the present case, offence had taken place on 23.01.2013 whereas accused was arrested in this case on 13.03.2013. After the arrest of accused, he was produced before the Ld. Magistrate for his TIP proceedings but he had refused to participate in the same as per Ex.PW4/D. The reason for refusal given by accused vide Ex.PW4/D was that he had already been shown to the child victim by police.*
- 43. The defence of accused regarding nonparticipation in TIP proceedings stands duly proved by evidence of PW2 Father of child victim, who has deposed in his examination in chief that after about one month of the incident, he was summoned by the police officials of PS Dabri alongwith child victim to identify accused, who was already in the police custody and thereafter, accused was identified.*
- 44. From the testimony of PW2 Father of child victim, it has come on record that accused was already shown to the child victim in the police station and, therefore, refusal of TIP by accused vide Ex.PW4/D does not raise any kind of adverse inference against him as his defence that he was already shown to the witness, duly stands established.*
- 45. Further, since it has come in the evidence of PW1 Child victim that she has deposed in this case whatever she was tutored by police officials, therefore, possibility of accused being wrongly identified in the court, cannot be ruled out.*
- 46. Although there is presumption under section 30 and 31 of the POCSO Act regarding the fact that accused had indeed committed offence in question but said presumption is rebuttable.*

47. *In the present case, since it has come on record that child victim is a tutored witness and the identification of accused at the police station and in the court is also doubtful and having regard to the fact that even testimony of child victim is not reliable and trustworthy and evidence of child victim has not been duly corroborated, by non-examination of material witnesses i.e. neighbours and kids in the neighbourhood of accused, who were available, therefore, in these facts, presumption stands rebutted by accused and it will not be safe to rely upon the testimony of child victim. Accordingly, accused is acquitted for the offence u/s 366/342 IPC and u/s 6 POCSO Act. Personal bond/surety bond, if any of accused is discharged.*

5. From the evidence on record as noted above, the reasoning of the learned Trial Court in acquitting the respondent for the charges as noted above cannot be held to be perverse warranting interference. Consequently the appeal is dismissed.

(MUKTA GUPTA)
JUDGE

MARCH 17, 2017
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