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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: October 10, 2017

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CRL.L.P. 439/2017

STATE (NCT OF DELHI)

..... Petitioner

Through: Ms.Kusum Dhalla, APP for the
State with SI Pankaj Kumar PS
Vasant Kunj South

versus

SHAKEEL

..... Respondent

Through: Mr.R.S.Mishra & Mr.Anand
Mishra, Advocates

PRATIBHA RANI, J. (Oral)

1. The State is seeking leave to appeal against judgment dated 19th March, 2016 passed by Additional Sessions Judge-01 in Sessions Case No.110/14 whereby the respondent Shakeel has been acquitted of the charges under Section 451/354D/506 IPC and Section 8/12 of POCSO Act.
2. Notice of the leave petition was sent to the respondent and the LCR was also requisitioned.
3. The grievance of the State is that the victim in this case was thirteen year old girl who was staying with her maternal uncle at Delhi. The respondent/accused Shekeel entered her room on 18th July, 2014 at 8:00 AM and tried to hold the hand of PW-3 'F' (name

withheld to conceal her identity). When she raised alarm her parents and maternal uncle who were present on the terrace, came down and chased the accused Shakeel. They managed to apprehend him and he was handed over to the police.

4. Learned APP for the State submitted that the learned Trial Court had acquitted the appellant noticing the variations/improvements in the version of the child victim and her parents - father (PW-2), mother (PW-6) and maternal uncle (PW-1) about the nature of the incident and the manner of apprehension and arrest of the respondent/accused ignoring that her statement so far as presence of the respondent/accused in the room of PW-3 'F' and he being apprehended by her family members thereafter and her complaint that he tried to hold her hand, was consistent. But despite that learned Trial Court has acquitted him, hence, leave to appeal may be granted.

5. The incident dated 18th July, 2014 was first reported to the police vide DD No.28B (Ex.P-3) at 10:22 AM. The informant was PW-1 Abdul Umar Mohd. (maternal uncle of PW-3 'F') who called from his mobile informing about a quarrel near Rajokri Pahari, Harijan Basti Bus Stand. The DD was assigned to HC Rishi Rose who along with Const. Dinesh (PW-4) left for the spot. The second information in respect of the said incident was recorded vide DD No.53B (Ex.P-4) at 3:30 PM and the informant was again PW-1 Abdul Umar Mohd. (maternal uncle of victim) who at that time reported that the respondent accused Shakeel had been doing wrong act for the past one year. This DD was assigned to SI Babu Lal PW-8

who along with Const. Mahender and lady Const.Nirmal left for the spot. HC Rishi Rose whom DD No.28B, Ex.P-3 was marked to attend the call has not been examined. The outcome of the inquiry, if any, made in respect of the call of quarrel made at 10:22 AM is not available on record. However, Const.Dinesh has been examined as PW-4 who on receipt of DD No.28B accompanied HC Rishi Rose to the spot. His examination-in-chief reads as under:

“On 18.07.2014 I was posted at PS Vasant Kunj (South) as Constable. On that day on receipt of DD no.28B regarding quarrel at about 10:20 PM I alongwith HC Rishi Rose went to the spot i.e. Harijan Basti, Rajokari where prosecutrix alongwith her parents and maternal uncle met us. The victim was produced before HC Rishi Rose. The parents told us that victim was subjected to “ched chad” and they were telling that they would give their report before the SHO concerned. They had also produced the accused before HC Rishi Rose who took the aforesaid persons to the PS and were making inquiry from them. During the course of inquiry, SI Babu Lal came there and told us that maternal uncle of victim called at 100 number and a call DD no. 53B was recorded to that effect and same was marked to SI Babu Lal. HC Rishi Rose produced the victim, her parents, her maternal uncle and accused Shakeel present in the Court today (correctly identified) before SI Babu Lal. SI Babu Lal made interrogation from accused and he was arrested vide arrest memo Ex.PW 1/A and IO prepared the personal search memo Ex.PW 1/B. Both the memos bears my signatures at point B. My statement was recorded by the IO.

Xxx by Sh. R.S.Mishra, Ld. Counsel for the accused.

It is incorrect to suggest that I did not join the investigation and the accused was not arrested in my presence. It is incorrect to suggest that IO had taken my

signatures on the personal search memo Ex.PW 1/B and arrest memo Ex.PW 1/A at the PS itself. It is incorrect to suggest that I am deposing falsely. ”

6. Statement of PW-8 SI Babu Lal who reached the spot on receipt of DD No.53B recorded at 3:30 PM has stated that he along with Ct.Mahender and W/Ct.Nirmala left the police station. As there was no mention of the address in the DD, he called on the mobile of the caller and came to know that he was sitting in the police station. He again went to the police station and met the caller Abdul Umar Mohd., maternal uncle of the victim and the parents of the victim. HC Rishi Rose and HC Dinesh were also present there. After verifying the facts the victim was sent for medical examination and thereafter her counseling was got done through the NGO. Her statement Ex.PW3/A was recorded on the basis of which FIR was registered.

7. The prosecution has failed to explain that if information in respect of the quarrel was received at 10:22 AM and all the concerned parties including the accused were brought to the police station soon thereafter, then how the same caller i.e. PW-1 Abdul Umar Mohd., maternal uncle of the victim could have made another call after about 7 hours to PCR while sitting in the police station to the ignorance of the duty officer/the officials making the entries in the Roz Namcha and if no address was disclosed in the second DD No.53B, Ex.P-4, recorded at 3:30 PM then how PW-8 SI Babu Lal could have left the police station with two constables without knowing the destination.

8. It is necessary to mention here that so far as the respondent/accused is concerned, he is closely related to the victim's

family. The family of the victim as well the respondent/accused both are resident of the same place i.e. village Uttawara in Haryana. PW-2 Abdul Alam, father of the victim has admitted that the respondent/accused is closely related being his nephew (Bhatija). His cross-examination being relevant to understand the real nature of the dispute is extracted here under:-

“I have read urdu. I have studied up to class V. It is correct that I have two other daughter Fatima, Aged about 15-16 years and Talseema, Aged about 17 years. The accused is y nephew (Bhatija) by relation. It is incorrect to suggest that my daughter Fatima had friendship with the accused. It is correct that a panchayat was called in the village. It is incorrect to suggest that the said panchayat was called for finishing the friendship between my daughter Fatima and the accused. Vol. It ws in regard to the friendship between the prosecutrix and the accused. It is correct that the matter was settled but it is incorrect that the amount settled was 1.5 lakhs to be paid to us by the family of the accused. Vol. The settlement was that these 2 lakhs were to be deposited with the panchayat to be given to us while the remaining 2 lakhs were to be paid after two months and the accused was to be turned out of the village however, neither the accused was sent out of the village nor any money was given to us.”

9. However, PW-6 Smt.Ajija, mother of the victim, in her examination-in-chief while stating that respondent/accused used to obstruct in the study of her daughter (PW-3) stated that she called the Panchayat at her native place and Panchayat penalized him with direction to pay ₹4 lakh as punishment and to leave the village for two years. The respondent/accused has no local address and the plea taken

by him is that he was brought from the native place and falsely implicated in this case.

10. It is pertinent to note that in the arrest memo Ex.PW-1/A only the permanent address of the arrestee has been given and the same is mentioned as his present address. The column Nos.4 and 6 i.e. the details pertaining to FIR number and Section of law as well date and time of arrest have been left blank. Even the date of preparation of arrest memo is not mentioned under the signature of the Investigating Officer or any of the witnesses.

11. Learned Trial Court has given sound reasons for disbelieving the testimony of the child victim, her parents and maternal uncle. The operative part of the reasoning given by the learned Trial Court is extracted here under:

26. As far as incident dated 18.07.2014 at about 8.00 a.m. at H.No.1163 Near Naap Tol Office, Harijan Basti, Rajokri is concerned, the same was firstly reported to police by PW-1. The information was recorded in Ex.P-3 i.e. DD No.28 B and again in DD no.53B there was an information regarding molestation of a 13 years old girl for the past one year by one boy. DD No.28B was recorded at 8.22 a.m. while DD No.53B was recorded at 3.30 p.m. on 18.07.2014.

27. It is argued by Ld. counsel for accused that this shows that accused is falsely implicated in this matter since 3.30 p.m. no information was provided to police regarding the alleged molestation. It is further stated that accused was lifted from his native village and was falsely implicated in the present case. On the other hand it is argued by Ld. APP for State that DD no.53B clearly shows that there is the alleged history of molestation of victim girl by accused for the past one year was given.

28. As far as this fact is concerned, from the perusal of record, it appears that DD No.28B was recorded when the call was made by PW1. The DD No.53B was also recorded on the call of same witness PW1. So, the perusal of time span between two DDs is about more than 7 hours. So, the possibility cannot be ruled out that the incident of “Chhed Chhad” was an aftherthought.

29. It is further argued that there are different statements given by victim regarding the alleged incident of molestation. As per her in Ex.PW3/A she had stated “galat niyat se mera haath pakad kar rumal se mera muh debadiya aur meri salwar ka nara kiche laga”. However, in her statement as PW3 dated 20.08.2015 she had stated “the accused Shakeel caught hold of my hand”. It is stated that due to different statements at different forums, the testimony of prosecutrix could not be relied. It is further stated that neither PW2 nor PW5 had stated about the alleged incident of gagging the mouth of the prosecutrix aur trying to unite her salwar by pulling string. It is stated that due to this reason, the testimonies of none of prosecution witnesses can be relied. It is further stated that there is difference in testimonies regarding the alleged place of arrest of accused as well as the persons who had arrested the accused is stated that as per PW1 accused ran away. PW1 chased him on his motorcycle and accused concealed himself in the bushes in the jungle and police was called and accused was apprehended. As per PW2 accused was apprehended by the public gathered at the spot. As per PW3 i.e. prosecutrix accused was apprehended by her mama and public persons. As per PW6 accused was apprehended at the spot.

30. Now in this case, the testimony of victim is changing with respect to the incident of molestation which took place on 18.07.2014. No doubt in the cases of sexual assault on woman, the testimony of victim is itself sufficient for the conviction of the accused but if the same is unchanging, reliable and trustworthy. In this

case, with respect to the incident dated 18.07.2014, regarding the manner in which the incident took place, i.e. the alleged act of molestation, the statement of prosecutrix is changing at different forums. So, in these circumstances, the same is does not appears to be trustworthy or believable.

31. Even the testimonies of PW1, PW2, PW3 and PW6 is different regarding the place of arrest of accused and the manner in which he was arrested. This also cause doubt as to whether the accused has done the said act of molestation and thereafter he ran away.

32. On account of my aforesaid discussion, the prosecution failed to prove its case beyond reasonable doubt.

33. Accordingly, accused is acquitted for the offences u/sec.451 IPC and u/sec.8 POCSO Act (for the incident dated 18.07.2014). Similarly, accused is also acquitted for offence u/sec.451 IPC (for the incident of dragging the prosecutrix by feet at about 2:00 a.m. in night at village at District Palwal Haryan). Similarly, accused is acquitted for the offence u/sec.12 POCSO Act r/w Sec.354D IPC (for the offence of sending SMSs and criminal intimidation by showing country made pistol).”

12. Legal position is well settled that the Appellate Court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The Trial Court judgment cannot be set aside merely because the Appellate Court’s view is more probable. The Appellate Court would not be justified in setting aside the Trial Court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the Trial Court is either ‘perverse’ or wholly unsustainable in law. (*Vide : 2009 (10) SCC 2006*).

13. In the case of **State of U.P. vs. Nandu Vishwakarma AIR 2009 SC 3188**, it was observed that *‘when on the basis of the evidence on record two views could be taken – one in favour of the accused and the other against the accused – the one favouring the accused should always be accepted.*

14. Thus, I do not find it to be a fit case to grant leave to appeal. Accordingly, the leave petition is hereby dismissed. Trial Court record be sent back forthwith along with a copy of this order.

PRATIBHA RANI, J.

OCTOBER 10, 2017

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