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

% *Date of Judgment: 24th of July, 2017*

+ **CRL.L.P. 408/2017**

STATE

..... Appellant

Through: Mr. Rajat Katyal, APP

versus

ISRAFEEL

..... Respondent

Through: *Nemo*

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

G.S.SISTANI, J. (ORAL)

Crl.M.A.No. 11670/2017 (exemption)

1. Exemption allowed, subject to all just exemptions.
2. The application stands disposed of.

Crl. M.A.No. 116690/2017 (delay)

3. This is an application seeking condonation of 206 days delay in filing the present leave to appeal. Though we find no reasons to condone the delay, but since we have heard the matter on merits, delay of 206 days in filing the present leave to appeal is condoned.
4. The application stands disposed of.

CRL.L.P. 408/2017

5. The present leave to appeal has been filed by the State under Section 378 (3) of the Code of Criminal Procedure, 1973 ('Cr.P.C.') against the order of acquittal dated 09.09.2016 passed by the Additional Sessions Judge, Karkardooma Courts in Sessions case No. 174/2013 by virtue of which the respondent Israfeel was acquitted for the offence punishable under Section 376 of the Indian Penal Code

(hereinafter referred to as ‘IPC’) and Section 4/12 of Prevention of Children from Sexual Offences Act, 2012 (hereinafter referred to as ‘POCSO’).

6. Briefly stated, the case of the prosecution as per the complaint of the victim dated 07.09.2013 that about 4 months prior to the complaint, the respondent Israfeel (brother in-law of the victim in a distant relation) who was the neighbour of the victim had raped her on 3-4 occasions. As per the complaint, the respondent used to come her Jhuggi in the absence of her parents during the daytime and established physical relation with her on the pretext of marriage with the victim. On one day the wife of the respondent came to know about the said act and called a Panchayat in the village and disallowed the respondent from meeting her.
7. On the basis of the complaint, FIR under Section 376 of IPC and Section 4/12 of ‘POCSO’ Act was registered. On 13.09.2013, the statement of the victim was recorded under Section 164 of Cr.P.C. The medical examination was refused by the victim. Vide order dated 17.01.2014, charges were framed against the respondent under Section 376 of IPC and Section 6 of the POCSO Act, to which he pleaded not guilty and claimed to be tried.
8. To bring home the guilt of the respondent, the prosecution examined 13 witnesses in all including PW3 (victim herein). The statement of the respondent was recorded under Section 313 Cr.P.C. whereby he stated that the father of the victim took a loan of Rs. 27,000/- on two occasions and when he demanded the same, the father and mother of the victim quarreled with him and threatened him to falsely implicate him in a false case. He also denied all the allegations leveled against him. The respondent examined one witness in his defence.

9. Mr. Rajat Katyal, learned counsel for the State submitted that the judgment of the Trial Court is bad in law as the Trial Court has failed to properly appreciate the evidence on record, the judgment is based on conjectures and surmises and hence, cannot stand the scrutiny of law. It is submitted that the Trial Court has failed to appreciate the testimony of victim who had fully supported the case of prosecution and narrated as to when and where the offence was committed by the respondent. The statement of the victim is in consonance with the statement earlier given by her and also with the other prosecution witnesses being PW2 Meena (mother of the victim) and PW6 Vandana Sharma (who works in NGO).
10. Learned counsel for the State submitted that the victim (PW-3) had fully supported the case of the prosecution on all material particulars and minor discrepancies, improvements or variations in disclosing the details by the witness cannot be the sole ground for concluding that the prosecution has not been able to prove its case against the respondent. Thus, Mr. Katyal prays that the impugned judgment is liable to be set-aside and the respondent be convicted for the offence charged with.
11. We have heard the learned counsel for the State and carefully examined the impugned judgment rendered by the Trial Court as well as the testimonies of the prosecution witnesses and given thoughtful consideration to the matter.
12. The main thrust of the case of the prosecution was based upon the testimony of victim (PW3). To decide the case in hand, it would be necessary to analyse the testimony of the material witnesses including PW3 (victim), PW2 Meena (mother of the victim) and PW6 Vandana Sharma (President of NGO).

13. The victim (PW3) aged 16 years at the time of her deposition testified in her examination-in-chief that she was a resident of a Jhuggi at Dukhan, Chitra Vihar, Delhi. On 07.09.2013, at about 12 noon when her parents had gone for work, the respondent who was correctly identified by her in the Court as her Jija in relation came to her house and raped her. After 5-6 days of the said act committed by the respondent, she told her mother. Her mother took her to Vandana Sharma (PW6), who in turn called the police. Police recorded her statement as Ex. PW3/A. She was taken to the hospital for medical examination but refused by them since number of days had passed after the incident. The respondent raped her and threatened her not to disclose this to her mother. She was produced in the Court where her statement under Section 164 Cr.P.C was recorded. PW3 again deposed that respondent is nephew of her mother. PW3 further deposed that the respondent had raped her 3-4 times, 5-6 days before the day of complaint. She did not remember the exact date when she was raped for the first time. It was voluntarily deposed by her that when she raised alarm, the respondent put cloth in her mouth and also promised to marry her. Her mother was working as a maid while her father was a labourer and engaged in shuttering work. Learned APP for the State sought permission to cross-examine the victim in the Trial Court whereby it was stated by the victim that the respondent who was her neighbour came to her Jhuggi and committed rape on her 3-4 times after putting cloth in her mouth. It was further deposed by her that a Panchayat was held in her village when the said act came to knowledge of the wife of respondent. It was further stated by PW3 that the said Panchayat was called by the wife of the respondent and was held 1 month prior to 07.09.2013. Thereafter, the respondent

refused to meet the victim and also refused to marry her. She further deposed that the respondent did not commit rape on 07.09.2013 (day of complaint). However, he had committed rape 4 months prior to the day of complaint.

14. PW3 in her cross-examination categorically stated that there were number of Jhuggis adjoining her Jhuggi. She had a brother who remains in the lap of her mother. It was voluntarily stated that she had never gone to school and she along with her sister and brother always stayed at home. PW3 further stated that her father used to work with the respondent. It was admitted in her cross-examination that a quarrel had taken place between her father and the respondent on some other issue and thereafter her father had stopped working with the respondent.
15. PW2 Meena (mother of the victim) identified the respondent in Court as nephew of her husband and was also son-in-law of her *jeth*. She deposed in her examination-in-chief that the respondent used to visit her home and live in Jhuggi at Chitra Vihar. One day her daughter told her that the respondent had raped her 3-4 times during day time when they used to go for work. She told the same to her husband. She along with the victim and her husband went to the home of Vandana Sharma (PW6) and told her everything. Thereafter, Vandana Sharma had called the Police. Her daughter was taken to the LBS Hospital for the medical examination by the Police. The statement of the victim and PW2 was recorded by Police and the victim was taken to the Hospital to ascertain her age.
16. In her cross-examination PW2 stated that she did not remember the date of birth of her daughter. The suggestion was denied by PW2 that the respondent had given loan of Rs. 17,000/- to her and Rs. 10,000/-

to her husband prior to the incident. She further denied that her husband had a quarrel with the respondent for repayment of loan. With regard to the day of complaint, PW2 stated that she did not remember the date when her daughter told her. But, it was voluntarily stated by her that the victim had disclosed about the incident 4-5 days prior to her visit to the home of Vandana Sharma (PW6). She also stated that she did not go to Police Station before going to the house of Vandana Sharma. As to the Panchayat, she admitted that it was held in the village of the respondent before she went to the house of Vandana Sharma. It was voluntarily stated by her that the respondent had promised to marry her daughter in the Panchayat.

17. PW6 Vandana Sharma deposed that she worked with an NGO known as All India Crime Prevention Organisation. She is the vice President in the said NGO. On 07.09.2013, the victim along with her parents and one Suleman came to her office. The complete incident was narrated to her. Thereafter, she called at 100 number and the statement of the victim was recorded in her presence. The victim was taken to the hospital for medical examination, however, the victim and her mother refused for the internal medical examination of the victim. In her cross-examination, it was stated by PW6 that her statement was recorded by the Police after she returned from the hospital. She also visited the Jhuggi of the victim and found that there were many other Jhuggis surrounding the Jhuggi of the victim.
18. Besides the above public witnesses, PW1 HC Subhash registered the FIR in the present case and proved the same as Ex.PW1/A. PW4 SI R. S. Pandit (initial IO) who took the victim to the hospital for her medical examination. PW5 SI Madhavi Bisht (subsequent IO) had deposed that on 05.10.13, she was entrusted with the investigation.

She deposed that she got the ossification test of the victim at LBS Hospital and her age was opined as between 16 to 17 years.

19. Undoubtedly, there is no bar in law to convict the accused on the basis of the sole testimony of the prosecutrix, however, the same is only permissible if the testimony is of sterling quality inspiring confidence. We may notice a judgment of a coordinate bench of this Court, of which one of us (G. S. Sistani, J.) was a member, in ***State v. Wasim & Anr*, 2017 SCC OnLine Del 8502** had while finding the testimony of the prosecutrix therein could not be relied upon, observed as under:

“19. ...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.

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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)”

20. Applying law to the facts and circumstances of the present case, it has emerged from the evidence that the victim was not consistent in her testimony which renders the case of prosecution highly doubtful and unbelievable.
21. After careful reading of the evidence discussed in aforegoing para 13 to 18, we find that the victim had given two versions in her examination-in-chief. *Firstly*, she deposed that on 07.09.2013 at about 12 noon, she was raped by the respondent. Thereafter, she was cross-examined by the learned APP for the State wherein she gave a different version that the respondent had raped her 3-4 times and it was done 5-6 days before making the complaint. She categorically admitted that the respondent did not commit rape on 07.09.2013 i.e. day of complaint but 4 months prior to the day of incident. The said statement is also in contradiction with her statement recorded under Section 161 Cr.P.C. wherein she stated that the respondent had committed rape upon her on the day of complaint itself. The victim further stated that there were number of Jhuggis adjoining her Jhuggi which make her version not believable as to why she did not seek help from the neighbouring Jhuggi.
22. Furthermore, it is evident from the MLC of the victim that she had refused external as well as internal examination. We are persuaded with the reasoning adopted by the learned Trial Court that had there been any sexual assault on the victim, the medical evidence would have certainly reflected something positive in that regard. Accordingly, when the prosecutrix herself has given completely

contradictory statements, no conviction could be sustained on her testimony. No support can be drawn from the testimony of other public witnesses. Moreover, there was no evidence as to the age of the victim. Thus, the prosecution has failed to establish the age of the victim and no proof of the same has been produced.

23. In view of the above, we are of the view that it is highly unsafe to rely upon the statement of the victim. Hence, there is no infirmity in the impugned judgment of the Trial Court.
24. 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); *Chandrappa v. State of Karnataka*, (2007) 4 SCC 415 (paragraph 42); and *Muralidhar @ Gidda v. State of Karnataka*, (2014) 5 SCC 730 (paragraph 12)].
25. Accordingly, we find no ground to interfere in the judgment of the Trial Court. The personal bonds and the sureties under Section 437-A Cr.P.C. are discharged.
26. The leave to appeal is dismissed.

G. S. SISTANI, J.

CHANDER SHEKHAR, J.

JULY 24, 2017//