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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.L.P. 644/2018, CRL.M.A. 33666/2018, CRL.M.A. 33667/2018
STATE Petitioner

Through: Mr. Amit Gupta, APP for State

versus

SONU Respondent
Through: Mr. Amit Gupta, APP for State.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER
% **05.10.2018**

This petition impugns a judgment dated 31.05.2018 in case being FIR No. 806/2014 under sections 366/452 IPC read with section 10 & 9 (m) of the POCSO Act, 2012. The respondent was accused of taking away a minor child of three years and inappropriately touching her in her chest region. This was, allegedly, witnessed by PW-1 – her father, when he was coming down the stairs of his house at about 8 o'clock in the evening. He apprehended the accused and raised an alarm. The neighbours and passers-by came about and in the resultant melee, the accused was beaten up. PW-3, the brother of PW-1 happened to arrive at the spot just about the same time and witnessed the altercation. The accused was taken away by the police. A criminal case was registered and prosecution ensued.

The impugned order has found that the prosecution has failed to prove its case primarily on the following grounds that: (i) admittedly, the staircase was covered, hence, while coming down from it, the courtyard and the area beyond the courtyard was not visible and therefore alleged act of the

accused taking away the child on the street, could not have been seen from the staircase. According to the site plan, the street was beyond the courtyard. Therefore, when the courtyard itself was not fully visible, the street beyond it could not have been visible from the staircase; (ii) the I.O. had not stated at whose instance the site plan had been prepared; (iii) It is unclear whether the I.O. himself visited the site and assessed the range of visibility from the staircase.

On all these counts, the learned Trial Court found that the prosecution had failed to prove its case. The impugned order has reasoned as under:

“27. PW-1 and PW-3 are material witnesses, as per the prosecution story, however, there are contradictions in their deposition. PW-1 deposed that he had chased the accused and apprehended him at a distance of 10-15 steps away from his house in the street. PW-1 further deposed that he had caught the accused in the street in front of house of Panditji. PW-1 further deposed that after apprehending the accused, he raised alarm and public gathered there and his elder brother made call to the police and the police came at the spot. PW-1 nowhere deposed that after apprehending the accused, he had brought back the accused from the street to his house. The deposition of PW-1 is in sequence that he chased the accused and apprehended him at a distance of 10-15 steps away from his house in the street and raised alarm, public gathered there and his elder brother made a call to the police and police came at the spot. However, PW-3 deposed that when he came home, he saw the accused was present there in the custody of his younger brother. The question arises, if the accused was apprehended by PW-1 in the street then why did he bring the accused at his house, particularly when the public gathered there. It is also important to mention here that in the statement of father of the child victim,

Ex. PW-1/A, he had stated that he had made a call at 100 number to the police but he in his testimony as PW-1 deposed that the call at 100 number was made by his brother. Thus, the testimony of PW-1 is also self contradictory.

28. PW-1 deposed that the accused was taking the child victim and he apprehended the accused in the street. Public gathered there and gave beatings to the accused. During this process, where was the child victim and who had brought her home from there. PW-1 is silent on this aspect. It is also important to mention here that PW-1 had not deposed in his examination in chief that he had seen the accused touching the chest of the child victim inappropriately. PW-1 was cross examined by Ld. Additional Public Prosecutor, wherein he admitted the suggestion that the accused was touching the chest of the child victim inappropriately. The question arises, if the accused had touched the chest of the child victim inappropriately and PW-1 had seen it, then PW-1 had to deposed this fact on his own, being father of the child victim. The child victim was only three years old at the time of alleged incident. PW-1 had merely admitted the suggestion given by Ld. Public prosecutor that accused had touched the chest of child victim inappropriately but he had not said anything else, what does inappropriately meant. The allegations against the accused are that he was kidnapping the child victim. The question arises, if the accused was kidnapping the child victim then why did he touch the chest of child victim inappropriately. If he had any such bad intention, he could have done such thing after taking away the child victim. It is difficult to believe that a person while kidnapping a child of 3 years of age, would touch the chest of the child inappropriately at the same time.

29. PW-1 deposed that the stairs of his house was covered. PW-3 deposed that the courtyard/ varandah

at ground floor was not visible from the staircase of the first floor. The question further arises, if the staircase was covered and the varandah at the ground floor of the house was not visible from the staircase, then how could PW-1 see the accused from the stairs, when the accused was at the varandah of the house.

30. PW-6, IO deposed that he prepared the site plan Ex.PW-6/F. PW-6 nowhere deposed on whose instance, the site plan was prepared. There is no attested witness of the site plan Ex.PW-6/F. If, father of child victim had seen the accused taking the child victim from his house and he caught the accused in the street outside his house, therefore, the site plan must have been prepared at his instance. But it is not deposed by PW-1 that the site plan was prepared at his instance nor by PW-6, that he prepared the site plan at the instance of PW-1. The site plan is a very important piece of document for the present case. But it cannot be prepared by the IO on his own.

31. In view of the above discussions, I am of the considered view that the prosecution has failed to prove beyond reasonable doubts that the accused had committed house trespass by entering into the house of the child victim and tried to kidnap or kidnapped the child victim with intention to force her to have illicit sexual intercourse with her. Prosecution has also failed to prove that the accused had touched the chest of the child victim with sexual intent. Hence, the prosecution failed to prove the charge against the accused beyond all reasonable doubts. It is well settled law that benefit of doubt always goes in favour of the accused. Accordingly, the accused is acquitted from the charge under section 366/452 IPG and section 10 r/w section 9 (m) of the PQCSO Act.”

The Court would note that one of the reasons for the prosecution's case failing is that the I.O. had not submitted the site plan in accordance

with law. This was a crucial document which should have been carefully led in evidence and proven. Failure to do so shattered the prosecution case. Whether the lapse was a deliberate one or was on account of incompetence, is a matter for the police authorities to look into.

In view of the above, let the DCP concerned look into the matter and if he deems proper, initiate such action apropos the I.O., as may be appropriate.

The petition is without merit and it is accordingly dismissed.

NAJMI WAZIRI, J

OCTOBER 05, 2018

ACM