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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.L.P. 121/2019, CRL.M.A. 2985/2019, CRL.M.A. 2986/2019
STATE Petitioner

Through: Mr. Rajat Katyal, APP for State.

versus

FARMAN KHAN & ANR. Respondents

Through:

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **ORDER**
08.02.2019

The petitioner seeks leave to appeal against the order dated 11.09.2018 acquitting the respondents in case FIR No. 1755/2016 registered under sections 354(A)/509/34 IPC and sections 8/12 POCSO Act. It is the petitioner's case that the learned ASJ failed to appreciate that the prosecutrix established the identity and role of the respondents; that PW-3/ prosecutrix detailed the acts of the respondents and also identified them; that undue weightage was placed on the non-joining of witnesses and that minor contradictions which do not go to the root of the matter, are not fatal to the prosecution's case. He further argues that evidence with regard to the age of the prosecutrix was also not considered.

The Court is not persuaded with the aforesaid argument because the Trial Court has duly considered the evidence and has found that the prosecution has failed to discharge the onus under section 12 of the POCSO Act. The prosecution relied upon the statement of the prosecutrix which

was found to be prevaricating on many occasions, hence, the learned Trial Court held her statement not to be trustworthy. The impugned order has reasoned as under:-

17. The next point for consideration is whether accused persons had sexually assaulted or caused sexual harassment to the prosecutrix/PW-3. Ms. 'NM'/PW-3 is the most material witness being the victim and she has deposed on 05.09.2014 that on 30.08.2013 she alongwith her friends, Ms. 'S, ÁV' and ÁR' had gone to grocery shop near her house where 4/5 boys were already present including the accused, Farman Khan and they were drinking alcohol. She further deposed that accused, Farman Khan came near her and touched at her back and said 'Hello' and he was having one bottle of alcohol in his hand and he was also smoking and thereafter his friends started passing comments on her. PW-3 has deposed that she raised noise whereupon people collected and thereafter accused fled away towards the park and in the meantime her father also reached there and she informed her father who called the police. PW-3 has further deposed that her complaint, Ex.PW-3/A was taken by the police at her house. The Ld Addl. PP for the State was permitted to cross-examine PW-3 as she was reported to be resiling from her complaint, Ex.PW-3/A. During her cross-examination by Ld. Addl. PP for the State Pw-3/prosecutrix volunteered to state that whatever police asked her to write down was written by her on the piece of paper. PW-3 has further stated during her cross-examination that the accused had not touched her breast. During her cross-examination by the learned counsel for accused, Hemant, PW-3/prosecutrix admitted that the other accused accompanying Farman had not sexually assaulted her or misbehaved with her. She also admitted that he had not passed any lewd comments against her and she had not seen Hemant consuming liquor although she had seen him smoking. During her cross-examination by the Ld. Counsel for accused, Farman Khan, PW-3/prosecutrix denied knowing the accused, Farman prior to the incident. She also stated that his name was disclosed to her by the police after his apprehension. She

even volunteered to say that she had written the complaint, Ex.PW-3/A whatever police asked her to write down. Thus, the testimony of the prosecutrix/PW-3 is inconsistent and contradictory to her complaint, Ex.PW-3/A. The written complaint given by the prosecutrix/PW-3 on 30.08.2013, Ex.PW-3/A gives the name as well as house number of the accused, Farman but the prosecutrix/PW-3 claimed in her cross-examination that she was not knowing the accused prior to the incident. She had even mentioned in the complaint that she can identify those boys who were living in the same locality. The arrest memo of the accused, Farman Khan, Ex.PW-6/A reveals that he was arrested at 02.00 am on 31.08.2013. The written complaint, Ex.PW-3/A was made on 30.08.2013 and thus, it is not explained as to how the name and address of the accused, Farman Khan was mentioned in the complaint if prosecutrix/PW-3 was not knowing the accused Farman Khan prior to the incident. She also contradicts her own complaint, Ex.PW-3/A by saying that accused had not touched her breast and had touched her back and said Hello. The said factum of accused's touching her back and saying Hell is missing in her complaint, Ex.PW-3/A. Pertinently in the complaint given to the police, the prosecutrix/PW-3 stated that she ran to her mom (mother) and when they came, the boys threatened them but during her testimony in court she stated that people had gathered when she raised noise and the accuseds had fled towards the park and in the meanwhile her father also reached there. Thus, there are many material contradictions in the testimony of the prosecutrix/PW-3 and her statement in court is inconsistent with her complaint written to the police. In view of inconsistencies and material contradictions in the testimony of prosecutrix/PW-3, it would not be safe to base the conviction of the accuseds without due corroboration. However, the father or mother of prosecutrix/PW-3 have neither been examined by prosecution nor cited as witness although the prosecutrix/PW-3 in her deposition in court has stated that her father had reached the spot and she had told him about incident and he called the police. PW-8, SI Anand Kumar also

confirms that he along with Ct. Sanju had met the father of prosecutrix on 30.08.2013 after receipt of DD No. 24-A and DD No. 25-A which are exhibited as Ex.PW-2/A and Ex.PW-2/B. Pertinently DD No. 25-A, Ex.PW-2/B was recorded on the information given by father of the prosecutrix but he has not been examined by the prosecution. Even none of her friends who were eye witness to the incident have been cited as witness or got examined by the prosecution. The only other public witness examined by prosecutrix is PW-5, Shri Govind Shukla but he had not supported the prosecution case and has not corroborated the prosecutrix/PW-3 in any manner and rather PW-5 categorically denied making any statement to the police. He also denied witnessing any such incident. PW-5 was permitted to be cross-examined by the Ld. Adll. PP for the State but nothing material or favourable to the prosecution could be elicited during his cross-examination. **In these circumstances when the testimony of prosecutrix/PW-3 is full of contradictions and is inconsistent with her written complaint and is not credible and she is not being corroborated by any other independent witness, the prosecution cannot be said to have proved the charges against the accuseds beyond reasonable doubt.** Reliance is also placed upon the judgment reported as Suraj Mal versus State (Delhi Admn.), AIR 1979 S.C. 1408, wherein it has been observed by the Hon'ble Supreme Court "Where witness make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witness." Similar view was also taken in the judgment titled as Madari @ Dhiraj & Ors. Vs. State of Chhattisgarh, 2004(1) C.C. Cases 487. In the judgment reported as Namdeo Daulata Dhayagude and others Vs. State of Maharashtra, AIR 1977 SC 381, it was held that where the story narrated by the witness in his evidence before the Court differs substantially from that set out in his statement before the police and there are large number of contradictions in his evidence not on mere matters of detail, but on vital points, it

would not be safe to rely on his evidence and it may be excluded from consideration in determining the guilt of accused. If one integral part of the story put forth by a witness was not believable, then entire case fails. **Where a witness makes two inconsistent statements in evidence either at one stage or both stages, testimony of such witness becomes unreliable and unworthy of credence and in the absence of special circumstances, no conviction can be based on such evidence.** (Reliance can be placed upon the judgment of the Hon'ble Delhi High Court reported as *Ashok Narang Vs. State*, 2012 (2) LRC 287 (Del).

18. In view of above discussion and the inconsistent testimony of prosecutrix/PW-3 which has remained uncorroborated and the above case laws, it cannot be held with certainty that the prosecutrix/PW was sexually assaulted or sexually harassed by the accused persons and hence both accuseds are entitled for benefit of doubt. Accordingly, the prosecution has failed to prove the charges framed against accuseds, Farman Khan @ Nabbu and Hemant beyond reasonable doubt and therefore, the said accused persons are hereby acquitted of said charges. However, in terms of Section 437A Cr.P.C., let accused persons furnish personal bond in the sum of Rs.30,000/- with one surety each in the like amount with undertaking to appear before the Appellate Court as and when they receive notice from it.

(emphasis supplied)

Insofar as the two statements of the witness are inconsistent at different stages of the trial, the credibility of such statement becomes doubtful and a conviction cannot be based upon such dubious evidence. To convict and punish a person, evidence of impeachable and sterling quality would be required. Only those portions of the prevaricating stand of the prosecutrix which tend to implicate an accused cannot be chosen over equally exculpatory statement against the said accused.

In view of the above, no case is made out and the Court finds that there is no plausible reason or apparent infirmity in the impugned order. The petition is without merits and is accordingly dismissed.

NAJMI WAZIRI, J

FEBRUARY 08, 2019

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