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

Judgment reserved on: 11th February, 2019
Judgment pronounced on: 28th February, 2019

+ CRL. L. P. 445/2018

STATE (GNCT OF DELHI)

.... Petitioner

Through: Mr. Ravi Nayak, APP for State with
Inspector Vijay Kumar, PS New Usman Pur
and W/SI Santosh, IO (PM Cell), Security PS
New Usmanpur.

Versus

VIPIN @ LALLA

.....Respondent

Through: Mr. Piyush Phuja, Advocate.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. By this petition under Section 378(1) of the Code of Criminal Procedure, 1973 (hereinafter as 'Cr.P.C'), the State seeks leave to appeal against the judgment dated 28.03.2018 passed by the learned Special Court (POCSO ACT), ASJ-01, North East District, Karkardooma Courts Delhi in Session Case No. 44631/2015 in FIR No. 889/2014 registered at Police Station, New Usmanpur whereby the respondent Vipin @ Lalla was acquitted of the charges registered under Sections 363/366/342/376/506 of the Indian Penal Code, 1860 (hereinafter as 'IPC') and in the alternative under Section 4 of the POCSO Act.

2. Brief facts of the case as noted by the learned Trial Court are as under:

“(1) Brief facts of the prosecution case are that on 18.09.2014, on receipt of DD No.28A, SI Santosh went at the informed place i.e. X-125, Gali no.6, Brahampuri, New Usmanpur, Delhi. There she met ASI Mahender and Ct. Patil. Victim and her mother were also present. Victim alleged that she along with her family was residing as tenant on the ground floor of H.No.X-125, Gali no.6, Brahampuri, Delhi. On 16.09.2014 at about 12.30 p.m., she was returning home from her school. When she reached in Gali No. 8, Brahampuri, Vipin, who was residing on the first floor of her house, met her and asked her to accompany him. He also threatened her that if she did not follow his instructions, he would stab her. He caught hold of her hand. When she tried to resist, Vipin threatened her to kill her brother. Thereafter, Vipin took her to a room where he kissed her, removed her clothes and against her wishes, he established physical relations with her. On these allegations, the present FIR under Sections 363/376/342/506 IPC and under Section 4 POCSO Act was registered.

(2) During the investigation, victim was medically examined. On 10.10.2014, accused surrendered before the court and he was arrested...”

3. After investigation was over, charge-sheet against the accused was filed before the Court for the offences punishable under Sections 363/376/342/506 of the IPC and under Section 4 of the POCSO Act and charges were framed against the respondent under Sections 363/366/376/342/506 IPC and under Section 4 of the POCSO Act. To

substantiate its accusation, prosecution examined 11 witnesses in all to prove its case. Statement of accused under Section 313 of Cr.P.C was recorded wherein he reiterated his innocence and examined one witness in his defence.

4. The learned Trial Court, upon analysis, examination and evaluation of the prosecution evidence and after considering the rival submissions recorded acquittal in favour of the accused for the charged offences.
5. Learned counsel, Mr. Ravi Nayak, for the State, opened his submissions by contending that the impugned judgment dated 28.03.2018 is based on conjectures and surmises and has disregarded the cogent evidences, and needs to be set aside. Learned APP further stated that conviction can be held on the sole testimony of PW-4 (Prosecutrix) even if there are minor discrepancies and inconsistencies in the testimony; that the testimony of PW-4, (the prosecutrix) and PW-10, (the mother of the prosecutrix) remain consistent and corroborative and have deposed regarding the key material facts in the case indicating the committal of the offence.
6. Mr. Ravi Nayak further contented that the factum of rape on the prosecutrix has been established by the medical examination of the prosecutrix wherein there is clear evidence of penetrative sexual assault. Learned counsel further contended that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape irrespective of the consent of the girl, and for the same the offence should fall within the purview of POCSO Act.
7. Lastly, the learned counsel contended that the Trial Court placed reliance on the statement of PW-11, (Investigating Officer) but

misconstrued the dimensions of the cartons, which were lying in the store room, as the dimension of the store room and that PW-11 had nowhere stated that the room was 2 ft x 2 ft, rather he suggested that the cartons, which were kept in the room, were of that dimension. The learned APP to support his contentions relied upon the case of ***Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat: 1983 (3) SCC 217.***

8. Per contra, Mr. Piyush Phuja learned counsel for the Respondent, contended that there are major variations and improvements in the testimony of the prosecutrix and other key witnesses and that the Respondent cannot be held guilty on the basis of wavering statements. He further stated that neither any blood or semen samples (of the prosecutrix and the accused) were taken for examination nor incriminating evidence was revealed from the clothes of the accused to connect him with the alleged incident.
9. The learned counsel further contended that learned Trial Court failed to take into consideration that there was inordinate delay in registering the FIR which shows that the present case has been fabricated after due deliberations to falsely implicate the Respondent and thus, the prosecution case should be discarded.
10. Lastly, Mr. Piyush Phuja contended that the room where the alleged incident took place is fictional as the prosecutrix did not mention in her statement about any shop, where the room is situated. Moreover, the dimensions and logistics of this room kept changing. Lastly, Mr. Piyush Phuja stated that there is no infirmity with the Trial Court decision and the same should not be altered. The learned counsel placed reliance on

the case of *Tameezuddin @ Tammu Vs. State of (NCT) of Delhi: [2009] 14 (ADDL.) SCR 80.*

11. We have heard the learned counsels for the parties and perused the entire material available on record.
12. It is a settled law that the sole testimony of the prosecutrix is sufficient to implicate the accused if it inspires confidence. Reliance for the same is placed upon the judgment of the Apex Court in the case of *Vijay v. State of Madhya Pradesh: (2010) 8 SCC 191*. Relevant para of the judgment reads as under:

14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix.

13. It is also vital to note that if the statement of the prosecutrix is not inspiring confidence or not worthy of credence then the same should not be the sole basis for conviction. The same was reiterated in *Sadashiv Ramrao Hadbe v. State of Maharashtra: (2006) 10 SCC 92*, where the Supreme Court held the following:

9. It is true that in a rape case the Accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.

14. As is also evident from the observations above, such reliance may be placed only if the testimony of the prosecutrix appears to be worthy of credence. In this regard, it is also relevant to note the following observations of the Apex Court in the case of ***Raju v. State of Madhya Pradesh: (2008) 15 SCC 133*** which read thus:

10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the Accused as well. The Accused must also be protected against the possibility of false implication, particularly where a large number of Accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.

15. At this stage, it would be essential to examine the testimony of the PW-4 (Prosecutrix) and PW-10 (mother of the prosecutrix). The PW-4 (Prosecutrix) in her examination in chief deposed that:

On 16.09.2014 it was about 02.30/3.00 pm, I was returning to my home after my school, Vipin @ Lalla was standing

in the Gali No. 06; he called me and I went to him. He caught hold of my hand and put a knife on my back and thereafter he took me to Mangal Bazaar area. Thereafter he took me in a room where he kissed me and thereafter he took off my Salwar and committed sexual intercourse with me forcibly. I also slapped him and I hit him with a Danda on his legs and thereafter I rescued myself and ran away from there towards my house. He also followed me. I reached my home.

At the time of incident, Vipin @ Lalla had threatened me that if I disclosed the incident to anyone, he will kidnapped my brother and kill him. He also threatened me to kill my father.

After reaching my house, I could not disclose anything to my family member on 16 and 17 September due to the threats of the Vipin @ Lalla. On 18.09.2014 I was feeling pain on my stomach and legs and due to continuous asking of my Bhabhi and sister, I told the incident to them. They disclosed it to my mother. Thereafter, my mother asked me about the incident and I told her all the facts to her also and my mother told it to my father. Thereafter, my parents called the police. Police came to my house; made enquiries from me and I told all the facts to the police. Police recorded my statement which is Ex.PW4/A bearing my signature at point A. Thereafter, police took me to a hospital at Shastri Park, Delhi. I was medically examined there by the doctors. My inner clothes were taken by the doctors.

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Vipin @ Lalla was residing on the first floor and we were residing on ground floor as tenants in the same house. He is not married.

During the cross examination, PW-4 (Prosecutrix), deposed that:

My school timings are from 07.00am to 12.30 pm. I return home from school on foot and it takes about 15 minutes in reaching home. There are about 20 other children of my locality who attend the same school. We all go together to the school and also return together. It is correct that about 100 children go from Gautam Puri road to Brahampuri after the school is over. It is correct that there is complete market from Gautam Puri water tank to Brahampuri Shiv Mandir.

At the time of incident, when the accused met me in Gali No.06, since it was afternoon, the Gali was all isolated. It took me about 4-5 minutes in reaching the said Gali from my school. The family of the accused used to reside in the building prior to our residing there. Our families were never in talking terms with each other. We have been residing in the said house since quite long as my brothers and sisters were born in this house. There had been no dispute of any kind between my family members and that of the accused ever since we started residing there till 16.09.2014. It is correct that a weekly market is organized in Mangal Bazaar on every Tuesday.

Accused had placed some pointed object at my back which I could not see. It takes about 20-25 minutes in reaching Mangal Bazaar from Gali No. 06. Accused had taken me on foot to Mangal Bazaar. Accused had taken me through some streets which I do not remember and not from the proper way. It took about 20-25 minutes in reaching

Mangal Bazaar. There was no coffee shop or restaurant at Mangal Bazaar. He had taken me to a room which was inside a grocery shop. One shopkeeper was sitting on the shop. In the room inside the shop, waste material was lying such as broken wood pieces and empty beer bottles and it was quite filthy. There were other shops near the said shop but at that time they were lying closed. I returned to my house at about 03.00pm. In ordinary course, I reach back my house by 12.45om. I cannot say if the shopkeeper remained sitting in the shop till I was inside the room as the gate between the room and the shop was closed.

When I reached back home, my mother, my sister and my sister-in-law (Bhabhi) were present at the house. There were some public persons in the way from Mangal Bazaar to my house but shops were closed as it was noon time. It is correct that the entrance to the room was from the shop only where I was taken by the accused. When I left the room, the shutter of the shop was partly open. It is wrong to suggest that the weekly market had already begun when I managed to come out of the shop. My school bag remained with me till I returned back home.

When I returned home, my mother asked me the reason for coming late and I told her that I was detained for extra class. I was having injury on my leg when I reached home. I had not told about the said injury to my mother but she came to know. My school bag had got soiled as also my clothes. I had not taken a bath nor I washed my clothes or my school bag immediately on reaching my house. I had not attended my school on the next day. I had felt the requirement for medical treatment on reaching my house on that day but I did not ask for it from anyone.

When I was taken inside the room by the accused, I had raised a shout. At that time, the shopkeeper had gone away somewhere. I had seen the shop vacant when the accused had come outside to fetch water. The accused brought the water within 5 minutes. (Vol. He had closed the door of the room from outside while leaving). The accused had brought an open Bisllery bottle. I do not know from where he had brought the bottle. I could see the shutter partly open when the accused had opened the door to go out to bring water. I had not demanded the water. I had become unconscious as the accused was not letting me to go out of the room and then he had gone to bring water. My eyes were open when the accused went to bring water but I was unable to stand up.

16. To elucidate this case, it is imperative to verify the testimony of PW-10 (mother of the prosecutrix). PW-10 (mother of the prosecutrix) in her examination in chief deposed as under: -

“On 16.09.2014, when the victim returned from her school, she was crying and remained crying even at the night. On our asking, she just told us that a person would kill her brother and father but did not reveal his name. Her condition continued to remain same till 18.09.2014 when on our insistence, she revealed that on 16.09.2014, when she was returning home from her school accused Vipin @ Lalla met her near Gali No. 8, called her near him and asked her to accompany him wherever he takes her and threatened to kill her with a knife which he was having with him if she did not obey his commands. He took her to a shop in Mangal Bazaar and inside the shop, there was an almirah which he opened and inside it there was a room and he took her there. The victim told me that she tried to run but the accused threatened that he would kill her

brother and father. There, the accused gave beatings to the victim and committed wrong acts with her i.e. he raped her. The victim further told me that the accused even after that did not permit her to go and then, she picked up a danda lying there and hit the accused on his legs with it and managed to run away and returned home

In her cross examination PW-10 (mother of the prosecutrix), deposed as under:-

“.....The victim used to go to her school alone and her father used to drop her at the school and I used to take her back from school. (Vol. on 16.09.2014, I had not gone to pick her up from the school as I went unwell). None of her classmates used to accompany her to the school or back home as they reside in different areas. It never happened earlier that I had not gone to pick her up from the school. In case, I could not go, my eldest daughter used to go to pick her up.

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When she returned, I was present in the house along with my two daughters and my daughter-in-law. My son is working at Gandhi Nagar. When victim returned back, her face was red and her hairs were open and she was crying and did not respond to my queries. She did not take food and slept while crying. She was also saying that some would kill her father and brother. When my husband and son returned in the evening, I apprised them about the condition of the victim. She did not attend the school on 17.09.2014. (vol. she is not attending the school even now.)”

17. From the testimony of the PW-4 (Prosecutrix) and PW-10 (mother of the prosecutrix), it is evident that there are innumerable discrepancies in their version. At one point PW-4 (Prosecutrix) stated that the accused “.....caught hold of my hand and put a knife on my back” and in her cross examination she stated that “accused had placed some pointed object at my back which I could not see”. It is evident that she did not know whether it was a knife or something else. The Prosecutrix also stated that “there are about 20 other children of my locality who attend the same school. We all go together to the school and return together. It is correct that about 100 children go from Gautam Puri road to Brahampuri after school is over”. Later the prosecutrix contradicted her own statement wherein she stated that “at the time of the incident, when the accused met me in Gali No. 06, since it was afternoon, the said Gali was all isolated”.
18. PW-10 (mother of the prosecutrix) in her statement said “when she was returning home from her school accused Vipin @ Lalla met her near Gali No. 8, called her near him and asked her to accompany him wherever he takes her and threatened to kill her with a knife” but PW-4 (the prosecutrix) referred to Gali no. 6 and deposed that “Vipin @ Lalla was standing in the Gali No. 06”. Further, nowhere she stated that the accused had threatened her to kill her at any occasion. In another instance, the PW-10 (mother of the prosecutrix) stated that “he took her to a shop in Mangal Bazaar and inside the shop, there was an almirah which he opened and inside it there was a room and he took her there.” On the contrary, the prosecutrix did not mention about any almirah in her examination in chief nor in her cross examination. Another disparity

in their testimony is the presence of the family members on the day of the incident. According to PW-10 (mother of the prosecutrix) father of the victim used to drop her at the school, she further stated that “in case, I could not go, my eldest daughter used to go to pick her up” on the contrary PW-4 (the prosecutrix) deposed that “there are about 20 other children of my locality who attend the same school. We all go together to the school and return together. It is correct that about 100 children go from Gautam Puri road to Brahampuri after school is over”. It remained unexplained by the prosecution, as on the day of the incident did anybody from the family had gone to pick up the prosecutrix from school or she on the day of alleged incident has travelled alone. Moreover, nowhere in her examination-in-chief had she stated about being unconscious during the incident, but later she deposed that “I had become unconscious as the accused was not letting me to go out of the room and then he had gone to bring water my eyes were open when he had gone to bring water but I was unable to stand.”

19. The attention of this court has been drawn to the leg injury sustained by the prosecutrix, whereas she has given different explanations to her mother and to the NGO official who counselled her regarding the injury. However, it is essential to note that the doctor (PW-6) who had examined the victim had not seen any leg injury.
20. In our considered opinion, as pointed above, that the testimonies of PW-4 (Prosecutrix) and PW-10 (mother of the prosecutrix) are not corroborative and there are many inconsistencies and discrepancies in their statements.

21. As per the case of the prosecution, PW-4 (the Prosecutrix) was threatened by the accused person and on knife point she was taken in a room, inside a shop in Brahmpuri, where the alleged incident happened. As per the prosecution, the shopkeeper, Shantanu Mishra, was present at the spot at the time of commission of crime. Strangely, such a key witness has not been arrayed by the prosecution as witness nor he was arrayed as an accused, instead he entered the witness box as DW-1 on behalf of the Respondent. DW-1 (the shopkeeper) during his examination in chief deposed as under:-

“The owner of the shop is Sh. Shantnu Mishra. I had taken the shop on rent in the year 2012. I do not know Vipin @ Lalla. On 18.09.2014, police had come to my shop. It is wrong to suggest that in my shop, at the instance of the victim, police had prepared the site plan. It is wrong to suggest that I am deposing at the instance of the accused.”

22. As per the case of the prosecution, when the Respondent has taken PW4 (the Prosecutrix) inside the grocery shop ‘one shopkeeper was sitting on the shop’. However, DW-1 (the shopkeeper) deposed that ‘I do not know Vipin @ Lalla. On 18.09.2014, police had come to my shop. It is wrong to suggest that in my shop, at the instance of the victim, police had prepared the site plan.’ As per **Ex. PW-11/B** (Site Plan) which was prepared by PW-11 (SI, Santosh) at the instance of PW-4 (the Prosecutrix) there was no identification of a separate room inside the alleged shop. However, PW-11, (SI, Santosh) deposed that ‘The said shop, i.e. at the place of incident, is having its entrance through shutter and there were some racks installed on the right side of the entrance

but I do not remember the no. of steps at the entrance of the shop. There was a hidden sotre behind the racks which were used a door to the entrance of the said store.’ In this context, PW-4 (the Prosecutrix) in her examination in chief has deposed that ‘Thereafter he took me in a room’. PW-4 (the Prosecutrix) did not specify anything about entering the room from the shop. However, in the cross examination she modified her stand and deposed that ‘he had taken me to a room which was inside a grocery shop. One shopkeeper was sitting’. She further deposed in her cross examination that ‘I cannot say if the shopkeeper remained sitting in the shop till I was inside the room as the gate between the room and the shop was closed.’ There was no whisper of any shopkeeper either in her examination-in-chief or in her statement which was recorded under Section 161/164 of Cr.P.C. From the aforesaid summary of statements, it can be safely inferred that the prosecution has failed to prove the alleged place where the incident has occurred.

23. Another aspect which appears implausible is the fact that the dimension of the room, where the alleged incident took place, is 2ft x 2ft. The same stands established through the statement of PW-11, SI Santosh. Relevant portion is quoted below:

“...it is correct that there are 4-5 shops adjacent to the place of incident and at that time, they were opened. It is correct that the said shop was situated at Mangal Bazaar Road and weekly market is held every Tuesday and it is thickly crowded area...”

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Xxxx

Xxxx

“...there was a hidden store behind the racks which were used as a door to the entrance of the said store. Some empty cartons were stored there and it was measuring about 2’X2’.”

After perusing his statement as a whole it is evident that he was referring to the store room only. Moreover, elucidating the dimensions of the cartons is highly immaterial to the present case when the focal issue is the store room. The act of rape seems impossible to be done in such a room or limited dimensions.

24. Admittedly, the MLC of the PW-4 (the prosecutrix) has been conducted after two days of the alleged incident and PW-4 (the prosecutrix) has changed her clothes and washed her genitals after the act, hence, no material evidence could be adduced by the prosecution from medical report of the victim as well as scientific report.
25. As far as contention with regard to delay in registration of FIR is concerned, it is settled law that in cases of offence punishable under Section 376 of the IPC the benefit of delay in registration of FIR cannot be given to the accused persons.
26. In the present case, as discussed above, it is evident. that the prosecution has miserably failed to establish the case against the Respondent. The statement of PW-4 (the prosecutrix) and PW-10 (the mother of the prosecutrix) are contradictory and inconsistent. The medical and scientific evidence also does not support the case of the prosecution. According to the prosecution, the accused forcibly took the victim along from a busy road at a knife point during broad daylight. It seems highly improbable that in a busy street, no one noticed the Respondent holding

the victim at a knife point. The prosecutrix claims that she shouted for help, which again seems doubtful as no independent witness has been produced by the prosecution, neither the shopkeeper of the shop where the alleged incident took place was examined, nor anyone from the adjacent shops was arrayed as witness. The behavior of PW-4 (the prosecutrix) is also unnatural as she neither took any steps to get away from the clutches of the Respondent nor reported the matter immediately to her family members. The place of incident i.e. the shop has also not been established by the prosecution.

27. In the case of *State of Madhya Pradesh Vs. Dal Singh &Ors., reported at JT 2013 (8) SC 625*, the Supreme Court has held that the appellate court while considering the appeal against the judgment of acquittal shall interfere only when there are compelling and substantial reasons for doing so and if the judgment is unreasonable and relevant material have been unjustifiably ignored, it would be a compelling reason for interference. In the case of *Rukia Begum Vs. State of Karnataka AIR 2011 SC 1585* the Apex Court has held that in case two views are possible and the trial court has taken the view favouring acquittal, the High Court should not disturb the finding.
28. Having regard to the principles laid down by the Apex Court in the case of *Ghurey Lal (supra)*, *State of Madhya Pradesh (supra)* and *Rukia Begum (supra)*, we do not find that there is any infirmity in the impugned judgment. Accordingly, no grounds are made out to

interfere in the impugned judgment passed by learned trial court and the leave to appeal petition is dismissed.

29. Ordered accordingly.

SANGITA DHINGRA SEHGAL, J

SIDDHARTH MRIDUL, J

FEBRUARY 28, 2019/afa

