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

% *Judgment reserved on 20<sup>th</sup> December, 2018*  
*Judgment pronounced on 13<sup>th</sup> February, 2019*

+ **CRL. L.P. 620/2018**

STATE (GNCT OF DELHI) ..... Petitioner  
Through: Ms.RadhikaKulluri, APP for the State.

Versus

KULDEEP @ SONU .....Respondent  
Through: Mr. T. A. Siddique, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

**HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL**

**SANGITA DHINGRA SEHGAL, J.**

1. The present leave petition has been filed by the State under Section 378(4) of the Code of Criminal Procedure (hereinafter referred to as “Cr.P.C.”) against the impugned judgment dated 15.05.2018 passed by learned Additional Sessions Judge-01, New Delhi District, Patiala House Courts, New Delhi in Sessions Case No. 9210/2016 arising out of case FIR No. 585/2015 under Sections 377/342 of the Indian Penal Code (hereinafter referred to as ‘IPC’) and under Sections 4/8 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as ‘POCSO Act’) whereas, the charges were later modified to section 6/10 of the POCSO Act registered at Police Station - South Campus, New Delhi,

whereby the respondent was acquitted of the offences punishable under Sections 377/342 of IPC and under sections 6/10 of POCSO Act.

2. The brief facts of the case, as observed by the learned Trial Court are reproduced as under:-

*“In the night of 08.10.2015, the complainant/mother of the victim/PW1 came to the police station along with her husband and the victim child. SI Pratap Singh/PW7 recorded the statement of the complainant/Ex.PW1/A. Along with Ct. Basram/PW4, the IO took them to Safdurjung hospital for medical examination of the victim where MLC/Ex.P-3 (admitted by the accused in proceedings under Section 294 Cr.P.C) was prepared. The exhibits and samples taken by the doctor were taken into possession by the IO/SI Pratap Singh/PW 7 along with the sample seal vide memo/Ex.PW4/A. The IO also took into possession the blood sample of the victim vide seizure memo/Ex.PW7/X. The IO endorsed the statement of the complainant vide Ex.PW7/A and prepared the rukka which was handed over to Ct. Basram for getting the FIR/Ex.P-1 (there are to Ex.P-1, the FIR is the second exhibit marked as Ex.P-1; admitted by the accused in proceedings under Section 294 Cr.P.C) registered. The Duty Officer also issued the certificate under Section 65B Indian Evidence Act/Ex.P-2 (admitted by the accused in proceedings under Section 294 Cr.P.C). Ct. Basram took the FIR to the spot where the IO had reached along with the complainant party. The IO prepared the site plan/Ex.PW7/B, which is stated to have been videographed. The IO along with the victim and his parents then went to the residence of the accused from where*

*the accused was apprehended and interrogated. He was arrested vide memo Ex.PW4/B and searched vide memo/Ex.PW/C. The accused is stated to have been taken them back to school to the place of incident i.e. a room in the school and a pointing out memo/Ex.PW4/D was prepared. The IO took the accused to AIIMS for his medical examination and potency test along with Ct. Surajveer Singh/PW6. The accused was medically examined and his MLC/Ex.P-4 (admitted by the accused in proceedings under Section 294 Cr.P.C) was taken. The report of the Potency Test/Ex.PW7/Y was also collected. The samples collected by the doctor were taken into possession by the IO vide memo/Ex.PW6/A. The victim was counseled and the Counselor gave her report/Ex.P-5 (admitted by the accused in proceedings under Section 294 Cr.P.C). The mother of the victim produced an underwear of the victim which was stated to have been worn by him at the time of the incident. The victim had also identified the bus parked at the school in which the accused was working as the Conductor. IO moved an application/Ex.PW7/D for getting the statement of the victim recorded under Section 164 Cr.P.C. The said statement/Ex.PW2/A was recorded by the Ld.MM vide proceedings/Ex.P-6 (admitted by the accused in proceedings under Section 294 Cr.P.C). A copy of the same was provided to the IO on his application/Ex.PW7/E. The IO had visited the school again and had inquired from the Principal, class teacher of the victim and another teacher. He had also made inquiries from the driver of the bus. He collected the age documents i.e., the attested copies of the admission form/PW3/A, birth certificate/Ex.PW3/B, voter ID/Adhar card of parents/Ex.PW3/C (colly). The Principal also*

*issued a certificate/Ex.PW3/D with regard to the age of the victim. The IO also collected copies of the attendance register for the months from August, 2015 to October, 2015/Ex.PW3/E pertaining to the accused.*

*The sealed pulandas were deposited with the FSL through Ct.Mukesh/PW5. The FSL result/Ex.P-8 (admitted by the accused in proceedings under Section 294 Cr.P.C) was filed through a supplementary chargesheet. The underwear of the victim/Ex.P-1 (first exhibit marked as Ex.P-1) was identified by the IO and the mother of the victim.*

*Dr. Pooja Gupta/PW8 was posted as SMO at the relevant time. She has identified the signatures of Dr.Ashish Kumar Bharti who had prepared the MLC/Ex.P-3 (admitted by the accused in proceedings under Section 294 Cr.P.C) wherein he had referred the victim child to ward 19 (pediatric surgeon). The said MLC also bears the signature of PW8. Dr. Harshita/PW9 had examined the victim (at ward 19) and prepared her report/Ex.PW9/A. She had found on local examination, a small area of erythema present posterior in the perianal extending from 5 O' clock to 7 O' clock position, non-tender even to deep palpation. There was no abrasion or bruise present and the anal sphincter tone was normal. She saw no sign of trauma."*

3. On completion of the investigation, the respondent was charge sheeted under Sections 377/342 of IPC and Sections 6/10 of POCSO Act to which he pleaded not guilty and claimed trial.
4. To bring home the guilt of the respondent, the prosecution examined 9 witnesses in all. The statement of the respondent was also recorded under Section 313 Cr.P.C. wherein he

reiterated his innocence by denying all incriminating circumstance and claimed to have been falsely implicated. The respondent examined one defence witness in order to prove his innocence.

**Arguments addressed on behalf of the State**

5. Ms. Radhika Kolluru , learned APP appearing for State while opening his arguments in the present leave petition submitted that the impugned judgment is based on conjectures and surmises and is against the facts and law; that the trial court has failed in appreciating the testimonies of the victim child/ PW-2 and the mother/ PW1; that the trial court failed in appreciating the medical evidence available on record i.e. MLC of the victim child wherein it is plainly mentioned that a small area of erythema was present posterior in the perianal extending from 5:00 PM to 7:00 PM wherein application of physical force is depicted; that the trial court has failed in appreciating the provision of Section 29 of POCSO Act wherein the court has to presume that the accused person has committed the offence under Sections 3/5/7/9 of the Act; that the trial court has erred in not appreciating the law laid down by Apex Court wherein there is no requirement in law to insist the corroboration of statement of victim to convict the accused; that absence of injury will not falsify the case of the prosecution as per the law laid down by the Apex Court in catena of judgments.

**Arguments addressed on behalf of respondent**

6. Per contra, Mr. T.A. Siddique, learned counsel appearing on behalf of the respondent contended that the respondent has been falsely implicated in the present case; that the alleged injury on the victim child was not noticed on the day of the alleged incident; that no formal complaint to the school principal/authorities was made by the mother of the victim child on the day of the alleged incident, whereas, a verbal complaint was made to the principal by the mother of the victim child after a month of the incident; that the child/victim was never left in isolation in the school premises, all the children were either asked to be present in a class room after the school got over or were under a constant supervision of an attendant; that no investigation on part of the alleged weapon “danda” of crime was done by the prosecution; that the counsel placed his reliance in *State (Govt of NCT of Delhi) vs Mullah Muzib* passed by the Division Bench of this Court in Crl. LP No. 62/2015 on 09.02.2015 wherein the accused was acquitted of charges levied against him under section 6 and 10 of POCSO Act; lastly, that the respondent has been incarcerated for a period of three years.
7. We have heard the learned counsel for the parties and perused the material on record.

**Testimonies of complainant and child victim**

8. Undoubtedly, the child victim was about 5 years old at the time of alleged incident. The alleged incident is stated to have taken

place on 07.10.2015 and the child victim first time brought the same to the notice of his mother on 08.10.2015, who immediately reported the matter to the police. Before considering the other facts and circumstances of the case, we deem it appropriate to discuss the testimonies of the child witness and his mother. The mother of the child victim was examined as PW-1 and deposed that:

*“On 08.10.2015 my victim son came from the school. He was silent and slept. In the evening he woke up and went to latrine. After latrine I started cleaning his potty. My son started weeping due to pain. I asked him as to what was the reason. For some time he could not tell me anything. I again asked the reason. My son told me that after the school was over, he was present in the class and was waiting for school bus. He was alone in the KG class room, accused Sonu present in the court today ( correctly identified) who was helper on bus and was also working as cleaner in the school, came in his class room. My son further told me that accused bolted the gate of the class room from inside and asked my son to put off the clothes. my son refused for the same, on which accused forcibly put off the clothes of my son and he also put off his own clothes and inserted a danda into the anus of my son. Due to which my son started crying. Accused slapped on the face of my son and asked him to shut his mouth and after that accused took my son in the school bus and my own son was left at the house. My husband came in the evening from his office and I told all the facts to him.*

*On the intervening night of 08/09.10.2015 I alongwith my husband and victim son went to PS South Campus. My son was medically examined*

*in Safdarjung hospital. Underwear of my son was taken into possession by the doctor concerned”*

9. During her cross examination PW-1 deposed as under:-

*“I used to clean potty of my victim son daily. I had clean the potty of my son on 07.10.2015 but on that day my victim son had not told me that he was having pain. It is correct that my victim son had not told me that he was having pain. It is correct that my victim son had told me on 08.10.2015 that the incident had taken place yesterday. However, he had not told about the incident on 07.10.2015. I did not know on 07.10.2015 that some incident had taken place with my son on that day. Vol. however, he was mum on 07.10.2015. I had not told this fact to police.*

*I had made complaint about the incident to the principal of the school. So far as I remember, it was in the month of November that I made a complaint to the principal when I went to deposit the school fee in the school. I had not made any written complaint to the principal.”*

10. After examining the testimony of PW 1 with regard to the incident, it is observed that the story of the prosecution has a lot of astonishing defects from its inception. Admittedly the victim child did not complain about the alleged incident soon after the commission of crime and reported the same to his mother on the next date i.e. on 08.12.2015. Further, the conduct of PW-1 the mother of the child is also unnatural as she did not make any complaint to school authorities on 08.10.2015 and waited for one month to report the matter of sexual assault on his son to

the principal. The testimony of the mother, to our mind is feeble and does not draw a case against the accused person. To elucidate the story of the prosecution the testimony of PW-2 shall be examined which reads as under:-

11. The child victim was examined as PW-2 and alleged that:

*“He threatened me, also beaten me. he took off his pyjama and my lower garments and he inserted a stick in my potty walijagah main”*

Cross examination of PW-2:

*Q- Whether other children were with you on the day of incident or after the closing of school ?*

*“Yes. That there are other children at the time of closing of school. On the day of incident, other children were also with me”*

*Q- Whether before boarding the school bus, the children are made to gather at class room in the observation of class teacher?*

*“ yes jab takbhaiyakechuttinahihote. Bhaiya 5th class main padhtehai.*

12. The cross-examination of the victim child when compared with the testimony of PW-1/ (Mother of the victim) reveals material contradictions. PW-1 in her testimony stated that the child was alone in his class room at the time of the incident whereas the victim child in his cross examination stated that many other students were present with him in the class room and further added that there were other children with him on the day of the incident too. PW-2 even admitted that he was not allowed to leave the classroom without the company of his elder brother

who was also studying in the same school. Therefore, in view of the statement of the child we infer that at no point of time he was left alone in the school premises. Further, we need to examine the MLC and FSL report to substantiate the case.

**Medical report**

13. The testimony of PW-9 (Dr. Harshita )reads as under:-

*“I medically examined the victim on local examination there was a small area of erythema present posterior in the parianal extending from 5 O Clock to 7 O clock position, non tender even on deep palpation. There was no abrasion, bruise was present on the person of the victim, anal sphincter ton normal. There was no sign of any trauma, sample of anal swab was taken and sealed with the seal of Safdarjung Hospital and was handed over to the IO SI Pratap Singh. My detailed report is now Ex.PW9/A signed by me at point A.”*

Cross examination of PW-9 (Dr. Harshita )

*“The injury on the erythema can be caused if a person falls on blunt object. I cannot comment if a danda inserted into the anus then same type of injury can be sustained by a person. It is correct that if a danda is inserted into the anus some injury should be appear near/around the anus.”*

14. A perusal of the testimony of PW-9 signifies that there were no abrasions and bruises found on the body of the victim. The MLC does not support the case of the prosecution. The testimonies of PW-1 and PW-2 also stood negated by MLC (Ex.PW-9/A). Hence in facts of the present case it will be highly unsafe to

convict the respondent on the basis of testimony of PW-1 and PW-2 without corroborating it with the medical evidence.

**Forensic Report**

15. Clothes of the victim and the respondent i.e. Exhibit 1a : one underwear, Exhibit 1b : one underwear of the child victim and Exhibit 5 : One underwear of the respondent, were sent to FSL for analysis. On analyzing the said articles, experts opined as under:

**BIOLOGICAL EXAMINATION**

1. Blood could not be detected on exhibit '1a', '1b', '2', '5' & '8'
2. Semen could not be detected on exhibit '1a', '1b', '2', '5' & '8'
3. No foreign material like tissue could be detected on exhibit '1a', '1b', '2', '5' & '8'

**RESULTS OF EXAMINATION**

Due to non detection of semen on exhibit '1a', '1b', '2', '5' & '8', the exhibits '3' & '6' were not further subjected to DNA Analysis.

16. From the perusal of the FSL report, it is observed that no blood was detected either on the underwear of the victim Saransh or on the clothes of the respondent. In corollary of events, we are of the view that the FSL report does not support the story led by the prosecution.

**Faulty investigation**

17. In *Kailash Gour and Ors. Vs. State of Assam* reported in (2012) 2 SCC 34, the Apex Court has observed that an accused is presumed to be innocent till he is proved guilty beyond a reasonable doubt is a principle that cannot be sacrificed on the altar of inefficiency, inadequacy or inept handling of the investigation by the police. The benefit arising from any such faulty investigation ought to go to the accused and not to the prosecution.
18. Investigating Officer was examined as PW 7, who in his examination in chief deposed:-

*“On the intervening night of 08/09.10.2015 I was posted at PS South Campus as SI. On that day I was on night duty emergency duty. On that night at about 11 PM complainant Reena alongwith her Husband Naresh and victim child ages about 5 years came to PS. They made complaint against accused regarding committing penetrative sexual assault on the victim child. I had recorded the statement of complainant Smt Reena, mother of the victim child.*

xxxxx

*I prepared the site plan Ex. PW7/B at the instance of complainant. It bears my signature*

xxxxx

*The videography of the place of incident was got done.”*

19. During cross examination, PW-7 stated that

*“Students used to sit in the said room used after the closing of the school in order to waiting their respective transport.*

xxxxx

*I had not called any public person at the spot for joining him in the arrest of the accused.*

xxxxx

*I had not recorded the statement of principal or any other police staff at the time when I had visited the spot. I do not remember as to who prepared the site plan*

xxxxx

*Victim had not stated before me that accused had inserted a danda type of object in his anus”*

20. While examining the testimony of PW-7, we are of the view that the investigation of the case was not carried out in a right perspective. According to PW-7, videography of the alleged spot was done, but failed to place the same on record. Further, Investigating Officer contradicts from his own testimony wherein at one point he deposed that the site plan was prepared by him and later fails to remember the preparation of the site plan. This investigation has miserably failed in proving the case against the accused and nothing incriminating can be inferred against the accused person.
21. Further it is the contention of the appellant that the accused may be presumed to have committed the offence as it is a necessary ingredient of the act whereas in our legal provisions imposing reverse burden, however, must not only be required to be strictly complied with but **also may be subject to proof of some basic facts** as envisaged under the statute. It is important to note the use of the word ‘may’ in the quote above. Finally, with regard to the standard of proof required in cases of presumption, it is held that the burden is on the prosecution to

prove foundational facts ‘*beyond reasonable doubt*’. The prosecution in the case before us has gloomily failed in proving foundational facts and the arguments of the prosecution are not supported by any material evidence. We express our extreme displeasure about the way in which such serious cases are dealt with, inefficiency and callousness on part of the investigating authorities is bound to shake the faith of the society in the system of administration of criminal justice in this country which, in our opinion, has reached considerably lower level than desirable.

22. However, it is found that there were discrepancies in the statement of the victim. Also, none of the prosecution witnesses supported the case of the prosecution. Accordingly, having regard to the totality of the circumstances, the leave petition stands dismissed and the impugned order is upheld.
23. Ordered, accordingly.

**SANGITA DHINGRA SEHGAL, J**

**SIDDHARTH MRIDUL, J**

**FEBRUARY 13, 2019**  
**gr**