

**IN THE HIGH COURT OF DELHI AT NEW DELHI***Judgment Delivered On: 18.04.2022***CRL.L.P. 24/2021****STATE OF NCT OF DELHI****..... Petitioner****versus****SHIVJANAM****.....Respondent**Advocates who appeared in this case:

For the petitioner : Mr. Ashish Dutta, Additional Public Prosecutor for the State.

For the respondent : Ms. Manika Tripathy, Mr. Manish Vasisht and Mr. Shubham Hasija, Advocates.

CORAM:**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL****HON'BLE MR. JUSTICE RAJNISH BHATNAGAR****J U D G M E N T****SIDDHARTH MRIDUL, J. (OPEN COURT)****CRL. M.A. 2425/2022 (Delay)**

The present application under Section 5 of the Limitation Act, 1963, has been filed on behalf of the State/petitioner seeking condonation of 438 days' delay in filing the leave to appeal petition.

In view of the reasons stated in the application, which is duly supported by an affidavit, the same is allowed. The delay of 438 days in filing the accompanying leave to appeal petition is condoned.

The application is disposed of accordingly.



1. The present leave to appeal petition assails the impugned judgment dated 18.10.2019, rendered by Additional Sessions Judge-07, Special Court (POCSO Act), South-East District, Saket Courts, New Delhi, whereby Shivjanam, the sole respondent/accused was acquitted of all the charges framed against him by the Trial Court, under Section 376 of Indian Penal Code (in short 'IPC'), 1860 and Section 6 of the Protection of Children from Sexual Offences Act (in short 'POCSO Act'), 2012, arising out of FIR No. 144/14 registered at Police Station Okhla Industrial Area, Delhi.

2. The prosecution's case against Shivjanam is premised entirely on the testimony of 'SK', PW-1, the alleged victim's mother. 'SK' deposed to the effect that on the 26.02.2014, at about 02:15 P.M. in the afternoon, she went to answer the call of nature at the *sulabh shauchalya*, located in the vicinity of her residence, along with her daughter, the three-year-old victim. It is PW-1's case that when she emerged from the *shauchalya*, she witnessed the sole respondent/accused, who is her neighbour and therefore, known to her, kissing the minor child and fingering her private parts. 'SK', PW-1, further stated that she made a call to the Police Control Room within half-an-hour of witnessing the alleged commission of the offence and that her



statement, which is Ex. PW-1/A, was recorded by S.I. Raghunani, PW-3.

3. Immediately thereafter, PW-1 and the victim were escorted to All India Institute of Medical Science (AIIMS) for the latter's medical examination, as reflected in the MLC [Ex. PW-1/D]. On 28.02.2014, PW-1 went to the court of the concerned Metropolitan Magistrate (M.M.) in Saket Courts, where the statement under the provision of Section 164 of the Code of Criminal Procedure, 1973 was duly recorded. In the said statement, PW-1 essentially reiterated the complaint made by her to the Police under Section 161 Cr.P.C, recorded as Ex. PW-1/A.

4. However, it is observed from PW-1's cross-examination that the room of Shivjanam, the respondent/ accused, is located within the toilet premises itself, and that prior to the alleged commission of the offence, a quarrel had taken place between PW-1 and her family on the one hand, and the accused on the other. It is further observed that in the statement recorded under Section 164 Cr.P.C [Ex. PW-1/E], it is observed that the expression '*sharir*' was employed, whereas the initial allegation recorded in statement under Section 161 Cr.P.C. [Ex. PW-1/A], was that the accused had inserted his finger into the vagina of the victim.



5. More significantly, it emerged in the cross-examination that, when PW-1 came out of the *shauchalya*, she saw Shivjanam carrying the victim in his arms from the 'backside' (sic).

6. Furthermore, a perusal of the MLC of the minor victim, i.e. Ex. PW-1/D, categorically reflects that there was no external or internal injury visible on the child at the time of the medical examination conducted by Dr. Nipun, PW-7. To elaborate; the victim's hymen was intact and there was no sign of any vaginitis or indication of any object having been inserted.

7. It is in this backdrop, that the learned Trial Court returned the finding, impugned in the present leave petition, which reads as follows:

"15. On appreciating the testimony of the mother of victim in the light of her previous statements recorded at various stages of investigation and in the light of her cross examination, one finds material contradictions. In the statement recorded under Section 164 Cr.P.C, she mentioned that while going inside the toilet, she left her daughter outside and at that time, her daughter was playing in mud. On the other hand, during cross examination, she stated that the floor outside the toilet was a cemented floor meaning thereby that there was no mud or kachcha floor outside the toilet. In the statement recorded under Section 164 Cr.P.C, she stated that at the time when she came out of the toilet, she saw the accused sitting on the corner of the toilet but during cross examination, she mentioned that accused was standing at that time. It was her version that after the incident, she went home and brought her mobile phone to the spot and thereafter, made a call at 100 number. She has mentioned this in cross examination. She has further stated in cross



examination that the ~~call at 100 number was made~~ ^{NEUTRAL CITATION NO: 2022/DHC/001857} after about half an hour of the alleged incident. She has narrated the chain of events that after apprehending the accused, she raised alarm and public persons gathered at the spot and on seeing the public persons, accused fled away from the spot. She has mentioned that thereafter, she went home, collected her mobile phone and came back to the spot and made a call at 100 number. The DD Entry no.13A contradicts the chain of events narrated by her. In this DD Entry, it stands recorded that an information has been received that a person, who is under the influence of alcohol, is committing galat kaam with a two year old girl child and the person, who was doing the galat kaam, has been apprehended. It is an admitted position that the call at 100 number was made by the mother of the victim. In case, her version, as narrated in the testimony recorded in the court, is taken to be correct, then accused had already fled away from the spot at the time when the call at 100 number was made. The information that the person assaulting the girl was under influence of alcohol also seems to be incorrect as the mother of the victim nowhere stated this facts in her subsequent statements. The facts, as brought about during the cross examination of the mother of the victim, shows that at the time when she came out of the toilet, she was not having a clear view of the accused and her daughter. She stated in cross examination that she saw the accused and her daughter from the backside. Her statement depicts that she was not having a clear view and she is not fully confident about the allegations of sexual assault.

न्यायमेव जयते

16. The accused has put forward a defence that there was previous rivalry between him and the family of the victim. This defence was put to the mother of the victim in the form of suggestions and she admitted that prior to the incident, a quarrel had taken place between her family and the accused. Infact, a direct question was put to her during cross examination that she has falsely implicated the accused on account of previous rivalry. In response of this question, she stated that she cannot say if the allegations levelled against the accused are false or correct. This response is fatal for the prosecution's case. Not only did she concealed material facts that accused was her



neighbourer and that there was previous rivalry between them but she herself stated that she cannot say if the allegations levelled against the accused are true or false. Her testimony contains improvements and various contradictions. Her testimony does not inspire confidence and cannot be relied on in the absence of corroboration.

17. In the present case, mother of the victim is the sole eye-witness of the alleged sexual assault. In order to base conviction on the testimony of a sole eye-witness, her testimony should be of a sterling quality and beyond shadow of doubt. The present matter fails on this count. The testimony of the mother of the victim is not of such sterling quality that a conviction could be based upon her sole testimony. Her testimony contains various contradictions. She has concealed various material facts about her previous acquaintance and rivalry with the accused. She herself expressed doubt over the truthfulness of allegations leveled against the accused. There is no independent source to corroborate her statement. In view of this, it would be unsafe to base conviction on the basis of her sole testimony.

18. Further, there are various infirmities in investigation and the investigation agency made no efforts to rope in public witnesses. It is an admitted case of prosecution that the incident took place at around 02.15 PM in front of a public toilet of an area which is thickly populated. It is matter of common understanding that at that point of time, number of public persons and passerby would have been present at the spot. The mother of the victim has categorically stated that at the time of incident, public persons gathered at the spot. It appears from the testimony of police witnesses that no sincere efforts were made to rope in public witnesses. Investigating officer has put forward a stereotype explanation that public persons were requested but they did not join the investigation. The fact that police officials made no sincere efforts to seek corroboration from public witnesses puts question-mark over the fairness of the investigation.



19. In a criminal trial, the prosecution is duty bound to establish the charges against the accused beyond reasonable doubt by leading cogent and reliable evidence. The prosecution is bound to lead evidence to rule out any hypothesis which may point towards the innocence of the accused. On the other hand, it is called upon on the accused to present a defence which is probable or believable. The accused has presented a line of defence that the mother of the victim falsely implicated him on account of previous rivalry. Record shows that at the time of recording of statement under Section 313 Cr.P.C, accused took a new line of defence that the mother of the victim borrowed money from him and when he demanded repayment, she falsely implicated him in the present case whereas during trial, he took defence that the mother of the victim falsely implicated him on account of previous rivalry. However, this new version does not demolish his earlier line of defence that the mother of the victim has falsely implicated him on account of previous rivalry. The defence presented by the accused can not be rejected as unbelievable or improbable. More particularly, when there is no reliable evidence to substantiate the allegations of sexual assault.

20. In order to bring home the charges under Section 6 of the POCSO Act, there must be clear evidence to establish that accused committed penetrative sexual assault upon the victim. In the present case, there is no reliable evidence to establish that accused either kissed the victim with sexual intention or inserted his finger in her vagina. In the absence reliable and cogent evidence, the presumption provided under Section 29 and 30 of the POCSO Act does not rescue the prosecution. The accused has successfully rebutted these presumptions by demonstrating during the cross examination of the mother of the victim that there was previously rivalry between them. It was also brought about during the cross examination that the mother of the victim concealed various material facts and she herself doubted the truthfulness of the allegations levelled against the accused. In view of this, I have reached a conclusion that this is a fit case where benefit of the doubt should be given to the



accused. Accordingly, ^{NEUTRAL CITATION NO: 2022/DHC/001857} ~~accused Shivjanam stands acquitted~~ from the charges under Section 6 of POCSO Act.”

8. Having heard Mr. Ashish Dutta, learned Additional Public Prosecutor appearing on behalf of the State, as well as Ms. Manika Tripathy, learned counsel appearing on behalf of Shivjanam, the sole respondent, we find ourselves in complete agreement with the finding arrived at by the Trial Court, as elaborated in the paragraphs extracted, hereinabove. The medical evidence on record, read in conjunction with the testimony of PW-1 leads to but one inescapable conclusion, that the present is a case, where respondent/ accused was entitled in law to the benefit of the doubt.

9. We further observe, from the evidence on the record that, the prosecution failed miserably to establish by cogent and reliable evidence, that the respondent committed penetrative sexual assault on the victim. Also, the presumption stipulated under the provision of Section 29 and 30 of the POCSO Act, was rebutted by the testimony of PW-1 herself, to the effect that there was previous rivalry between them, as well as the circumstance that, the alleged commission of offence had been witnessed by the prosecution's solitary eye witness from the 'backside' of the respondent.



10. In view of the foregoing, the impugned judgment dated 18.10.2019, rendered by the Trial Court does not suffer any infirmity, so as to warrant any interference in the present leave petition.

11. Resultantly, the present leave to appeal petition being devoid of merit, is dismissed and disposed of accordingly.

**SIDDHARTH MRIDUL
(JUDGE)**

**RAJNISH BHATNAGAR
(JUDGE)**

APRIL 18, 2022/at

[Click here to check corrigendum, if any](#)