

\$~9

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

%

Decided on: 10th November, 2022

+

CRL.L.P. 97/2021

STATE

..... Petitioner

Represented by: Ms. Shubhi Gupta, APP for the State
with Insp. Subhash Chand Yadav, PS
Jamia Nagar.

versus

ABUZAR@RAHIL

..... Respondent

Represented by: Mr. Vaibhav Gaggar, *Amicus curiae*
with Mr. Ketan Sarraf & Mr. Utkarsh
Tiwari, Advocates.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

MUKTA GUPTA, J. (ORAL)

1. By this petition, the State seeks leave to appeal against the judgment dated 17th December, 2019 passed by the learned Additional Sessions Judge-01 (POCSO) South-East District, Saket Courts, acquitting the respondent for offences punishable under Sections 376/506 IPC and 6 of Protection of Children from Sexual Offences Act, 2012 (in short, "POCSO Act").

2. FIR No.263/2013 was registered at Police Station Jamia Nagar under Sections 376/506 IPC and 6 of POCSO Act wherein the prosecutrix stated that she was the student of 5th standard aged around 16 years. However she did not know how to read and write because she had studied in Urdu. Her mother used to work as a cook in the houses. Around 9 months ago in the marriage of the sister-in-law of her sister, the respondent gave his mobile phone number on a piece of paper. Thereafter she started talking to the respondent. After about one month, she went to the house of her sister where again in a marriage she met the respondent. Thereafter she started working as a cook in a house, during which period in the month of November, the respondent called her in the park. They spoke between 8 PM to 9:30 PM. Despite the prosecutrix asking about the time, respondent did not tell her and when she snatched the phone she found that it was 11:00 PM at night. Since it was late, the respondent stated that she would not be able to go to her house at late night and she should go to the house of the respondent where there were two rooms. The prosecutrix went to the house of the respondent and, at night, the respondent tried to have physical relation. When she stopped, the respondent stated that he wanted to marry her, on which, she asserted that they should first marry and then she will have physical relationship. Thereafter, she slept and when she woke up she found that her *Salwar* had been taken off and the respondent was lying on her. On her repeatedly weeping, the respondent stated that he will marry her and nothing will happen to her. Thereafter the respondent threatened her that he had made a video and started blackmailing her. After some time she got to know that she was pregnant and when she informed the respondent, the respondent refused to marry the prosecutrix.

3. Pursuant to the filing of the charge-sheet, prosecutrix was examined as PW-11 and in her examination-in-chief, she reiterated her version stated in the FIR except that her video was made which was elicited by the learned APP on the cross-examination. Though the prosecutrix was cross-examined by learned counsel for the respondent on two dates, however, she stopped appearing thereafter and thus her cross-examination could not be completed. In the absence of her complete cross-examination, the evidence of the prosecutrix as deposed in the examination-in-chief could not have been considered and thus the learned Trial Court acquitted the respondent.

4. It is well settled that if the witness does not subject itself for complete cross-examination, the testimony of the said witness cannot be considered as held by this Court in the decision reported as 2000 (55) DRJ 707 (DB) Ripen Kumar Vs. Department of Customs as under :

“..... The procedure as laid down under the Evidence Act is clear and unambiguous. Under the Evidence Act, evidence means the examination-in-chief and cross-examination. That statement alone will form evidence. In the present case petitioner had been deprived to cross-examine PW-1 thereby dislodge his testimony. Hence incomplete statement of PW-1 in the absence of cross-examination could not be treated as evidence nor the same could be relied upon. Therefore the observation of learned ASJ that incomplete statement could have been the basis of deciding the question of charge is contrary to law. Part statement of PW-1 did not attain the status of evidence, nor on the basis of the same it could be said that statement of the accused recorded under Section, 108 of the Customs Act stood proved.

5. The finding of the learned Trial Court on this count that the evidence of the prosecutrix cannot be considered in the absence of complete cross-

examination, cannot be faulted.

6. The second evidence on record was the DNA analysis. However, the report of Ms. Seema Nain (PW-12) Assistant Director (Biology), FSL, Rohini was that since the material received for analysis was conception material, no DNA profile could be isolated and due to non-availability of DNA material, the same could not be connected with the respondent. To assure ourselves that no DNA material could be isolated from the product of conception, we had requested Ms. Seema Nain to appear before this Court who appeared before this Court on 25th August, 2022 and explained that the sample of production of conception which is in the first three months of pregnancy was sent to the FSL and the sample was drawn by the doctor and not by the said Assistant Director. According to Ms. Seema Nain, the sample was drawn from the placental material which did not have the DNA profile of the male participant and thus the DNA profile of the male participant could not be isolated and hence it cannot be proved that the respondent was the male contributing to the conception.

7. It may be noted that despite the prosecution proving during the course of trial that the victim was a minor based on school record, in the absence of the complete testimony of the prosecutrix or the alternate evidence in the form of DNA report, it cannot be held that the offence alleged against the respondent has been proved beyond reasonable doubt. Undoubtedly, to prove the offence of rape, only penetration is required to be proved which could have been proved from the testimony of the prosecutrix herself. However, in the absence of the complete cross-examination of the prosecutrix, her deposition cannot be read in evidence and used against the respondent. Accordingly, this Court finds no ground to grant leave to appeal

to the State. Leave to appeal petition is accordingly dismissed.

8. Order be uploaded on the website of this Court.

MUKTA GUPTA, J.

ANISH DAYAL, J.

NOVEMBER 10, 2022

ck

