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

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Decided on: 8<sup>th</sup> April, 2022

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**CRL. L.P. 135/2021**

STATE

.....Appellant

Represented by: Mr. Ashish Dutta, APP for the State  
with S.I. Sunil Tokas, P.S. S.B. Dairy,  
Delhi.

versus

ROHIT KUMAR

..... Respondent

Represented by: Mr. B. Badrinath, Advocate.

**CORAM:**

**HON'BLE MS. JUSTICE MUKTA GUPTA**

**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA**

**NEENA BANSAL KRISHNA, J. (ORAL)**

1. The State, aggrieved by the judgment dated 29<sup>th</sup> July, 2020 acquitting the respondent-Rohit Kumar for the offence punishable under Sections 307/341 Indian Penal Code, 1860 (*hereinafter referred to as 'IPC'*), has preferred the present Appeal under Section 378(1) of Criminal Procedure Code, 1973 (*hereinafter referred to as 'Cr.P.C.'*).
2. The facts in brief are that in the winter afternoon of 17<sup>th</sup> December, 2012 at about 02:45 P.M., complainant- Pradeep was playing with his niece Baby Sakshi, aged about 5 years in a park outside their house, while his grand-mother Smt. Kasturi Devi was basking in the sun. Monika, a child



who lived in the neighbourhood, was also playing nearby with a football. Smt. Kasturi Devi took an objection and told the child Monika not to play there as the ball could hurt her; Monika left. After some time, Rohit Kumar, her brother/respondent came with an iron strip and confronted them for having told his sister not to play there. Pradeep told him that his grand-mother had taken the objection and started to leave for the park along with Baby Sakshi in his lap. The respondent stopped him and lifted the iron strip to hit him, which he was able to dodge, but it hit Baby Sakshi, who sustained injuries on her head. The respondent then ran away. A call was made at No.100, police arrived and they were taken to the hospital for treatment. FIR under Sections 323/341 IPC was registered. The respondent was arrested on 20<sup>th</sup> December, 2012 and was released on police bail.

3. The investigations were then taken over by S.I. Mukesh Kumar who obtained the MLC. In the subsequent opinion, the doctor certified the nature of injuries as “Dangerous”. The offence of Section 323 was converted to Section 307 of I.P.C. and the accused was re-arrested on 21<sup>st</sup> June, 2013. The recovery of the sword was made pursuant to his disclosure statement. On completion of investigation, charge-sheet for offences punishable under Sections 307/341 IPC was filed in the court.

4. Charges under Sections 307/341 IPC were framed against the respondent on 11<sup>th</sup> April, 2014 to which he pleaded not guilty.

5. The prosecution in support of its case examined eleven witnesses in all.

6. In his statement recorded under Section 313 Criminal Procedure Code, 1973 (hereinafter referred to as ‘Cr. P.C.’) the respondent pleaded innocence. The plea of the respondent was that he was not present at the



spot and did not inflict injury to the victim and to prove the same, he examined his school-mate DW-1/Mr. Akash, who deposed that the respondent was present in the school on the date of alleged incident till about 03:30 P.M.

7. The appellant also examined his sister DW-2 Monika. Even as per the prosecution case because of Monika the incident took place. Monika desposed that in the year 2012, she was studying in 11<sup>th</sup> Standard. On 17<sup>th</sup> December 2012 at around 2.15 pm, she along with the other girls was playing Stappu in a portion of the park. Mistakenly, the ball went to the other side of the park occupied by the complainant and his family members. The complainant and his family told her that they had already told them not to play in the park because the park was their property on which arguments ensued and she was beaten. One of the girls informed her mother, who immediately came to the park. Without hearing anything, they also started beating her mother. She and her mother went to their house. One hour thereafter, her mother sent someone to school to inform her brother i.e. the respondent. Rohit came to the house at about 4 pm. Thereafter, he informed about the incident to their father. During cross examination, Monika also stated that she made a PCR call on 17<sup>th</sup> December 2012 at 4 pm, however, no action was taken on her PCR call but action was taken on the call of the complainant.

8. The learned Additional Sessions Judge referred to the testimony of the eyewitnesses PW-1/Pradeep-complainant, PW-2/Smt. Kasturi Devi and PW-4/Smt. Beermati who failed to identify the respondent as being the perpetrator of crime.

9. PW-3/Baby Sakshi, the injured, deposed about the incident and injury



being inflicted on her head with the sword/strip. The relevant portion of her statement is reproduced as under:

*“....I was in the lap of my brother Pradeep when I received the injury on my head with a sword. The injury was inflicted on my head by the accused. Accused lives near to my house and he is known to me even prior to the incident ....”*

10. The learned Additional Sessions Judge while acknowledging that a child is a competent witness for which reliance was placed on **Panchhi & Ors. vs. State of U.P.**, AIR 1998 SC 2726, **State of U.P. vs. Krishna Masters & Ors.**, AIR 2010 SC 3071 and **Gagan Kanojia & Anr vs. State of Punjab** 2006 13 SCC 516, observed that though PW-3/Baby Sakshi referred to the accused *“but neither did she name the accused nor was the accused got indentified by her in the court”*. The testimony of PW-3/Baby Sakshi was held to be too cryptic to base the conviction in such a serious offence. It was also observed that the recovery of sword from the accused was not proved beyond reasonable doubt, since the only independent witness, PW-1/Pradeep, the complainant denied any recovery being made in his presence. The learned Additional Sessions Judge thus concluded that the prosecution has not been able to lead cogent and convincing evidence to prove the charges against the accused.

11. Aggrieved by the acquittal, the State has preferred the present leave to appeal petition under Section 378 (1) Cr.P.C. The main grounds of challenge are that the victim PW-3/Baby Sakshi had fully supported the prosecution case and also proved the identity of the accused. She has specifically deposed that the injury was inflicted on her head by the accused. Furthermore, the recovery of sword has been proved by the testimony of



PW-7 Head Constable Chand Singh, PW-8 Constable Praveen and PW-9/S.I. Mukesh Kumar, who had also deposed that the complainant PW-1/Pradeep had named the accused-Rohit Kumar as the assailant, in his complaint. The recovery of the weapon could not have been disbelieved merely because PW-1/Pradeep failed to corroborate the recovery. The testimony of PW-7/Head Constable Chand Singh, PW-8/Constable Praveen and PW-9/S.I. Mukesh Kumar could not have been disregarded and disbelieved on the sole ground of they being the police witnesses. Moreover, it is evident from the testimony of PW-1/Pradeep that he had been won over and the benefit of the same cannot enure to the accused. PW-11/Dr.Vijay Dhankar had also given an opinion that the injury on the victim could likely be caused by the recovered weapon Ex.P1. The entire incriminating evidence has been disregarded by the learned ASJ and the respondent is liable to be convicted.

12. Submissions heard.

13. The prosecution had relied upon the testimony of four eye-witnesses. PW-1/Pradeep deposed that two to three boys came inside the park armed with iron *pattis* and sword and gave a *patti* blow, causing injury to PW-3/Baby Sakshi. He further deposed that police had obtained the signatures on various blank papers and categorically denied the presence of the accused-Rohit Kumar; rather he deposed that he was not amongst the boys who had quarrelled and inflicted injury. PW-2/Smt. Kasturi Devi, deposed on similar lines as PW-1. She admitted that accused Rohit Kumar was her neighbour but denied his involvement in the incident. PW-4/Smt. Beermati, a neighbour, identified the accused as residing in the neighbourhood but asserted that when she reached the park, child Sakshi was



bleeding from her head and was taken to hospital. She denied having seen the accused causing injury to Baby Sakshi. Thus all the three eye witnesses, namely, PW-1/Pradeep, PW-2/Smt. Kasturi Devi and PW-4/Smt. Beermati denied the presence of the accused or he being the perpetrator of crime.

14. The most material witness was PW-3/Baby Sakshi, the injured. She deposed that injury was inflicted on her head by the accused, who is known to her since prior to the incident as he lives near her house. No doubt, she deposed about the incident and about being injured, but in her entire testimony, she neither named the accused nor did she identify the accused in the court as the offender. Though her evidence is incriminating but because of the non-identification of the accused in the court, and reference to the assailant as “accused” without giving his name, her testimony has been rightly not relied upon by the learned ASJ to establish the identity of the accused. The prosecution has thus failed to establish the identity of the accused.

15. The other corroborative incriminating evidence was the recovery of weapon of offence at the instance of the accused. The recovery witnesses are PW-8/Constable Praveen and PW-9/S.I. Mukesh Kumar. PW-8/Constable Praveen had deposed that on 21<sup>st</sup> June, 2013, he and the complainant had joined the investigations with S.I. Mukesh Kumar, the accused was apprehended and arrested vide memo Ex. PW-1/B. Pursuant to his disclosure statement Ex. PW-8/A, the accused got recovered one sword without *muttha* Ex. P-1 from his house from under the bed, the sketch of which was prepared as Ex. PW-1/F and the same was seized vide memo Ex. PW-1/E. His testimony is corroborated by PW-9/S.I. Mukesh Kumar, the subsequent I.O.



16. According to PW-8/Constable Praveen and PW-9/S.I. Mukesh Kumar, the complainant had accompanied them on 21<sup>st</sup> June, 2013 and was a witness to recovery of weapon of offence. However, PW-1/Pradeep has been categorical in his testimony to deny the recovery of weapon of offence in his presence. Undoubtedly, the testimony of PW8 and PW9 cannot be discounted merely because they are police officials but it is significant that the only independent witness has failed to support the recovery of the weapon.

17. A reference may also be made to testimony of PW-7/Head Constable Chand Singh who was the initial I.O. and had got the FIR registered. According to him, the accused Rohit Kumar was arrested from Phase-II, Metro Vihar on 20<sup>th</sup> December, 2012 and his personal search was conducted vide memo Ex. PW-7/D and he was released on police bail. Interestingly, neither any disclosure was made by the accused Rohit Kumar nor any recovery of sword was made from his house when the accused was arrested and released on police bail on the 20<sup>th</sup> December, 2012. It is only when the nature of injury was opined to be 'Dangerous' and Section 307 IPC was added that the police machinery geared up into action and the accused was re-arrested in June, 2013 i.e. after about six months of the incident. Not only this, the disclosure statement was then recorded and the weapon of offence was conveniently recovered from the house of the accused. No cogent explanation is forthcoming for the alleged recovery of weapon of offence after about six months of the incident and that too, when the accused was available and arrested initially in December, 2012 and the gravity of injury was evident since beginning from the MLC. The alleged belated recovery of weapon is highly suspicious and has been rightly discredited by



the learned ASJ.

18. A reference may be made to the testimony of PW-11/Dr. Vijay Dhankar who gave the subsequent opinion Ex. PW-9/D that the injury as recorded in MLC being an incised wound 12x4 cm., could have been caused by the weapon i.e., the sword. In his deposition, PW-11 stated that his opinion was based on the type of injury i.e. the incised wound and the type of weapon *Talwar* which was sharp edged weapon. He further stated that incised wounds are caused by sharp-edged weapon. He could not say whether the weapon produced had in fact caused injury on the victim and he only opined that said injury can be caused by similar kind of weapon which was produced before him. He further stated that such kind of injury can be inflicted by knife as well.

19. In the cross examination of DW2-Monika, nothing has been elicited to show that she did not make a PCR call and all the PCR calls have not been brought on record to deny that she made a PCR call.

20. From the deposition of DW-1, it is clear that the respondent was a student of Govt. Senior Secondary School, B Block, Holambi Kalan, Metro Station, Delhi and the school timings were 12.30 pm to 5.30 pm. The prosecution made no efforts to find out from the school about the presence of the respondent in the school at the relevant time which could have been a cogent evidence.

21. The prosecution had miserably failed to prove either the identity of the accused or the recovery of weapon of offence. The learned ASJ thus rightly concluded that no cogent and convincing evidence has been led by the prosecution to bring home the offence against the respondent/accused beyond reasonable doubt.



22. Leave to appeal petition is therefore dismissed.

