



\$~3

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

% *Date of decision: 25th August, 2023*

+ **CRL.L.P. 92/2022**

THE STATE OF DELHI Petitioner
Through: Mr. Tarang Srivastava, APP for State
with Insp. Gaurav Kumar & S.I.
Aarti, PS Bhalswa Dairy.

versus

RAJESH Respondent
Through: Mr. Amit Gupta (Amicus Curiae),
Mr. H.S. Mahapatra & Mr. Shiv
Verma, Advocates with respondent in
person.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T (oral)

NEENA BANSAL KRISHNA, J

1. The present Criminal Leave Petition under Section 378 of the Code of Criminal Procedure, 1973 has been filed on behalf of the petitioner/State seeking Criminal Leave to Appeal against the Judgment dated 16.12.2020 whereby the learned Additional Sessions Judge-05, (POCSO) North, Rohini Courts, Delhi has acquitted the accused/respondent of the charges punishable under Sections 376(2)(i) of the Indian Penal Code, 1860 and Section 6 of the Protection of Children from Sexual Offences Act, 2012 registered *vide* FIR No. 465/2015 at Police Station Bhalswa Dairy.

2. The **case of the prosecution** is that on 22.07.2015 at about 11.15 AM,



it was informed that a child, aged about 5 years was sexually assaulted by an ice cream vendor (respondent herein). On the complaint of the grandmother, FIR No. 465/2015 was registered at about 4:25 PM and investigations were carried out. The medical examination of the child (victim) got done and her statement under Section 164 Cr.P.C was recorded. On completion of the investigation, a chargesheet was filed under Section 376 (2)(i) read with Section 6 of POCSO Act.

3. Charges were accordingly framed to which the respondent did not plead guilty. The prosecution in support of its case, examined 11 witnesses, the most material ones being PW1 (victim), PW2 Anish Ahmed (neighbour), PW8 Smt. Shaista (wife of PW2), who were both ocular eye witnesses to the incident and PW3 Smt. Rupa (grandmother of the victim) and on whose statement the FIR was registered.

4. **The first material witness Smt. Rupa (PW3)**, the grandmother of the victim on whose complaint FIR was registered, stated that on the day of the incident, she was informed by her neighbour PW2 Mr. Anish Ahmed that the Ice Cream vendor (respondent herein) has physically assaulted her granddaughter by putting his hand inside her panty. She immediately rushed to the spot and picked her granddaughter who was crying. On enquiry, the victim child told her that the respondent had made her sit on the ice cream cart and had assaulted her by touching her on her private parts. The grandmother made a call to the Police and her statement Ex.PW3/A was recorded.

5. PW3 i.e. the grandmother was the first witness to whom the entire incident was narrated by the victim immediately after it happened. However, PW3 in her testimony while corroborating the statement made by her in the



examination-in-chief, denied in her cross-examination that she was informed about the incident by her neighbour, PW2 Anish Ahmed or his wife PW8 Smt. Shaista and claimed that one lady who was working as a labourer near the house had informed her that some commotion was taking place and many public persons had gathered. She also deposed that the child returned back home on her own and was not crying. She further deposed that she was informed that the Ice cream vendor lifted the child from the seat of his Rickshaw; in the meanwhile some persons started fighting with each other in the public. She denied telling the Police that the child had been sexually assaulted. The learned Additional Public Prosecutor re-examined the witness but she reaffirmed her testimony as given in the cross-examination. This witness while in her examination-in-chief had supported the allegations made by her in the complaint but in the cross-examination which was conducted on the same day, she totally denied that any incident of sexual assault took place or that she was informed about the same by her neighbour Mr. Anish Ahmed or the child/victim.

6. In this backdrop, **the testimony of the second material witness** PW2 Mr. Anish Ahmed becomes significant who according to the prosecution was an eye witness to the incident. He was standing outside his house when he had witnessed the entire incident and had called his wife PW8 Smt. Shaista who had also seen the incident happening and immediately thereafter, had rushed to the spot and had caught the Ice Cream vendor and given him beatings. In the meanwhile, the grandmother of the child also arrived and took away her granddaughter.

7. Though PW2 Mr. Anish Ahmed according to the prosecution was an eye witness but in his testimony, he deposed that on hearing commotion in



front of his house, he came out and found that the Ice Cream vendor was fighting with some persons. He denied being a witness to the incident; so much so, that he even failed to identify the respondent/accused. On his cross-examination by learned Additional Public Prosecutor, he denied having witnessed the incident of assault.

8. The other material witness, PW8 Smt. Shaista, wife of PW2, according to the prosecution had also witnessed the incident along with her husband. However, she also in her testimony deposed that there was a quarrel which took place in a *Gali* and had found the accused person fighting with many people. In her cross-examination by learned Additional Public Prosecutor, she denied having witnessed the incident or having been called by her husband to witness the incident. She even denied having followed her husband to the scene of incident and deposed that the child's grandmother also came and the child rushed towards her. PW8, therefore, turned completely hostile and failed to support the case of the prosecution.

9. PW2 and PW8, according to the prosecution were the only two eye witnesses, who totally failed to support the case of the prosecution.

10. **The other star witness was the victim herself**, who appeared as PW1. She was a child of about 5 years of age as proven by the prosecution.

She in her Statement under Section 164 Cr.P.C Ex.PW1/A stated that :-

“ The ice cream vendor uncle who was identified by her had touched her vaginal area while she was sitting on the seat of the ice cream rickshaw. She started crying in the meanwhile, one uncle came down from upstairs and pulled her down from the rickshaw ”

In her testimony as PW1 she deposed as under :-

“accused came there and touched my private part from



outside my panty (underwear) then I jumped from the rickshaw, one person started beating the accused. My grandmother also started beating the accused, then all the ice cream from the Cart fell down, then police came at the spot.”

11. The child remained consistent in her testimony that there was no insertion of finger by the respondent in her private parts.

12. The learned ASJ on appreciation of the evidence of all the material witnesses, concluded that there was no evidence of penetrative sexual assault on record and therefore, held that no offence under Section 6 of the POCSO Act was proved.

13. Learned ASJ further considered whether the offence of sexual assault was made out in view of the testimony of PW1, the victim.

14. A reference was made to the testimony of all the above witnesses and it was observed that there were material contradictions in the depositions of the eye witnesses namely PW2 Anish Ahmed, PW8 Mrs. Shaista and PW3, the grandmother, who had completely changed her narration of facts in their examination-in-chief. In view of the contradictions found in the testimony of the material witnesses, it was concluded that the offence against the respondent was not proved beyond reasonable doubt and accordingly the benefit was given.

15. We find that the learned ASJ has comprehensively considered the entire evidence on record to ascertain not only the offence of penetrative sexual assault but also if the offence of sexual assault was made, but in view of the contradictions in the testimony of the material witnesses, it was rightly concluded by him that the prosecution had failed to prove its case beyond reasonable doubt.

16. Accordingly, we find no merit in the present Criminal Leave Petition



against the impugned Judgment of acquittal dated 16.12.2020, and the same is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

AUGUST 25, 2023/AT