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

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Date of decision: 07.11.2023+ **CRL.L.P. 158/2022**

STATE OF NCT OF DELHI

..... Petitioner

Through: Ms. Manjeet Arya, APP for State
alongwith SI Anita and Inspector
Harpal.

versus

SUMER

..... Respondent

Through: Ms. Rajni Gupta, Adv. with
respondent in person.**CORAM:****HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE SHALINDER KAUR****J U D G M E N T (oral)**

1. The present criminal leave petition under Section 378(3) of the Code of Criminal Procedure (in short 'Cr.P.C'), 1973 has been filed by the State seeking leave to Appeal against the impugned Judgment dated 21.07.2020 vide which the respondent has been acquitted for the charges for the offences punishable under Sections 376 of Indian Penal Code (in short 'IPC'), 1860 and Section 10 & 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012.

2. The case of the prosecution is that an FIR No. 682/2015 was registered at the Police Station Uttam Nagar for the offences punishable under Section 376 IPC and Section 4 of POCSO Act, on the complaint of the prosecutrix i.e., Ms. 'X' (the name and identity of Ms. 'X' is mentioned in the judicial file but not revealed here in order to protect her identity).



3. The factual position on which the prosecution version is found is that the respondent is the step father of Ms. 'X'. She was staying with her real younger sister, mother, two step sisters and the respondent in a rented accommodation. Due to a dispute, the parents of Ms. 'X' were separated. Ms.'X' has alleged that when her mother was alive, the respondent molested her many times about which she informed her mother and then there used to be a fight between her deceased mother and the step father. Her mother expired on 10.09.2014. It is alleged that a day after her mother's death, when Ms. 'X' was asleep at night, the respondent twice removed the clothes of her lower body and of his lower body and lied on top of her; she woke up due to the said act of the respondent and pushed him away. On the next day, she narrated the entire incident to two neighbours, namely, Ms. Uma and Ms. Sunita who sent her to Salam Balak Trust, Delhi.

4. The investigation was entrusted to the police of Police Station Uttam Nagar. On the completion of the investigation, the chargesheet for the offences punishable under Section 376 IPC and Section 4 & 6 of POCSO Act, 2012 was filed. After committal proceedings, the charges for aforesaid offences were framed on 10.09.2015. The respondent pleaded not guilty and claimed trial.

5. The statements of five witnesses were recorded on behalf of the prosecution wherein Ms. 'X' appeared as PW2. Apart from oral evidence recorded by the prosecution, learned Legal Aid Counsel appearing on behalf of the respondent before the learned Trial Court admitted the following documents under Section 294 Cr.P.C:

- (i) Statement of Ms. 'X' under Section 164 Cr.P.C recorded by Ms. Saumya Chauhan, Ld. MM as Ex.PW2/C.



- (ii) MLC no.7896 of accused prepared by Dr. Pallavi as Ex. PX-1;
- (iii) MLC no. 133 of prosecutrix prepared by Dr. Naved Lone as Ex.PW2/B;
- (iv) FIR recorded by DO HC Hari Ram as Ex. PX-2;
- (v) Endorsement on the rukkas as Ex.PX-3;
- (vi) Certificate under section 65B of the Indian Evidence Act as Ex.PX-4;
- (vii) Order of CWC Dr. Amita Tiwari, dated 19.05.2015 along with the Statement of Victim dated 19.05.2015 as Ex.PX-5 (colly).

6. In view of the admission of the aforesaid documents, remaining prosecution witnesses were dropped. The prosecution evidence was closed on 08.08.2018.

7. The statement of respondent was recorded under Section 313 Cr.P.C. The respondent denied the allegations levelled against him and pleaded false implication. Despite opportunities having been afforded to him, the respondent did not lead any evidence in his defence.

8. On the culmination of the trial, the Learned Additional Sessions Judge (in short 'ASJ') after perusing the record disbelieved the prosecution case and found inordinate delay in recording of the FIR which was not explained by the prosecution. The learned Trial Court also noted the contradictions appearing in the testimony of Ms. 'X' and the flaws in the prosecution case which created doubt on the prosecution version. It was held that the prosecution has failed to prove fundamental facts so as to give rise to presumption contained in Section 29 of the POCSO Act, 2012. As a result, the respondent was acquitted of the charges framed against him after giving him the benefit of doubt.



9. Dissatisfied with the judgment of the learned Trial Court, resulting in acquittal of the respondent, the State has filed the present Leave to Appeal. The grounds pleaded essentially by the State are that acquittal of the respondent despite there being ample material on record to establish the offences under Section 376 IPC and Sections 6 & 10 of the POCSO Act, 2012 has resulted into grave miscarriage of justice.

10. The learned APP submits that the learned Trial Court failed to appreciate that at the time of incident Ms. 'X' was merely 13 years old and her actual date of birth is 02.04.2002. It is further submitted that the learned Trial Court wrongly gave undue weightage to the minor contradictions and variations appearing in the statement of Ms. 'X' and failed to appreciate the well settled law that the conviction can be based upon the sole testimony of Ms. 'X', if she is a sterling witness. Ms. 'X' had consistently stated and deposed that the respondent raped her. PW3, PW4 and MLC of Ms. 'X' corroborated her version. In absence of any reason or motive to falsely implicate the respondent in the present case, the testimony of the Ms. 'X' should have been admitted and presumption under Section 29 & 30 of the POCSO Act should have been invoked by the learned Trial Court.

11. It is submitted that the learned Trial Court ignored the dictum of the Apex Court that the cases of rape should be dealt with utmost sensitivity by examining broader probability of the case and the Court should not get swayed by minor contradictions. Thus, the learned Trial Court has failed to properly appreciate the evidence and the documents on record and passed the impugned judgment on the basis of conjectures and surmises, which is not sustainable in law.

12. Submissions have been heard, documents and evidence on record



perused.

13. Before we arrive at the reasons and conclusions, it is pertinent to note that the objective behind POCSO is to protect the children from sexual abuses and to secure the best interest of the child. It recognizes the necessity for the right to privacy and confidentiality of the child to be protected. The Courts have to deal with these matters with utmost sensitivity since these matters also affect the society at large. The legislature has enacted these laws for the protection of the children and in the interest of their welfare. Courts have upheld their role as their guardians by acting as *Parens Patriae* from time to time.

14. Further, the Courts have endeavoured to echo society's responsibilities in nurturing and safeguarding the sanctity of the children life, protecting their dignity and safety at every step. Securing the rights of the children at tender age will protect their childhood against exploitation and abuse, the Courts foresightedness is paramount in ensuring the achievement of the same. The Court has to deal with such cases with high scrutiny and guarantee the fair justice to all, especially in the cases of sexual violence against children.

15. Reverting to present appeal, the entire prosecution case rests on the testimony of Ms. 'X'. The main point for consideration is that whether the foundational facts have been proved beyond all reasonable doubt by the prosecution.

16. Noticeably, apart from the deposition of Ms. 'X' recorded by the learned Trial Court on 25.08.2017, her two statements were recorded during the investigation of the case. Ex. PW2/A is the statement of 'Ms. X'



recorded by police on 25.05.2015 on the basis of which FIR, Ex. PX-2 was registered. Ex. PW-2/C is her statement recorded under section 164 Cr.P.C by learned Metropolitan Magistrate on 27.05.2015. On perusal of all the above three statements, it is found that there are contradictions in all the three statements, which are major and such discrepancies cannot be overlooked. In the first statement Ex.PW2/A recorded of Ms. 'X' by the police there is no mention about the "penetrative assault" by the respondent but Ex. PW2/A only records about sexual assault. Whereas, in the statement Ex.PW2/C recorded by learned Metropolitan Magistrate on 27.05.2015, she has made categorical accusation about "penetrative assault" upon her by the respondent. Moreover, there is inconsistency in her statements with respect to number of attempts made by the respondent for sexual assault.

17. It is further evident from the testimony of Ms. 'X' that her real sister and the two step sisters were also sleeping in the same room at the time of the incident, their house had only one door which was open and light in the room was also on at that time. Ms. 'X' has admitted that she did not shout when she had pushed the respondent away from her. It is clear that Ms. 'X' had ample opportunity to raise alarm but she did not do so.

18. It is further important to note that though it is the prosecution case that respondent even used to molest (*cherchad*) Ms. 'X' when her mother was alive and that she had brought the fact in the knowledge of her mother. However the three statements of Ms. 'X' are contradictory on the said accusation also. In Ex.PW2/A, Ms. 'X' has stated that prior to her mother's death, her step father molested her multiple times and whereas, in her statement recorded before the learned Metropolitan Magistrate, Ex.PW2/C, she has also stated that respondent used to touch her breast. In her



deposition made before the Court, Ms. 'X' has further improved her version by deposing that prior to her mother's death, the respondent tried to rape her on 2-3 occasions.

19. Coupled with the above circumstances, another insufficiency, which would refrain this Court from placing full reliance on the evidence of Ms. 'X' is that the incident had occurred on 11.09.2014, while the statement of Ms. 'X' was recorded for the first time by the police on 25.05.2015. Indeed, with respect to this fact also, Ms. 'X' has testified that she had informed about the incident to her two neighbours, namely, Ms. Uma (PW3) and Ms. Sunita (PW4) on the next day i.e., on 12.09.2014 who then informed the police at 100 number on the same day. Accordingly, when apart from NGO, the police officials had arrived and they were apprised about the incident. Subsequently, the police made inquiries from her about the place where she wanted to stay; whether in the same house or elsewhere. She told the police that she did not want to live in her house as the respondent was living there. Thereafter, she was sent to Nirmal Chhaya where she stayed for a week and then she was sent to NGO Roz Udan Home, where she has been living till date. PW3 & PW4 have testified that on 10.09.2014, Ms. 'X' told them that appellant used to sexually assault her in state of intoxication which was not liked by her. Thereafter, NGO and police officials came and took Ms. 'X' and other three daughters of appellant with them.

20. On the contrary from the testimony of PW5 (Investigating Officer) and as per the record, there has been no call made on 100 number or any complaint received in the police station regarding the incident prior to 25.05.2015. If the testimony of PW2, PW3 & PW4 are to be believed, the police was in the knowledge about the incident on the very next day of the



occurrence and they had also made inquiries about it. Under the POCSO Act, there is mandatory reporting of child sexual abuse to law enforcement authorities which according to the PW3 and PW4 they had done so. But the prosecution is completely silent on the issue and it is not understandable, it being a very sensitive matter, if the incident was narrated to the police as well as to NGO on the very next day, still no action was taken by the police whereas according to the police the incident was report to them for the first time on 25.05.2015. Therefore, there is glaring inconsistency between the case of the prosecution and testimony of its primary witnesses. In such circumstances, the date of registration of FIR becomes important which has been delayed by 10 months and 14 days. Further, there is no clarity that why Ms. 'X' did not report about the incident either to the official of Nirmal Chhaya where she stayed for about one week after the incident or to any one at Salam Balak Trust prior to 19.05.2015. The Child Welfare Committee-VII thereafter had directed the Station House Officer (SHO) P.S. Uttam Nagar to investigate the matter and to take legal action against respondent as per law for sexual abuse upon Ms. 'X'.

21. On the other hand, the respondent has taken defence that he had gone to meet his biological daughters at NGO Roz Udan Home as he wanted to take them back, however, the official of NGO Roz Udan Home had demanded money from him to give his daughters in adoption but he refused to the said demand, therefore, he was falsely implicated in the present case at the behest of the official of NGO Roz Udan Home. The fact regarding taking the daughters of respondent from him and for giving them in adoption has been admitted by Ms. 'X'. She has further admitted that the respondent had refused to give his daughters to NGO for adoption.



22. The law is well settled that the evidence of the victim of sexual assault is enough for conviction and it, thus, does not require any corroboration unless there are compelling reasons. In the present case, in view of the above detailed discussions, the testimony of PW2 does not inspire confidence. The entire sets of circumstances are improbable and prosecution fails to establish the probability of foundational facts. Thus, the statutory presumption of guilt of respondent under Section 29 of the Act will not operate in the facts and circumstances of the case. The learned ASJ also observed that the prosecution has failed to prove that at the time of alleged offence, Ms. 'X' was below 18 years of age as she contradicted her said date of birth. In view of the above circumstances, as the testimony of primary witness is doubtful, the consideration about correct age of Ms. 'X' is immaterial.

23. We, therefore, are of the considered opinion that learned ASJ has rightly given benefit of doubt and acquitted the respondent of the offences punishable under Sections 6 and 10 of the POCSO Act and Section 376 IPC.

24. For the foregoing discussions, we find no merit in the Leave to Appeal against the impugned judgment dated 21.07.2020 which is hereby dismissed.

SURESH KUMAR KAIT, J.

SHALINDER KAUR, J.

NOVEMBER, 07, 2023
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