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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: 24th August, 2023***+ **CRL.L.P. 260/2023**

STATE

..... Petitioner

Through: Ms. Manjeet Arya, Additional Public
Prosecutor for State

Versus

SANJAY KUMAR

..... Respondent

Through:

CORAM:**HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)****CRL.M.A. 13227/2023 (Condonation of delay)**

1. *Vide* the present application, the petitioner/State seeks condonation of 752 days' delay in filing the present Criminal Leave Petition.
2. For the reasons and grounds stated in the present application, the application is allowed and delay of 752 days in filing the present Criminal Leave Petition is condoned.
3. The application is accordingly disposed of.

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4. The present Criminal Leave Petition under Section 378(3) of the Code of Criminal Procedure, 1973 (*hereinafter referred to as 'Cr.P.C., 1973'*) has been filed on behalf of the petitioner/State seeking Criminal Leave to Appeal against the Judgment dated 13.01.2021 whereby the learned



Additional Sessions Judge-01, (POCSO) East District, Delhi has acquitted the accused/respondent of the charges punishable under Sections 376(2)(F) of the Indian Penal Code, 1860 (*hereinafter referred to as 'IPC, 1860'*) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (*hereinafter referred to as 'POCSO Act, 2012'*) registered *vide* FIR No. 310/2016 dated 16.07.2016 at Police Station Kalyan Puri.

5. The **case of the prosecution** is that on 16.07.2016 at about 12:30 P.M., the Complainant/Sushila Devi along with her two children, including the victim, aged about 4^{1/2} years, was present in her house. After some time, the Complainant/Sushila Devi went to the market leaving her children behind. When she came back home after 10 to 15 minutes, she noticed that the victim and the accused/respondent were sitting on the floor of the room, accused/respondent was licking the private part (vagina) of her daughter/victim and also saw her underwear lying nearby on one side. The Complainant/Sushila Devi, on seeing this, slapped the accused/respondent two or three times and thereafter, called the PCR at Number 100. One lady police official along with other police personnel came to the spot. On complaint of Complainant/Sushila Devi Ex.PW2/A, the FIR in question was registered and investigation was undertaken.

6. On completion of investigation, the charge sheet was filed in the Court. **The charges under Section 376(2)(F) of IPC and Section 6 of POCSO Act, 2012** were framed against the accused/respondent to which he pleaded not guilty.

7. The prosecution in support of its case examined 8 witnesses in all. The most material witnesses being PW-1/victim, PW-2/mother of victim and PW-3/Dr. Namrata Goel.



8. PW-1/victim turned completely hostile and denied the entire incident, though PW-2/mother of victim fully supported her statement given to the police.
9. The statement of accused under Section 313 of Cr.P.C., 1973 was recorded, in which he pleaded his innocence.
10. The learned Trial Court observed that the victim had denied the entire incident and the MLC No. 138/2016 Ex. PW3/A did not support the allegations of rape. In these circumstances, the testimony of PW-2/mother of victim to the contrary, cannot be believed. The benefit of doubt was extended to the accused/respondent who was acquitted of the charges punishable under Section 376(2)(F) of IPC and Section 6 of POCSO Act, 2012.
11. Being aggrieved, the present Criminal Leave Petition seeking leave to appeal against the Judgment dated 13.01.2021 has been filed on behalf of the petitioner/State.
12. The **main grounds of challenge** to the Judgment dated 13.01.2021 are that the PW-2/mother of victim, who was an eye-witness to the entire incident, has supported the case of the prosecution completely and her testimony cannot be discarded as having no weight.
13. It is stated that the learned Additional Sessions Judge has fallen in grave error by not appreciating the fact that the prosecutrix was just approximately four and a half year old child and was vulnerable to tutoring or of being frightened. Therefore, the prayer is made to grant the Leave to Appeal against the Judgment dated 13.01.2021.
14. **Submissions heard.**
15. The primary witness to the entire incident was the victim who, in her



testimony as PW-1, had deposed that on the day of incident while her mother had gone to the market, she was present with the accused/respondent, who is her cousin brother. The prosecutrix had gone to the toilet to urinate and had taken off her panty. The accused/respondent her brother helped the prosecutrix to wear her panty. In the meanwhile, victim's mother reached home and after seeing this, she gave beatings to the accused/respondent with a hockey stick and thereafter, she turned her brother out of the house.

16. The statement of the victim under Section 164 of Cr.P.C., 1973 was proved by the Investigating Officer, Sub-Inspector Santosh Sirohi/PW-8 as PW-8/D. In the said statement, the prosecutrix stated that the accused/respondent had taken off her underwear and started licking her in place of "*susu*" and "*thereafter*", her mother came and gave beatings to the accused/respondent/brother.

17. Evidently, the victim-child (PW-1) in her statement under Section 164 Cr.P.C. recorded before the learned Metropolitan Magistrate stated that at the time of happening of alleged incident, her mother had reached the scene of crime scene; whereas, in her testimony recorded before the trial court, the victim-child (PW-1) has stated that she had gone for urination and since she was wearing her underwear and when the respondent/accused was helping her, her mother arrived. Though PW2, Smt. Sushila Devi, the mother in her testimony has deposed about the entire incident but when the victim herself denied any kind of sexual assault committed on her, the testimony of the mother, who is a corroborative witness, cannot be given much credence. Two different versions have been given by the prosecutrix and her mother creating a doubt about the exact incident that had happened.



18. Further, PW-3 Dr. Namrata Goel, who had conducted the medical examination has also stated that the victim child refused for internal examination and on general examination, no physical injury was observed and the victim –child had already changed her clothes which she wore at the time of alleged incident.

19. In the considered opinion of this Court, due to contradictory narration of incident by PW-1 (victim-child) and PW-2 (complainant/mother), a firm opinion as to what would have happened, cannot be formed; benefit of which has to be necessarily extended to the accused/respondent. Moreover, testimony of PW-3 (Dr. Namrata Goel), also does not support the case of prosecution. The learned Additional Sessions Judge has, therefore, rightly given the benefit to the accused/respondent and acquitted him from the offences punishable under Section 376(2)(F) of IPC and Section 6 of POCSO Act, 2012.

20. Finding no merit in the present Criminal Leave Petition, seeking leave to appeal against the impugned Judgment of acquittal dated 13.01.2021, the same is hereby dismissed along with pending application, if any.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

AUGUST 24, 2023
S.Sharma/r