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

% ***Date of decision: December 11, 2023***

+ CRL.L.P. 232/2022

STATE (NCT OF DELHI)

..... Petitioner

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

Versus

RAJU @ DADU @ RAM NARESH

..... Respondent

Through: Ms. Pallavi Vashist & Mr. Manoj
Kumar, Advocates

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 leave petition has been filed under Section 378 (1) Cr.P.C. seeking leave to grant appeal against the judgment dated 27.07.2020 passed by the learned Special Court POCSO, Tis Hazari Court, Delhi in case SC No.58287/2016 whereby respondent/accused has been acquitted of the offences under Sections 376(2)(i)/342/363/452/506 IPC and Section 6 of POCSO Act in FIR No.396/2016, registered at Police Station Kirti Nagar, Delhi.

2. The brief facts of the case as noted in the chargesheet are that the victim stated before the police that she along with her family was residing in Jhuggi No.A-565, Chuna Bhatti, Kirti Nagar. She alleged that she was studying in class VI and on 26.10.2016 she had gone to washroom situated



outside her jhuggi when someone closed her mouth and she could not raise alarm. she further alleged that despite resistance, respondent/accused removed her lower clothes and established physical relations with her. When she tried to escape, the respondent/accused showed knife to her and threatened her not to disclose the incident to anyone. The victim further stated that after an hour, someone knocked at the door and when respondent/accused opened the door, her mother was there who took her to their room where she narrated entire incident to her.

3. On the complaint of the mother of the victim, the FIR in question was registered. After completion of the investigation, chargesheet for offences under Sections 376(2)(i)/342/363/452/506 of IPC and Section 6 of the POCSO Act, 2012 was filed.

4. The learned trial Court framed charges for offences punishable under Sections 376(2)(i)/342/363/452/506 of IPC and Section 6 of the POCSO Act, 2012 against respondent-accused to which he pleaded not guilty and claimed trial.

5. The prosecution examined three witnesses in support of its case which included the testimony of victim as PW-1, mother of the victim as PW-2 and Investigating Officer of the case as PW-3.

6. The respondent/accused in his statement recorded under Section 313 Cr.P.C. denied all the allegations levelled against him, however, did not lead any evidence in defence.

7. The learned trial court on the basis of the testimony of the witnesses recorded, passed impugned judgment dated 27.07.2020 whereby



respondent-accused was acquitted of the offences charged with. It was held as under:-

“26. Hence, I give benefit of doubt to the accused. Accused Raju Dadu is acquitted for the offences punishable under section 363, 366, 342 and 506 of Indian Penal Code and section 6 of Prevention of Children from Sexual Offences Act, 2012, in alternative, section 376 of Indian Penal Code.”

8. The aforesaid judgment passed by the learned trial Court has been challenged by the appellant/State on the ground that in her testimony, victim (PW-1) has fully supported the statement given to the police and before the learned Metropolitan Magistrate and in her examination-in-chief. The learned trial Court has failed to appreciate the facts whereby the motive of the accused to sexually harass the victim and his *mala fide* intentions are clear and it is established that there was a money dispute between the accused and family of the victim.

9. The appellant-State has averred that the learned trial Court has wrongly come to the conclusion that there are contradictions in the statement of the victim child as PW-1 and her mother as PW-2. Due to some faulty investigation and lapses on the part of the IO, the case of the prosecution could not be thrown out and the facts pertaining to the case are to be considered in its entirety. The learned Additional Public Prosecutor for State submitted that the impugned judgment suffers from illegality and deserves to be accordingly, set aside.

10. On the other hand, learned counsel appearing on behalf of the



respondent/accused supported the impugned judgment and stated that the observations made by the learned trial Court are well-merited and based upon the facts and law and therefore, the present appeal deserves to be dismissed.

11. This Court has gone through the testimony of the witnesses recorded before the learned trial Court, impugned judgment and the other material placed on record.

12. The Hon'ble Supreme Court in **Mohan Vs. State of Karnataka** (2022) 12 SCC 619 has held that truth has to be found on the basis of evidence available before the court and there is a hierarchy of courts in dealing with cases and so, the Appellate Court shall not expect the trial court to act in a particular way depending upon the sensitivity of the case. Rather it should be appreciated if a trial court decides a case on its own merit despite its sensitivity. The Hon'ble Supreme Court spelt out the power of an Appellate Court to hold that every case has its own journey towards the truth and it is the Court's role to undertake the one. The Supreme Court, thus, held as under:-

“20. Section 378CrPC enables the State to prefer an appeal against an order of acquittal. Section 384CrPC speaks of the powers that can be exercised by the appellate court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the appellate court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The appellate court is



expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty-bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the appellate court shall remind itself of the role required to play, while dealing with a case of an acquittal.

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22. At times, courts do have their constraints. We find different decisions being made by different courts, namely, the trial court on the one hand and the appellate courts on the other. If such decisions are made due to institutional constraints, they do not augur well. The district judiciary is expected to be the foundational court, and therefore, should have the freedom of mind to decide a case on its own merit or else it might become a stereotyped one rendering conviction on a moral platform. Indictment and condemnation over a decision rendered, on considering all the materials placed before it, should be avoided. The appellate court is expected to maintain a degree of caution before making any remark.”

13. With regard to scope of re-appreciation of evidence in cases of acquittal, the Hon’ble Supreme Court in ***Bhagwan Singh Vs. State of M.P.***, (2002) 4 SCC 85 has observed that while disturbing the decision of acquittal



rendered by the trial court, the High Court is duty bound to re-appreciate the evidence and has held as under:-

“7. We do not agree with the submissions of the learned counsel for the appellants that under Section 378 of the Code of Criminal Procedure the High Court could not disturb the finding of facts of the trial court even if it found that the view taken by the trial court was not proper. On the basis of the pronouncements of this Court, the settled position of law regarding the powers of the High Court in an 000000 has full powers to review the evidence upon which an order of acquittal is based and generally it will not interfere with the order of acquittal because by passing an order of acquittal the presumption of innocence in favour of the accused is reinforced. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but Judge-made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to reappreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the accused has committed any offence or not. Probable view taken by the trial court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence.”



14. Also in ***Ramanand Yadav Vs. Prabhu Nath Jha*** (2003) 12 SCC 606, the Hon'ble Supreme Court has held as under:-

“21. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not.”

15. Upon going through the testimony of the Investigating Officer [PW-3], this Court finds that in his statement recorded before the learned trial Court, he has stated that on 26-27.10.2016, the investigation of the case was handed over to him. He recorded the detailed statement of the victim as Ex.PW1/A. After registration of the FIR, Investigating Officer had taken the victim to Acharya Bhikshu Hospital for her medical examination along with her mother and WSI Sunita. The MLC of the victim was got prepared as Ex.PW1/B. The Investigating Officer has further stated that the mother of



the victim had refused for internal medical examination of the victim. The Investigating Officer also collected proof of date of birth of the prosecutrix from school according to which her date of birth was 04.02.2005. The Investigating Officer had also gone to the school of the accused where he was studying and according to the school records, his date of birth was 09.08.1998. The Investigating Officer had also got the medical examination of the accused done from Acharya Bhikshu Hospital and his MLC was prepared as Ex.Px-4. On 02.11.2016, statement of the prosecutrix under Section 164 Cr.P.C. was also got recorded by the Investigating Officer.

16. The victim in her statement recorded under Section 161 Cr.P.C. by the police stated that on the night of 26.10.2016, when she woke up to attend call of nature, someone closed her mouth with cloth from behind, who was Raju, her neighbour, with whom she had talking terms, who took her to his *jhuggi* and since her mouth was closed, she could not raise voice. The victim alleged that even though she resisted, but the respondent-accused forcibly took off her clothes and committed rape upon her.

17. The victim in her statement recorded before the Child Helpline, West Delhi has narrated the alleged incident as has been recorded in the chargesheet in the present case.

18. As against her aforesaid statement, the victim in her statement recorded under Section 164 Cr.P.C. before the learned Metropolitan Magistrate on 02.11.2016 stated that in the morning of 26-27.10.2016 when she woke up to attend the call of nature, respondent/accused called her and when she refused, he insisted upon her to come and she without informing her mother went along with him. She also stated that respondent/accused



made her sit in his jhuggi and asked if she had some money to help him out, however, she told him that even though she was working but she was having no money. In the meantime, her mother came in search of her and asked her to go back home. She further stated that thereafter she went back home and her mother called up NGO Chetna who in furtherance called the child helpline. The victim stated that respondent/accused had only asked for money which she did not give and nothing else had happened with her. She specifically stated that there was no attempt of flirting and rudeness.

19. The victim in her examination-in-chief (PW-1) recorded before the trial court mixed the facts of both her earlier statements given under Section 161 Cr.P.C. and Section 164 Cr.P.C. and stated that she had gone to attend the call of nature when respondent-accused took her to his jhuggi and asked that he needed some money. The victim told respondent-accused that she had no money and he should ask her mother. The victim for the first time stated that the respondent-accused threatened to kill her brother. He then forcibly removed her clothes and made physical relations with her. At about 03:00 pm midnight, when her mother was searching for her, she heard noise of her anklets (payal) and opened the door of the room. She stated that the respondent-accused had only once made forcible physical relations with her.

20. During her cross-examination on behalf of respondent-accused, the victim stated that respondent-accused had several times made forcible physical relations with her and threatened that he would kill her brother if she told this fact to anyone. She acceded in her cross-examination that during her examination she had though stated that respondent-accused made forcible physical relations with her only once. During her further cross-



examination, the victim stated that she was not wearing anklet in the intervening night of 26.10.2016 and 27.10.2016.

21. The mother of the victim (PW-2) in her examination in chief stated that at about 04:00 am she noticed that the victim was not there in jhuggi and she went in her search. At that time, respondent-accused came out of his jhuggi but on her asking, he denied where the victim was. However, she asked him to open door of his jhuggi and saw that the victim was inside jhuggi and her mouth was covered with a handkerchief. Upon her asking, the victim told her mother i.e. PW-2 that respondent-accused had committed rape upon her and threatened to kill her if she raised alarm. She stated that she had called up Police Helpline and two Police Officials had come and took her to the police station with them, where statement of the victim was recorded and she was taken to the hospital for medical examination.

22. To the contrary, the mother of the victim (PW-2) in her cross-examination stated that accused had not committed any offence against her daughter and that no incident as alleged on the night of 26.10.2016 had happened. She specifically stated that her daughter on the said day was at home and that there was only a monetary dispute between her family and that of the accused which resulted into registration of a complaint against him. When PW-2 was re-examined by learned Addl. Public Prosecutor for State, she stated that her deposition recorded before the Court on 30.11.2017 was correct, however, matter stands compromised with the family of the accused and that accused had not committed any offence alleged against him.

23. Upon going through the testimony of the victim (PW-1), this Court



finds that with regard to the happening of the untoward incident of rape, the version put forth by the victim (PW-1) before the police in her statement under Section 161 Cr.P.C., statement under Section 164 Cr.P.C. recorded before the learned Metropolitan Magistrate and deposition before the trial court, is not at some variance but substantially deviated. Also, the mother of the victim (PW-2), who is also the complainant of FIR in question, has completely resiled from her version given in the complaint before the police and in her deposition recorded before the learned Court, so much so that she has very clearly stated that there was a monetary dispute with respondent-accused, which stands amicably settled.

24. In view of the above, the considered opinion of this Court is that the two primary witnesses have demolished the prosecution case by resiling from their statements.

25. It is not only that the prosecution has failed due to variable description of the incidents by PW-1 and PW-2 but also the prosecution case is fragile on the aspect of age of the victim. As per school certificate issued from North Delhi Municipal Corporation M.C. Primary School, the date of birth of the victim child is 04.02.2005 and it is stated that she had studied there from 20.07.2015 to 28.03.2016 in that school. Also, as per the affidavit tendered by father of the prosecutrix/victim for her admission in class 5, in Delhi Municipal School, the date of birth is 04.02.2005.

26. In her statement recorded before the Court, the victim has stated her date of birth as 04.02.2009 and that she celebrated her birthday every year after Diwali which shows that she was not aware of her exact date of birth. The onus to prove that the victim was minor at the time of alleged incident



was on the prosecution. The Investigating Officer of this case (PW-3) has though placed on record the school certificate mentioning the date of birth of the victim as 04.02.2005, however, no witness i.e. the record keeper or the Principal of the school has been examined in support of the case of the prosecution.

27. Even the mother of the victim (PW-2) in her testimony stated that at the time of alleged incident, the age of the victim was 14 years. There appeared to be major discrepancies with regard to the age of the victim stated by her as well as her mother and in the absence of any witness produced by the prosecution to prove the age of the prosecutrix, the learned trial court has rightly held that in the absence of any document on record to show that the date of birth mentioned in the school is correct date of birth, the prosecution cannot prove that victim is below the age of 18 years at the time of alleged incident.

28. Also, the MLC of the victim prepared on 27.10.2016 by the doctor at Acharya Bhikshu Hospital, Moti Nagar, New Delhi notes that *“on physical examination, there was no sign or mark of struggle anywhere on the body. Hymen absent. Vagina accommodating two fingers”*. The doctor also noted that mother of the victim had refused for internal examination of the child and advised that *“no active intervention required”*.

29. In the considered opinion of this Court, not only the crucial witnesses have not supported the case of the prosecution but also, prosecution has failed to prove the age of the victim to bring it into the ambit of the offences alleged with. Also, the MLC of the victim has not supported the case of the prosecution. Even the victim (PW-1) at one point stated that the respondent-



accused made forcible physical relations with her only once and thereafter, improved her version by stating that accused had made physical relations with her several times during the period of three months and thereafter, completely resiled by deposing before the Court that the respondent-accused had called her only to borrow some money from her and had not even flirted with her, which makes her testimony dubious.

30. There is no doubt to the settled legal position that the statement of a victim/ prosecutrix itself is sufficient to bring home the guilt of the accused for the offence of rape and conviction can be recorded on the sole testimony of the victim/prosecutrix, provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

31. The Supreme Court in ***Sadashiv Ramrao Hadbe v. State of Maharashtra*** (2006) 10 SCC 92 has held that:-

“9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

32. The Supreme Court in ***Abbas Ahmad Choudhary Vs. State of Assam*** (2010) 12 SCC 115 observed that *“in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the*



broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.”

33. In the present case, the victim while deposing before different Forums i.e. the police, Metropolitan Magistrate and the Court of Sessions has taken different stands, the Courts have to be cautious while analyzing whether the variance occurred is due to lapse of time in recording statements or a deliberate attempt to tear down the case of the prosecution. In the present case, the variations in the testimony of the victim (PW-1) are not minor, instead she has completely changed her version and stated that the respondent-accused had not even flirted with her. Also, her mother (PW-2) in her cross-examination has completely negated her version given in the complaint and put forth in examination-in-chief.

34. In the light of above, this Court is of the considered opinion that two prime witnesses are not creditworthy and prosecution has miserably failed to prove its case against the respondent-accused and hence, the respondent accused has rightly been acquitted by the learned trial Court of the offences charged with.

35. Finding no ground in the present petition to grant leave to appeal, it is accordingly dismissed. Pending application, if any, stands disposed of as infructuous.

(SURESH KUMAR KAIT)
JUDGE

(SHALINDER KAUR)
JUDGE

DECEMBER 11, 2023/r