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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: September 12, 2023

Decided on: December 13, 2023

+ CRL.A. 769/2023

STATE

..... Petitioner

Through: Mr. Yudhvir Singh
Chauhan, APP for the State
SI Hemant PS Sultan Puri

V

LIYAKAT ALI & ANOTHER

..... Respondents

Through: Mr. Rajesh Mahajan,
(DHCLSC) and Mr. R.K.
Bora, Advocate with R-1 and
2 in person.

CORAM

HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

J U D G M E N T

1. The present appeal is filed under article 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “**the Code**”) to impugn judgment dated 08.03.19 (hereinafter referred to as “**the impugned judgment**”) passed by the court of Sh. Amit Kumar,



Additional Sessions Judge (Special Court, POCSO ACT), North West, Rohini Courts, Delhi (hereinafter referred to as **“the trial court”**) in Sessions Case no.157/2015 arising out of FIR no 1134/2014 registered under sections 354/323/506/34 of the Indian Penal Code, 1860 (hereinafter referred to as **“IPC”**) and under section 8 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as **“POCSO Act”**) at P.S. Sultan Puri.

2. The factual background of the case is that FIR bearing no 1134/2014 dated 05.10.2014 was got registered under sections 354/323/506/34 IPC and under section 8 of POCSO Act on the basis of the complaint made by father of the victim (hereinafter referred as **“the complainant”**). The complainant on 05.10.2014 along with prosecutrix/victim (hereinafter referred to as **“Victim”**) came to PS Sulatn Puri and met ASI Rajender Singh Tomar who recorded statement of the complainant. The complainant stated that he along with family was residing at Sultan Puri and was doing tailoring work. The victim on 01.10.2014 along with her two brothers was sleeping on the roof and the complainant at about 1.30 am went to roof for smoking where saw that Liyakat (hereinafter referred to as **“the**



respondent no. 1”) who was residing on the first floor of the same building had made the victim sleep close to him. The complainant lifted the victim from there and made her sleep with brothers and did not speak to anyone due to late night. The complainant next day went to work and returned back at about 9.00 pm. The wife of the complainant asked the victim to go to the roof for sleeping but the complainant started weeping and refused to go to the roof. The victim told that the respondent no.1 dragged her to his bed and kissed her and also tried to remove her trouser (lower). The complainant asked the victim as to why she did not inform in the night itself to which she told that she was scared. The complainant immediately called Jaffar (hereinafter referred to as “**the respondent no. 2**”), the elder brother of the respondent no.1. The respondent no.2 did not listen to the complainant and said that the complainant is falsely implicating the respondent no. 1. The complainant on the next day went to his work and came back in night of 03.10.2014. The complainant visited room of the respondent no. 2 but he was not found there. The complainant asked the wife of the respondent no. 2 not to send the respondent no.1 to sleep on the roof. However, the respondent no.1 again went to



roof to sleep in night. The complainant again approached the respondent no. 2 but the respondent no. 2 threatened the complainant to commit wrong act with the victim and the wife of the complainant. The respondents no.1 and 2 had also beaten the complainant when complainant told them for approaching the police. The complainant came back to his room and slept therein and on the next day i.e. 04.10.2014 went to his work and came back at 9.00 pm. The respondents no. 1 and 2 came to house of the complainant and tried to assault him with a scissor. Thereafter the complainant approached police station along with the victim. The victim was taken to the hospital for medical examination but the victim refused for her internal medical examination. The present FIR bearing no. 1134/2014 dated 05.10.2014 was got registered under sections 354/323/506/34 IPC and under section 8 of POCSO Act at P.S. Sultan Puri.

2.1 SI Deepak Purohit (hereinafter referred to as “**the Investigating Officer**”) was entrusted with further investigation. The respondent no.1 was arrested. The statement of the victim under section 164 of the Code was recorded on 07.10.2014 wherein the victim stated that on 01.10.2014 when she was sleeping on the roof in



the night then the respondent no.1 dragged her towards him and kissed her and also pulled her trouser (lower) down. Thereafter the victim came down stairs to sleep with her mother and also informed the complainant. The complainant called the respondents no.1 and 2 and wife of the respondent no 2. The date of birth of the victim was found to be 05.03.2002. During investigation offence punishable under section 341 IPC was added. The respondent no 2 was not arrested. The charge sheet was filed after conclusion of the investigation.

2.2 The Court of Sh. Vinod Yadav, Additional Sessions Judge-01, North-West District, Rohini Courts, Delhi vide order dated 30.01.2016, framed charges for the offences punishable under sections 323/34 and 506/34 IPC against the respondents no.1 and 2. The respondent no.1 was also charged for the offences punishable under section 341 IPC and under section 9(m) of POCSO Act punishable under section 10 of POCSO Act read with section 18 of POCSO Act. The respondents no. 1 and 2 pleaded not guilty and claimed trial.



2.3 The prosecution in support of its case, examined 7 witnesses including the victim as PW1, mother of the victim as PW2 and the complainant as PW3. The prosecution also examined police officials who participated in the investigation including investigating officer SI Deepak Purohit as PW4.

2.4 The statements of the respondents no. 1 and 2 were recorded under section 313 of the Code wherein they denied incriminating evidence and pleaded innocence and false implication. The respondent no. 1 stated that he has been falsely implicated by the victim AL over a monetary dispute and no such incident had happened. The respondent no. 2 stated that he has been falsely implicated in this case by the child victim under the guidance and advice of her parents, NGO counsellor and police officials over a monetary dispute of Rs.1,50,000/- as could not arrange more money to give to parents of the victim AL on credit basis. No such incident ever took place.

2.5 The trial court vide impugned judgment acquitted the respondents no.1 and 2 primarily on grounds of material



contradictions and unexplained delay in lodging FIR. The relevant portion of the impugned judgment is reproduced verbatim as under:-

Coming to the main incident, there are material contradictions in the statement of the victim recorded u/s 164 Cr.P.C. and recorded in the court as well as the statement of her parents. There is also unexplained delay in reporting the matter to the police. The victim in her statement recorded u/s 164 Cr.P.C. did not mention any incident of her father coming to the roof and moving her back to sleep with her brothers, in this statement, she even did not mention anything about the alleged quarrel between her parents and the accused persons. She had simply stated about accused misbehaving with her and that she came down stairs and informed her father. While deposing in the court, victim stated regarding her father coming upstairs and dragging her towards her brothers and regarding quarrel between her parents and the accused. Further, victim never stated that accused had been sexually assaulting her since last two days or that any such incident happened earlier before the night of 01.10.2014 but her mother specifically stated that victim told her that accused Liyakat had been sexually assaulting her at roof at night for last two days. Further, victim stated all along that when her father moved her back towards her brothers, she came down and slept with the mother whereas father specifically stated that when he moved his daughter back towards her siblings, she slept with them. Further, father stated that when he saw the victim lying with the accused she was awake and frightened and he sincerely felt that she was scared yet not only that he did not react immediately, he did not react even in the morning or in the following evening when victim was again asked to go and sleep on the roof. Instead he went to his work as usual. It is highly improbable that a father who noticed his daughter lying on the bed of the accused and scared yet did not took any action immediately or thereafter for next five days.



Further, as per the prosecution case the accused were confronted on 02.10.2014 followed by alleged quarrel on that day, on 03.10.2014 and 04.10.2014 yet not even a PCR call was made by the complainant. As per complainant, he was given beatings by fists and blows and was also attacked with a scissor on 04.10.2014 yet he went to his work as usual and further the other inhabitants of the house or the neighbours did not hear any hue and cry of the complainant or his family members. Further, the mother of the victim stated that on 01.10.2014, she along with her husband slept in the room at around 12.00/12.30a.m. whereas the father of the victim stated that he was awake because of work in the night of 01.10.2014 till he went to the roof to smoke. The victim in her cross examination stated that except of Liyakat and her siblings including victim, none else used to sleep on the roof whereas the mother of victim stated that she along with her entire family used to sleep on the roof and they were not going to sleep on the roof since 2-3 days before 01.10.2014 just because of extra stitching work. Victim awakened and frightened did not raise any alarm despite seeing her father and father despite noticing victim frightened, did not take any action. Further, the delay in reporting the matter to the police remained unexplained. The alleged incident of sexual assault occurred on 01.10.2014 followed by quarrels and the complainant attended his job as usual continuously on all the days. The entire story of the prosecution does not inspire any confidence and there are sufficient doubt in the prosecution story. Both the accused persons are acquitted accordingly.

3. The Appellant/State being aggrieved filed present appeal and challenged impugned judgment on grounds that impugned judgment is not sustainable in law and is based on imagination, presumption, conjectures and surmises. The trial court has not properly appreciated



the evidence led by the prosecution particularly testimony of the victim as PW1 which remained consistent throughout. The complainant as PW3 explained delay in lodging FIR. The trial Court has ignored vital evidence and has not properly applied its mind. The trial court has failed to appreciate that there are no major variations which are not fatal to prosecution. The petitioner also raised other grounds to challenge impugned judgment.

3.1 The Additional Public Prosecutor for the petitioner/State also argued on grounds which are mentioned to challenge impugned judgment and also referred testimony of the victim AL as PW1. The Additional Public Prosecutor argued that the victim AL as PW1 supported case of prosecution which is corroborated by the testimonies of PW2 and PW3. The trial court has relied on contractions/discrepancies which are insignificant and are minor. The prosecution has also explained delay in lodging FIR. The Additional Public Prosecutor argued that impugned judgment is liable to be set aside.

4. The counsel for the respondents no.1 and 2 argued that the trial court acquitted the respondents no.1 and 2 by giving cogent and



sound reasoning in impugned judgment which does not call any interference. The contradictions pointed out by the trial court in the impugned judgment are material and go to the root of the prosecution case when coupled with the delay in reporting the incident to the police. The Appellate Court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses and was in a better position to evaluate the credibility of the witnesses. The counsel for the respondents no.1 and 2 further argued that the burden of proving the foundational facts lies with the prosecution despite section 29 of POCSO Act and only when the foundational facts are proved on record through credible evidence and beyond reasonable doubt only then the presumption can be invoked. The counsel for the respondents no. 1 and 2 argued that the appeal is liable to be dismissed.

5. The prosecution to prove its case examined the victim as PW1, mother of the prosecutrix as PW2 and the complainant who is father of the victim as PW3. A witness is considered to be an important factor or integral part of the administration of justice and role of a



witness is paramount in the criminal justice system. The witness by giving evidence assists the court in discovery of the truth. The Supreme Court in **Mahender Chawla and Others V Union of India and Others**, (2019) 14 SCC 615 observed that witnesses are important players in the judicial system, who help the judges in arriving at correct factual findings. The instrument of evidence is the medium through which facts, either disputed or required to be proved, are effectively conveyed to the courts. The victim/PW1 was a child at time of commission of offence subject matter of present FIR. The trial court in impugned judgment after considering evidence led by the prosecution pertaining to age of the victim/PW1 rightly and legally observed that the prosecution has duly proved that the victim was a minor below 12 years at the time of incident on 01.10.2014.

6. Section 118 of the Indian Evidence Act, 1872 deals with the witnesses who can testify. It provides that all persons shall be competent to testify unless in the consideration of court they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the



same kind. The issue of evidentiary value of the testimony of child witness has been considered by the Supreme Court on many occasions. It is observed and held that the credibility of a child witness depends upon the circumstances of each case and the precaution which should have been taken while assessing the testimony of a child witness is that the witness must be reliable and demeanor of child witness must be like any other competent witness without likelihood of being tutored. The Supreme Court in **Dattu Ramrao Sakhare and Others V State of Maharashtra**, (1997) 5 SCC 341 also referred by the trial court in relation to child witnesses, held as under:-

5. ...A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.

6.1 The Supreme Court in **Ratansinh Dalsukhbhai Nayak V State of Gujarat**, (2004) 1 SCC 64 also held as under:-



7. ...The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

6.2 The Supreme Court in **P. Ramesh V State Rep by Inspector of Police**, (2019) 20 SCC 593 also held as under:-

15. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only



in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.

6.3 The courts as a rule of prudence before accepting the testimony of a child witness cautioned that the testimony has to be evaluated carefully being susceptible to tutoring. The Supreme Court in **State of Madhya Pradesh V Ramesh and Another**, (2011) 4 SCC 786 held as under:-

14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with grater circumspection because he is susceptible to tutoring. Only in case there is evidence or record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

The Supreme Court in **Ranjeet Kumar Ram @ Ranjeet Kumar Das V State of Bihar**, 2015 SCC OnLine SC 500 also observed that evidence of the child witness and its credibility would depend upon the circumstances of each case and only precaution which the court



has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one.

6.4 The acceptance of testimony of a child witness under POCSO Act came into consideration before the Courts on many occasions. The Supreme Court in **Ganesan V State Rep. by Its Inspector of Police**, (2020) 10 SCC 573 while dealing with conviction under POCSO Act held that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration and the court may convict the accused on the sole testimony of the prosecutrix. A Coordinate Bench of this Court in **Rakesh @ Diwan V The State (GNCT of Delhi)**, 2021 SCC OnLine Del 3957 accepted testimony of the child victim as trustworthy, reliable and admissible. The Calcutta High Court in **Animesh Biswas V State of W.B.**, 2023 SCC OnLine Cal 2633 observed that the sole testimony of the victim, a child witness could be relied upon in cases of sexual assault provided her evidence was trustworthy, unblemished, and of sterling quality. This court in **Ajeet Singh V The State Govt. of NCT of Delhi & another**, Criminal



Appeal bearing no 612/2023 decided on 31.10.2023 also took similar view.

7. Let's examine respective testimonies of the victim as PW1, mother of the victim as PW2 and the complainant as PW3. The victim as PW1 primarily deposed that her family was residing at third floor and the respondent no. 1 was residing at second floor. The victim and the respondent no. 1 used to sleep on roof. The victim on 01.10.2014 was sleeping on roof with her brothers and sister and the respondent no. 1 was also sleeping on the roof. The respondent no. 1 at about 1.00/1.30 am dragged her towards him and kissed her and also tried to remove her *pajami* (trouser/lower). The complainant also came to roof for smoking and made her to sleep with her brothers and sister. The victim came down stairs to sleep with mother. PW1/the victim further deposed that the complainant on the next day asked her to go to the roof to sleep then she started weeping and told about the incident. Thereafter the complainant called the respondent no 1 and his brother i.e. the respondent no 2 and sister in law to complain but they quarrelled with the complainant. Thereafter the complainant made complaint to the police. The victim also admitted her signatures



on statement under section 164 of the Code Ex. PW1/A. PW1/the victim in the cross examination deposed that except of victim and her brothers and sister and the respondent no 1, none else used to sleep on the roof. The victim immediately noticed when she was dragged by the respondent no.1 and the complainant also came at roof at same time. The victim did not raise alarm when the respondent no.1 dragged her towards him as she was scared. The complainant A did not have any quarrel with either of the respondents prior to incident. The prosecution also examined T, mother of PW1/the victim as PW2 who deposed she along with family was residing at third floor and the respondent no.1 along with his brother i.e. the respondent no.2 and sister in law (*Bhabhi*) was residing at second floor. The family members of PW2 used to sleep on roof but PW2 herself and her husband i.e. the complainant did not sleep on roof for 2-3 days prior to the incident because of extra stitching work. PW2 further deposed that the complainant on 05.10.2014 lodged police complaint regarding the incident happened on 01.10.2014 with her daughter i.e. the victim. The victim had informed her and the complainant on the next day i.e. 02.10.2014 that the respondent no. 1



had been sexually assaulting her in the night for last two days but the victim did not tell this incident due to fear. The respondents no. 1 and 2 and wife of the respondent no. 2 quarrelled when called about incident. The respondent no. 2 on 04.10.2014 also threatened to commit same act with PW2. PW2 in cross examination deposed none else other than her family and the respondent no. 1 used to sleep on the roof. PW2 denied suggestions that a quarrel took place between the complainant, herself and the respondents no. 1 and 2 as the respondent no.1 and 2 had not paid money back to the complainant and PW1 despite demands and due to this the respondent no.1 and 2 were falsely implicated or that the respondent no.1 had ever slept on the roof or that the respondent no 1 never committed any assault on the victim or that in the intervening night of 04/05.10.2014 again a quarrel had taken place between her and the respondents no.1 and 2. The complainant as PW3 deposed as per allegations of the complaint.

8. The respective testimony of the victim PW1, mother of the complainant PW2 and the complainant PW3 proved following facts:-

i. The complainant PW3 along with family comprising his wife PW3, three sons and two daughters including the victim PW1 was residing at third floor of the property situated in area of Sultan Puri.



ii. The respondents no. 1 and 2 were residing in same property at second floor of same property.

iii. The family of the complainant PW3 and the respondent no. 1 used to sleep on roof. However the complainant PW3 and his wife PW2 in intervening night of 01/02.10.2014 did not sleep on roof. However the victim PW2 along with her brothers and sister slept on roof in intervening night of 01/02.10.2014.

iv. The respondent at about 1.30 am in night pulled/dragged the victim PW1 near to him and kissed her and also lower down her *pajami*(trouser). In meantime the complainant PW1 also came at roof for smoking and made the victim PW1 to sleep with her brothers and sister.

v. The complainant next day asked the victim PW2 to sleep on roof but the victim PW2 started to weep and narrated the incident to her parents i.e. the complainant PW3 and PW2.

vi. The respondent no. 2 who is brother of the respondent no. 1 and his wife were called to report incident but they fought and quarrel with the complainant PW3 and PW2. Thereafter present FIR was got registered on basis of complaint made by the complainant PW3. The statement Ex.PW1/A of the victim PW1 was recorded under section 164 of the Code.

8.1 The respective testimonies of the victim PW1, mother of the victim PW3 and the complainant PW3 are consistent, cogent, reliable, trustworthy and corroborating with each other in material particulars and can be safely relied on.



9. The trial court in impugned judgment while acquitting the respondents observed that there are material contradictions in the statement of the victim as PW1 recorded under section 164 of the Code and her deposition recorded in the court and the respective testimonies of the parents of the victim/PW1 i.e. the complainant/PW3 and PW2. The trial court observed that the victim PW1 in her statement recorded under section 164 of the Code did not mention any incident of her father coming to the roof and moving her back to sleep with her brothers and did not mention anything about the alleged quarrel between her parents and the respondents. The trial court also observed that the victim PW1 simply stated about the respondent no .1 misbehaving with her and she came down stairs and informed her father i.e. the complainant PW3 but in testimony the victim PW1 stated regarding her father coming upstairs and dragging her towards her brothers and regarding quarrel between her parents and the respondents no.1 and 2. The trial court in impugned judgment regarding contradictions also observed that the victim PW1 never stated that the respondent no.1 had been sexually assaulting her for last two days or that any such incident happened earlier before the



night of 01.10.2014 but her mother PW2 specifically stated that victim PW1 told her that the respondent no.1 had been sexually assaulting her at roof at night for last two days. The trial court in impugned judgment also pointed out various other contradictions in testimonies of prosecution witnesses.

9.1 It is an accepted legal position that mere marginal variations, contradictions, discrepancies or improvements in the statements of witnesses cannot be fatal to the case of the prosecution. Only major contradictions, discrepancies or improvements on material facts can shake the very genesis of prosecution case and can create doubts as to the prosecution case. The Supreme Court in **State of Punjab V Jagir Singh Baljit Singh and Karam Singh**, AIR 1973 SC 2407 observed as under:-

23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of



every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.

9.2 The Supreme Court in Pawan Kumar @ Monu Mittal V State of Uttar Pradesh and Another, (2015) 7 SCC 148 held as under:-

35. When a witness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

9.3 The Supreme Court in Bhagwan Jagannath Markad and Others V State of Maharashtra, (2016) 10 SCC 537 observed as under:-

19. While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence.

Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as



shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.

9.4 The Supreme Court in **Thoti Manohar V State of A.P.**, Criminal Appeal No. 1739 of 2007 decided on 15.05.2012 observed that minor discrepancies on trivial matters not touching the core of the matter cannot bring discredit to the story of the prosecution. Giving undue importance to them would amount to adopting a hyper-technical approach. The court while appreciating the evidence should not attach much significance to minor discrepancies, for the discrepancies which do not shake the basic version of the prosecution case are to be ignored. It was further observed that no evidence can ever be perfect for man is not perfect and man lives in an imperfect world. Thus, the duty of the court is to see with the vision of prudence and acceptability of the deposition regard being had to the substratum of the prosecution story.

9.5 The Supreme Court in **Birbal Nath V The State of Rajasthan & others**, Criminal Appeal no. 1587 of 2008 decided on 30th October, 2023 relied on **Rammi V State of M.P.**, (1999) 8 SCC 649 wherein it was held as under:-



24. When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

The Supreme Court in **Birbal Nath** observed that lengthy cross examination of a witness may invariably result in contradictions but these contradictions are not always sufficient to discredit a witness.

9.6 The contradictions and discrepancies in evidence led by the prosecution as pointed out by the trial court in impugned judgment are minor and insignificant variations and do not affect case of the prosecution. The observations made by the trial court in impugned judgment are based on assumptions rather than appropriate appreciation of evidence led by the prosecution in right perspective. There is force in arguments advanced by the Additional Public Prosecutor that trial court has unnecessary relied on insignificant and minor variations and contradictions in passing impugned judgment.



The arguments advanced by the counsel for the respondents in this regard are without any legal basis.

10. The trial court in impugned judgment also observed that there was unexplained delay in reporting the incident to the police. The Supreme Court in **Hariprasad @ Kishan V State of Chhattisgarh**, Criminal Appeal No 1182 of 2012 decided on 07th November, 2023 observed that delay in lodging FIR by itself cannot be regarded as the sufficient ground to draw an adverse inference against the prosecution case and it cannot be treated as fatal to the case of prosecution. It was further observed that the court has to ascertain the causes for the delay having regard to the facts and circumstances of the case and if the causes are not attributable to any effort to concoct a version, mere delay by itself would not be fatal to the case of prosecution. The incident subject matter of present FIR had happened in intervening night of 01/02.10.2014 but incident was reported on 05.04.2014. It is reflecting from evidence led by the prosecution that the complainant PW3 came to know about incident on 02.10.2014 the complainant PW3 asked his wife PW2 to call the respondent no. 2 who is brother of the respondent no.1. The



complainant PW3 on 03.10.2014 and 04.10.2014 also made efforts to settle and address the incident with the respondents but the respondents quarreled with the complainant PW3. Thereafter the complainant PW3 reported incident to the police. The complainant PW3 in cross examination also deposed that he did not go to police in the morning of 04.10.2014 due to consideration of modesty of child victim i.e. the victim PW2 and honour of his family and he wanted to give one more chance to the respondents to repent for their deeds. There was as such no inordinate delay in registration of FIR and delay if any as observed by the trial court was properly explained in testimony of the complainant PW3.

11. The Additional Public Prosecutor during arguments also referred section 29 of POCSO Act. Every person accused of an offence is presumed to be innocent and burden lies upon the prosecution to establish the guilt of the accused beyond reasonable doubt. The Supreme Court in **State of U.P. V Shanker**, AIR 1981 SC 897 observed that it is function of the court to separate the grain from the chaff and accept what appears to be true and reject the rest. The Supreme Court in **Sujit Biswas V State of Assam**, (2013) 12



SCC 406 held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. The section 29 of POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9 of POCSO Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. However, it is for the prosecution to prove guilt of the respondents beyond reasonable doubt even for offences punishable under POCSO Act. The Supreme Court in **Sunil Kumar V State of NCT**, 2021 SCC OnLine Del 2391 observed that as per section 29 of the POCSO Act, there is a presumption regarding guilt of the accused. The burden of proof on the prosecution is not of beyond reasonable doubt. The prosecution has to lay down and prove the fundamental facts regarding the guilt of the accused. Once such facts are proved, the onus is upon the accused to lead evidence to rebut the presumption.



12. The respondents in respective statement under section 313 of the Code stated that they have been implicated due to monetary disputes and quarrels between the complainant PW1 and the respondents. The respondents also took said defence in cross examination of the complainant PW3. The statement under section 313 of the Code is not a substantive piece of evidence which intends to ensure principle of natural justice to the accused. It empowers the court to examine the accused with the purpose to enable the accused to explain incriminating circumstances in the prosecution evidence. The Supreme Court in **Samsul Haque V State of Assam**, (2019) 18 SCC 161 held that the incriminating material is to be put to the accused so that the accused gets a fair chance to defend him. This is in recognition of the principles of *audi alteram partem*. The Supreme Court in **Reena Hazarika V State of Assam**, (2019) 13 SCC 289 observed that a solemn duty is cast on the court in the dispensation of justice to adequately consider the defence of the accused taken under section 313 of the Code and to either accept or reject the same for reasons specified in writing. It was also held that section 313 of the Code cannot be seen simply as a part of *audi*



alteram partem rather it confers a valuable right upon an accused to establish his innocence. The defence taken by the respondents does not inspire any confidence in absence of specific details and appear to be vague, sham and without any basis and cannot be accepted in absence of material particulars regarding monetary transactions.

13. The victim was less than 12 years at time of incident. The Child Sexual Abuse is a serious issue/problem being pervasive and disturbing and large numbers of children are being subjected to physical, emotional, and sexual abuse. The Child Sexual Abuse deserves adequate attention of every stake holder directly or indirectly connected with administration of justice and judicial process. It requires to be addressed with lot of sensitivity and sensibility. The Protection of Children from Sexual Offences Act, 2012 was enacted to protect children from offences of sexual assault, sexual harassment and pornography and to provide for establishment of Special Courts for trial of such offences. The preamble of the POCSO Act also reflects that the Government of India has acceded on 11.12.1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations which has prescribed



a set of standards to be followed by all State parties in securing the best interests of the child. The POCSO Act considered sexual exploitation and sexual abuse of children as heinous crimes which need to be effectively addressed. The child sexual abuse is a crime not only against the individual but against the fabric of the society and family. The prosecution from quality and quantity of evidence led by it has successfully proved that the respondent no.1 in the intervening night of 01/02.10.2014 at about 1.30 am, at the roof of house bearing no C-3/386, Sultan Puri, Delhi committed aggravated sexual assault upon the victim who was a minor girl of less than 12 years by pulling towards him, kissing and by removing her *payjama* (trouser) and accordingly convicted for offence under section of 9 (m) of POCSO Act punishable under section 10 of POCSO Act, 2012 read with Section 18 of POCSO Act. The impugned judgment passed by the trial court pertaining to the acquittal of the respondent no.1 for the offence punishable under section 10 of POCSO Act cannot be sustained and is accordingly set aside. However, the offence punishable under section 341 IPC against the respondent no.1 and the offences punishable under sections 323/34 IPC and sections 506/34



IPC against the respondents no. 1 and 2 are not proved in accordance with law in absence of definite, direct and adequate evidence. Accordingly, the respondents no. 1 and 2 stand acquitted for these offences. The appeal is partly allowed.

15. List on 18.12.2023 for arguments on the quantum of sentence.

DR. SUDHIR KUMAR JAIN
(JUDGE)

DECEMBER 13, 2023

N/SD