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

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Reserved on: September 15, 2023

Decided on: December 15, 2023

+ **CRL.A. 781/2023**

STATE

..... Petitioner

**Through: Mr. Yudhvir Singh
Chauhan, APP for State
with SI Rajnish, PS Lodhi
Colony.**

V

NIKHIL KUMAR

....Respondent

**Through: Mr. Rakesh Nautiyal,
Advocate with Respondent
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 section 378(1)(b) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “**the Code**”) on behalf of the petitioner/State (hereinafter referred to as “**the petitioner**”) to set aside the judgment dated 13.08.2019 (hereinafter referred to as “**the impugned judgment**”) passed by the court of Sh. Parveen Singh, ASJ-01, Special Judge/(POCSO), North-East District, Karkardooma Courts, Delhi (hereinafter



referred to as **“the trial court”**) in FIR bearing no.0469/2017 under section 354A IPC and section 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as **“POCSO Act”**) whereby the respondent was acquitted for the charges under section 354A IPC and section 10 POCSO Act.

2. The factual background is that Ct. Akhilesh on 12.09.2017 at about 6:40 pm received information from Police Control Room from a caller who was saying that his granddaughter was molested by one boy at House no. 106, Chauhanpur, Matawali Gali and said information was recorded vide DD No 77B which was handed over to ASI Jeevanand for further action. ASI Jeevanand after receipt of DD No 77B reached at House no 109, Village New Chauhanpur, Karawal Nagar where caller Sri Chand handed over the said boy namely Nikhil/the respondent/the accused (hereinafter referred to as **“the respondent”**) and thereafter ASI Jeevanand handed over the respondent and victim to SI Monika. SI Monika made inquiry from the victim who stated that the respondent had oral sex with her. The victim was sent to JPC Hospital along with her mother and HC



Rehana. HC Rehana after medical examination of the victim collected the said MLC and handed over to SI Monika.

2.1 SI Monika recorded the statement of the victim wherein victim stated that she along with her sister namely Jyoti on 12.09.2017 at about 05:30/06:00 pm was playing badminton on the roof of their house. The shuttle cock during play was dropped on the roof of the house of neighbor. The victim went there to pick the shuttle cock back where she found that the respondent was alone at the house and rest of the members were at the terrace. The respondent called the victim and stopped her at the stairs of his house and thereafter made the victim to sit at the stairs. The respondent opened his pants and took out his penis and asked the victim to lick penis and also kissed at cheeks of the victim. The victim refused to lick penis of the respondent. The victim took shuttle cock from the respondent and came to the roof and thereafter came back to her house. SI Monika on basis of statement of the victim prepared *rukka* and FIR bearing no.0469/2017 was got registered under section 354A IPC and section 12 of POCSO Act. ASI Rohtash (hereinafter referred to as the “**Investigating Officer**”)



was entrusted with further investigation. The respondent was also medically examined on 13.09.2017. The respondent was arrested. The Investigating Officer conducted further investigation.

2.2 The victim was produced before the Metropolitan Magistrate for recording of statement under section 164 of the Code which was recorded on 13.09.2017. The victim in statement under section 164 of the Code stated as under:-

In evening of last day, she was playing badminton and shuttle cock was dropped in court yard of the respondent. The victim went to court yard to pick the shuttle cock where she was stopped by the respondent. The respondent looked at her vagina and hips. The respondent made her to lie on floor and asked her to lick his penis. The victim did not lick penis of the respondent and tried to run away from there with shuttle cock. The respondent also kissed her on mouth. The victim ran away from there. The respondent is not a good person and touched her with badly.

2.3 The Investigating Officer collected documents pertaining to age of the victim from Sub-Registrar (Birth & Death Department), Municipal Corporation of Delhi and date of birth of the victim was found to be 19.11.2010. The charge sheet was filed after completion of the investigation under section 354A IPC and section 10 of the POCSO Act where the petitioner was implicated. The trial court vide order dated 15.11.2018 framed charges for offence punishable under



section 354A and section 10 of the POCSO Act to which the respondent pleaded not guilty and claimed trial.

2.4 The prosecution in support of its case examined 11 witnesses including victim as PW1. The statement of the respondent was recorded under section 313 of the Code wherein the respondent denied incriminating evidence and pleaded innocence and false implication. The respondent stated that he was beaten by uncle, father and Sri Chand (grandfather) of the victim. The grandmother of the victim and his mother are cousins. There was a property pending dispute between his family and family of victim for purchase of property no. 110 which was purchased by the mother of the respondent and family of the victim also wanted to purchase that house and due to this he was falsely implicated in this case. The respondent preferred not to lead defence evidence.

2.5 The trial court vide impugned judgment acquitted the respondent for offence punishable under section 354A IPC and section 10 of the POCSO Act primarily on the ground that the testimony of the victim cannot be said to be of sterling quality and it



will be unsafe to rely on the sole testimony of the victim as there are various contradictions. The relevant portion of the impugned judgment is reproduced verbatim as under:-

37. Considering the fact that the victim is the sole witness upon which the prosecution seeks to rely, these contradictions cannot be completely ignored especially in view of the fact that victim on being shown her previous statements, which resulted in these contradictions, did not put forward any explanation or stated that she had forgotten these details but she outrightly denied making these statements.

38. Considering the evidence discussed above, I find that defence has been able to dent the testimony of victim and she cannot be said to be a witness of sterling quality. Therefore, it will be unsafe to rely on the sole testimony of victim. I accordingly find that the prosecution has failed to prove its case beyond all reasonable doubts. The accused is accordingly acquitted of all the charges framed against him. His bail bond stands cancelled. Surety stands discharged.

3. The petitioner/State being aggrieved filed the present appeal to challenge the impugned judgment on the 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 evidence led by the prosecution particularly the testimony of the victim aged about 7 years. The impugned judgment is not based factual matrix of the case and has ignored



vital evidence led during trial. There is no material contradiction in testimony of the victim. There is no material variation in statement of victim recorded under section 164 of the Code and her statement under section 161 of the Code. The trial court did not appreciate presumption under section 29 and 30 of the POCSO Act while appreciating the deposition of the victim. The victim was examined after about 1 1/2 year of the incident and as such minor contradictions in her deposition do not affect case of the prosecution. The trial court wrongly disbelieved the testimony of witnesses by observing that there are variations and contradictions. It was prayed that impugned order be set aside.

3.1 The respondent filed reply wherein stated that the respondent was falsely implicated in the present case. The trial court has passed impugned judgment in accordance with law and does not call for any interference. The trial court has rightly appreciated evidence. The appeal is liable to be dismissed.

4. The prosecution case is primarily resting on testimony of the victim as PW1. A witness is prime instrument to assist the court in discovery of truth and is considered to be an important factor or



integral part of the administration of justice. The role of a witness is paramount in the criminal justice system. The trial court recorded testimony of the victim as PW1 without oath after being satisfied that the respondent was able to understand the questions put to her and to give rational answers to the question. PW1/the victim deposed that one day she was playing badminton with her sister on the roof of the house and the shuttle had fallen on the roof of the adjoining house. The sister of the victim asked her to bring the shuttle and thereafter the victim went downstairs and entered in adjoining house. The victim started to climb the stairs. The victim in stairs met one *bhaiya* who pulled her nicker and checked her vagina (*Su-su* as witness deposed) and checked her rectum. The victim was made to lie on floor by said *bhaiya* who asked the victim to lick penis. The victim refused to lick penis of the respondent then the respondent kissed on her cheek. The victim came back at her home and informed the sister and they also informed their mother. The respondent was beaten by paternal uncle (*chacha*). The police also came there and brought her to police station where she told everything to one aunty. The victim also admitted her signatures on statement Ex.PW1/A recorded under



section 164 of the Code and also admitted contents of statement Ex.PW1/A after being read over to her. The victim as PW1 also recollected the name of said *bhaiya* as Nikhil after hearing contents of statement Ex. PW1/A. The victim as PW1 also identified the respondent as Nikhil *bhaiya*. The victim as PW1 in cross examination admitted that the mother of the respondent was a regular visitor to her house and brother of the respondent namely, Rajesh and his wife and children are residing at the first floor of the house of the respondent. The victim as PW1 denied suggestions that when she had gone to the house of the respondent at that time his mother and sister were on the roof and were spreading wheat for drying or that mother of the victim had tutored her to give the statement or that there was a property dispute between her family and the family of the respondent or that she falsely implicated the respondent being tutored by her mother. The victim as PW1 admitted that there was no open courtyard/*aangan* in the house of the respondent.

4.1 The prosecution also examined R, mother of the victim who deposed that the victim on 12.09.17 at about 5:00/6:00 pm was playing badminton on her roof with sister. PW2 further deposed that



as informed by the victim/PW1, the shuttle cock fell down on the roof of adjacent house where the respondent used to reside. The Victim further told her that she along with respondent had gone to collect the shuttle cock from the roof of that House where the respondent took off the nicker of the victim and checked her from front as well as behind. The victim also informed PW2 that the respondent took out her penis and asked the victim to lick it. Thereafter PW2 went to the house of the respondent and confronted him. PW2 also identified the respondent. PW2 in cross examination denied suggestion that the respondent had not done any act or that he was falsely implicated due property dispute.

5. The Additional Public Prosecutor argued that the trial court has not properly appreciated the testimony of the victim as PW1 who was just aged about 8 years at time of deposition and there are no material contradictions in the testimonies of witnesses examined by the prosecution which can affect case of the prosecution. The Additional Public Prosecutor further argued that there is no significant variation in statement of victim Ex.PW1/A recorded under section 164 of the Code and her statement under section 161 of the Code. The trial court



has not considered presumption under section 29 and 30 of the POCSO Act while appreciating the deposition of the victim. It was argued that impugned order be set aside.

5.1 The counsel for the respondent argued that the respondent is falsely implicated in present FIR Ex.PW2/2 which was registered on the basis of statement of the victim. The prosecution is solely based on the testimony of the victim/PW1. The victim in *Rukka* Ex. PW2/1 stated that she was playing badminton on the roof along with sister at about 5:30/6:00pm and the shuttle cock fell on the roof of house of the respondent and also stated the respondent was present in the house and other family members were present on the roof. PW2 Ishwar Singh deposed that he received a *Rukka* on 13.09.2017 at about 12:15 am from PW8 SI Monika for registration of FIR Ex. PW2/2. The counsel for the petitioner further argued that the victim PW1 in statement under section 164 of the Code Ex.PW1/1 stated that she was playing badminton in the evening the shuttle cock cross over in the courtyard of the house of the respondent.

5.1.1 The counsel for the petitioner further argued that there are material contradictions in the testimony of the victim as PW1 and the



statement Ex.PW1/1 of the victim recorded under section 164 of the Code which created doubt that the victim PW1 was tutored. The victim initially stated that she was playing badminton with her sister and the shuttle cock had fallen on the roof of the house of the respondent while in statement Ex.PW1/1 the victim stated that the shuttle cock had fallen in |the courtyard of the house of the respondent. The victim as PW1 deposed that the shuttle cock had fallen on the roof of the adjoining house and there was no open courtyard or *aangan* in the house of the respondent. It reflects that the victim was tutored. The victim in her initial statement stated that the respondent was alone at his house and everyone else of his family was on roof whereas the victim in statement Ex.PW1/1 did not say anything about family members of the respondent. The victim in statement Ex.PW1/1 stated that shuttle cock was lying in the courtyard in the house of the respondent where the respondent stopped her and committed alleged act whereas the victim in testimony as PW1 deposed that the respondent had given the shuttle cock to her.



5.1.2 The counsel for the respondent further argued that the victim in initial statement stated that everyone in family of the respondent was at roof while in cross examination, the victim denied that when she had gone to the house of the respondent, his mother and sister were on the roof and were spreading wheat for drying. PW1 also stated that the respondent was alone at his house but in cross examination deposed that her mother was in a room on the ground floor. The testimony of the victim as PW1 was not of sterling quality and for this counsel for the respondent referred cross examination of the victim as PW1. It was further argued that the trial court has meticulously examined the evidence led by the prosecution and appeal is liable to be dismissed.

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.

6.5 The testimony of the victim is narrated of entire incident with clarity and trustworthy, credible and can be safely relied on. The testimony of the victim as PW1 inspires confidence of the court.

7. The perusal of the initial statement of the victim as per *rukka* Ex.PW2/1, statement Ex.PW1/1 and deposition of the victim as PW1 reflects that there are variations and contradictions. The trial court in impugned judgment also referred contradictions and variations in evidence led by the prosecution. The relevant portion of impugned judgment highlighting contradictions and variations in the statements and deposition of the victim as PW1 is reproduced as under:-

30. There is no contest to the contention of Id. Addl. PP that in the cases where the offences are committed in isolation, the sole testimony of the victim can be sufficient to bring home the guilt of the accused. However, at the same time, such a testimony has to be very credible and of sterling quality. Meaning thereby, that there should be no



improvements, inconsistencies or contradictions, which would make the court to doubt the credibility of the victim.

31. In the present case, according to the initial complaint of the victim, she was playing badminton on her roof and the shuttle cock crossed over and fell on the roof of the house of the accused. She further stated that she went to that house and at that time, accused was alone and everybody else was on the roof.

32. Therefore, here the first point which needs to be taken into consideration is the contention of Id. counsel for accused that had it been the case and the roofs were adjoining each other, the victim in normal course, should not have gone to the house of the accused to climb to the roof and collect the shuttle cock but she could have asked the neighbours to throw the shuttle cock back.

33. It is correct that this situation has not been put by Id. Counsel for accused to the victim during her cross examination, however at the same time, it is also to be noticed that the victim has categorically denied that at that time, the family member of the accused were at the roof of his house. Not only so, she had denied making this statement to the police. She was confronted with her statement Ex.PW1/DI and she did not put forward any explanation and only denied making this statement. However, the same is a part of the record.

34. It is also to be noticed that according to the initial case of the prosecution and the initial statement of the victim, accused was in a position to commit the alleged act as he was alone at the house. However, during her cross examination, the victim admitted that the brother of accused alongwith his wife and children was residing in the



first floor that house but she stated that she had not seen the children of Rajesh in that house on that day and therefore, she could not admit or deny the presence of children in the house. She volunteered that the mother of the accused was in a room on the ground floor. Therefore, the victim must have seen the mother of accused. Thus, in the presence of his mother and within the area of visibility, it could not have been possible for the accused to commit such an act.

35. It is also to be noticed that on the one hand, in the initial statement, the victim had stated that after the alleged incident, she went on the roof, got the shuttle cock and then went home. However, when she appeared as PWI, she stated that after the incident, it was not she who went to the roof to collect the shuttle but it was the accused who had given the shuttle to her. Meaning thereby, the accused had gone upstairs to collect the shuttle cock and came back. She was confronted with this position and she denied that she had stated to the police that she herself had gone to the roof and collected the shuttle cock and then went to her house. She was confronted with portion B to B of her statement Ex.PWI/DI where this fact was recorded but rather than giving an explanation, she denied making any such statement to the police.

36. It is also to be noticed that in the initial complaint, the victim had stated that after collecting the shuttle cock, she went home and informed her mother, who informed about it to everyone else. However, in her statement u/s 164 Cr.P.C, she was silent as to how the matter was disclosed to others. On the other hand, while appearing as PWI, she stated that after collecting the shuttle cock, she went to her house and informed her sister, who was on the roof.



Thereafter, both of them went downstairs and informed their mother. She was confronted with the situation as to whether she herself had informed her mother or first, she had informed her sister J and she deposed that she had not told the police that initially she had told about the incident to her sister J. Therefore, with regard to the disclosure of the commission of the offence, there is an improvement made by the victim.

8. It is correct and reflecting that there are contradictions, discrepancies and variation in evidence led by the prosecution which are also highlighted by the trial court in impugned judgment and also pointed out by the counsel for the respondent during arguments. 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.

8.2 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.

8.3 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.

8.4 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.



8.5 The Supreme Court in **Birbal Nath V The State of Rajasthan & others**, Criminal Appeal no. 1587 of 2008 decided on 30.10.2023 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.

8.6 The contradictions, variations and discrepancies in evidence led by the prosecution as pointed out by the trial court in impugned judgment and counsel for the respondent are minor and insignificant variations and do not affect case of the prosecution. The testimony of



the victim as PW2 cannot be discarded due to minor and insignificant variation and contradictions. The trial court should have appreciate and analyze the testimony of the victim as PW1 after considering fact that the victim at time of deposition was just 8 years. The trial courts in cases pertaining to child sexual abuses need to appreciate testimony of child victim with sensibility and sensibility and should not discard testimony of a child witness on surfacing of minor contradictions and variations unless these contradictions, variations and discrepancies affect root of the prosecution case. The victim at time of deposition was just aged about 8 years and cannot be expected to depose with perfection and minute details of the incident. It is proved that the respondent removed his nicker in front of the victim and took out his penis and asked the victim to lick his penis and also kissed the victim. It appears that the trial court in impugned judgment did not carefully analyze and appreciate the evidence of the prosecution appropriately in the 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 respondent in this regard are without any legal basis.

9. The Additional Public Prosecutor during arguments also referred section 29 of POCSO Act argued that the trial court in impugned judgment did not consider presumption as per section 29 of the 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. 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, 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.

10. The respondent in statement under section 313 of the Code denied incriminating evidence and pleaded false implication and innocence. The respondent stated that there was a property dispute regarding purchase of the property bearing no 110 between his family and the family of the victim which has been purchased by the mother of the accused and due to this he was falsely implicated in this case. The statement under section 313 of the Code not being a substantive piece of evidence ensures principle of natural justice to the accused.



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. 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. Section 313 of the Code confers a valuable right upon an accused to establish his innocence. The respondent in cross examination of the victim as PW1 and PW4, mother of the victim also took similar defence. The defence taken by the accused does not inspire any confidence in absence of specific details and appear to be vague, sham and without any basis.

11. The victim was 7 years old at the 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 (POCSO Act) 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 the evidence led by it has proved in accordance with law that the respondent on 12.09.2017 at about 5:30/6:00 pm committed aggravated sexual assault upon the victim who was a minor girl of 7 years of age by removing his nicker and taking out his penis and asking the victim to



lick his penis and kissed the victim. The impugned judgment cannot be sustained and is accordingly set aside. Accordingly, the offence under section 354A IPC and section 10 of POCSO Act are proved in accordance with law and the respondent is convicted for these offences.

12. List on 12.01.2024 for arguments on quantum of sentence.

DR. SUDHIR KUMAR JAIN
(JUDGE)

DECEMBER 15, 2023
AK