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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: 18th October, 2023***+ **CRL.L.P. 5/2022**

STATE

..... Petitioner

Through: Mr. Tarang Srivastava, APP for State
with Insp. Govind Singh, PS Uttam
Nagar.

versus

DILA RAM

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)**

1. *Vide* Order dated 09.02.2023, the fresh bailable warrant was directed to be issued against the respondent in the sum of Rs. 15,000/- through the SHO concerned.
2. Further, *vide* Order dated 11.07.2023, the learned Additional Public Prosecutor for the petitioner/State was given adjournment on the ground that pursuant to Order dated 09.02.2023, the SHO concerned has issued the Bailable Warrant through Ministry of External Affairs, Government of India against the respondent, who is the resident of Nepal, and the said Bailable Warrant would take some time for execution.
3. Today, learned Additional Public Prosecutor for the petitioner/State



submits that the respondent, being a Nepali citizen, could not be served.

4. An application under Section 378(1) Cr.P.C has been filed for grant of Leave to Appeal against the Judgement dated 28.08.2020 whereby the respondent has been convicted under Section 10 POCSO Act, 2006, but has been acquitted for the offence punishable under Section 376 IPC read with Section 4/6 POCSO Act.

5. The **case of the prosecution** was that a complaint was made by the prosecutrix Ms. 'X' alleging that she was around 14 years old and was residing with her two brothers and father and was studying in a Government school, Hastal village. The mother of prosecutrix Ms. 'X' was working as a house maid and used to reside at her place of employment but used to visit them for a day or two, in a month. The elder brother was staying at Noida, where he was working. The respondent/ accused was her father who was working in a factory, while her younger brother was studying in the school. The respondent and the mother of the prosecutrix used to consume liquor and fight with each other. She further stated that her mother was residing separately from the family since last 5-6 years. On 10.03.2014, she was alone at home with the respondent who came from behind and held her. She resisted, but the respondent stated that he loved her as a daughter and asked her to sleep with him. The respondent also threatened her that if she did not do as told, he would leave her with her mother at the house where she was working. Further, one day prior to the registration of FIR, the respondent committed "*galat kaam*" with her and she also asserted that he had been raping her since last three years.

6. On 11.03.2014 she informed about the incident to her mother on telephone, who came along with the maternal uncle to their house and



enquired from the respondent. The FIR under Section 4 POCSO Act and Section 376 and 506 IPC was registered. On completion of investigation, the charge sheet was accordingly filed.

7. The **charges** under Section 506 IPC and Section 6 POCSO Act were framed on 17.07.2014 to which the respondent pleaded not guilty.

8. The prosecution examined seven witnesses in all. The most material being the prosecutrix Ms. 'X' as PW7. The mother of prosecutrix 'X' was examined as PW2.

9. **The Statement of Accused was recorded under Section 313 Cr.P.C**, wherein he pleaded his innocence and claimed that he was falsely implicated as the mother of the prosecutrix had strained relationship with him.

10. **Learned Addl. Sessions Judge** observed that the prosecutrix in her testimony claimed that the respondent had done "*galat kaam*", and that the accused used to touch his private part with her private part. She has categorically denied that there was penetrative assault committed upon her. Learned ASJ therefore, convicted the respondent under Section 10 of POCSO Act for sexual harassment, but acquitted the respondent for the offence under Section 6 POCSO Act. The accused was sentenced to Simple Imprisonment for a period of seven years and to pay a fine of Rs.10,000/- for the offence punishable under Section 10 POCSO Act. He was further sentenced to undergo Simple Imprisonment for a period of two years and to pay a fine of Rs.10,000/- and in default of payment of fine to undergo SI for fifteen days for the offence punishable under Section 506 Part I of IPC.

11. **The State aggrieved by the acquittal of the respondent under Section 6 POCSO Act**, has filed the present Leave to Appeal against the



Judgment dated 28.08.2020.

12. Submissions heard.

13. The respondent who is the father of the prosecutrix had been charged under Section 6 of POCSO Act on the allegations of repeated penetrative sexual assault. There is no challenge to the age of the prosecutrix who is held to be 14 years of age. The entire prosecution case rested on the testimony of PW7 the prosecutrix. She deposed that her father/ respondent used to touch her private part with his private part and used to ask her to sleep with him. She further clarified that *“WOH MUJHE KISS KARTE THE, MERA PRIVATE PART TOUCH KARTE THE OR APNA PRIVATE PART MERE PRIVATE PART MEIN DALNE KI KOSHISH KARTE THE PART DALA NAHIN.”*

14. She further explained that he used to do these acts with her daily and continued to do so for two and a half years. She stated that she did not tell her mother about this till 11.03.2014, since her father had threatened her that in case she disclosed this to anyone, he would sent her to the Kothi where her mother was working and also threatened to beat her.

15. The learned APP for the State specifically cross-examined the prosecutrix on the aspect of penetrative assault to which she again reiterated that the respondent used to touch per private part, but never inserted his private part into her. Her testimony therefore, was categorical that there was no penetrative sexual assault committed upon her by the respondent.

16. It is pertinent to note that the prosecutrix in her complaint Ex.PW1/A had also stated that the respondent used to do *“galat kaam”* without providing details of the acts committed. The learned APP has argued that the prosecutrix in her testimony under Section 164 Cr.P.C Ex.PW7/A while



stating that he used to touch her private part had also stated that “*thoda sa andar bhi dalte the*”. It was argued that the prosecutrix had explained in her statement under Section 164 Cr.P.C that there was also partial penetration which was sufficient to constitute the offence of penetrative sexual assault.

17. It is observed that though the prosecutrix in her statement under Section 164 Cr.P.C had stated about partial penetrative sexual assault, but there was neither any mention of this fact in her complaint Ex.PW2/A nor in her testimony. In the absence of there being any cogent evidence of the prosecutrix to this effect; rather there being any specific denial of any penetrative sexual assault, it cannot be held that the prosecution was able to prove the offence under Section 6 POCSO Act.

18. Significantly, in the MLC Ex.PW3/A it is recorded in her history by the Doctor that the father had been raping her many a times and had not disclosed it because of the threats extended by the father, but she had asserted that the sexual assault was committed about seven days back. On medical examination, no signs of physical assault or of any unnatural sex (anal or oral) could be deciphered. The Medical Record, therefore, also did not support the case of the prosecution of there being any penetrative sexual assault. Pertinently, the FSL Report Ex.PW6/A also states that “no semen could be detected on the exhibits”.

19. We, therefore, find that learned ASJ had rightly relied upon the testimony of the prosecutrix and the Medical/Forensic Record to conclude that the offence of sexual harassment was proved, but there was no evidence of penetrative sexual assault. The respondent has been rightly given a benefit of doubt for the offence under Section 6 POCSO Act and has been acquitted.



20. We do not find any merit in the present Leave to Appeal, which is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 18, 2023
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