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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: 14th March, 2024***+ **CRL.A. 747/2023****STATE**

..... Appellant

Through: Mr. Tarang Srivastava, APP with
Insp. Yogendra Kumar, PS Punjabi
Bagh.

versus

RAJA RAM

..... Respondent

Through: Mr. Ankaj Giri, Advocates.

CORAM:**HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MR. JUSTICE MANOJ JAIN****J U D G M E N T (oral)**

1. State has taken exception to order dated 24.09.2021 whereby accused (respondent herein) has been acquitted of charges under Section 363/366/342/354B IPC and Section 6 of Protection of Children from Sexual Offences Act (POCSO Act), in alternate, section 376 IPC.
2. Leave to appeal was granted to the appellant on 06.09.2023.
3. As per case of prosecution, on 11.10.2015, at about 07.20 PM, when the victim [hereinafter referred as 'X' (name withheld)], was playing with her friend Renu near her jhuggis, accused Raja Ram (respondent herein), who used to reside in her neighbourhood and whom she knew already, called her. On her refusal, accused approached towards her and took her to a public toilet and closed the door from inside. The accused then stroked her private parts with his hand, while removing his underwear and also forcibly removing her clothes. In the meantime, cousins of 'X', on being informed by



Renu, came there and rescued her. 'X' was taken to her jhuggi by her cousins where she narrated the entire incident to her parents.

4. Police was informed and FIR was registered. 'X' was taken to SGM hospital for medical examination and accused was also arrested.

5. 'X' gave statement to the police on 11.10.2015 itself, in which she alleged that the accused had taken her to a public toilet and then after forcibly removing her clothes, he touched her private parts. There was, however, no allegation of rape or any penetrative sexual assault.

6. She was produced before concerned learned Metropolitan Magistrate for recording of her statement under Section 164 Cr.P.C. In her such statement recorded on 12.10.2015, she went on to supplement that when she was confined in public toilet, the accused had also forced her to have sexual intercourse. Thus, she claimed that there was penetrative sexual assault upon her. She also revealed that the accused used to commit such act upon her, every Sunday.

7. When 'X' had been taken for initial medical examination, she had alleged molestation only. However, in view of her statement made under section 164 Cr.P.C., she was again medically examined on 12.10.2015 and during her such subsequent medical examination, her clothes were also seized.

8. As per the case of prosecution, 'X' was minor at the relevant time as her date of birth was 20.08.2003.



9. To bring home the guilt, of the accused, the prosecution examined 09 witnesses. These included 'X' herself (PW1), father of X (PW2), cousins of 'X' (PW3 and PW5), Mother of 'X' (PW4), and her friend Ms. Renu (PW6).

10. Statement of accused was recorded under section 313 Cr.P.C., in which he pleaded innocence and claimed that he had been falsely implicated. He stated that 10-15 days before the incident, there was a quarrel between him and father of 'X' on the issue of taking liquor. He also revealed that he had slapped father of 'X' supplementing that no such incident, as alleged by 'X', had taken place.

11. Learned Trial Court, after analyzing the evidence led before it, came to the conclusion that prosecution had failed to prove that 'X' was less than 18 years of age at the time of alleged commission of offence. It also observed that there were material inconsistencies in the statements made by 'X' during investigation and during trial and she repeatedly changed her version, as per her whims and fancies. In addition to the above, her friend (PW6) also did not support the case of the prosecution.

12. Appellant/State has challenged the order of acquittal of the accused, *inter alia*, on the following grounds:

- a) *According to school record, date of birth of X is 20.08.2003 and, therefore, she was minor at the time of alleged incident and such fact has been ignored by Ld. Trial Court.*
- b) *The material key witnesses have supported the case of prosecution.*
- c) *There is no inconsistency in the version of X.*



d) DNA profile of male origin generated from the salwar and suit of the prosecutrix is similar to the DNA profile generated from the source (blood of accused) which corroborates the prosecution story.

13. According to learned counsel for respondent, learned Trial Court has appreciated all the material aspects and acquitted him after careful analysis of the evidence and the facts. It is contended by the respondent that as per 'X', her friend Renu was eyewitness to the incident and the first report was only about molestation, with no allegation of rape or sexual assault. However, the victim changed her story pursuant to tutoring by her parents and added allegation of penetrative sexual assault in her statement given under section 164 Cr.P.C. Respondent further contended that the case of the prosecution is based on the fact that PW6 had informed the cousins of the victim about taking away of victim, but PW6 has altogether denied witnessing any such incident. Thus, according to respondent, there is no illegality or infirmity in the impugned judgment.

14. Admittedly, 'X', in her examination-in-chief stood by the statement which she had made under section 164 Cr.P.C. She reiterated that accused was her neighbour and was known to her. On 11.10.2015, when she was playing with Renu, accused forcibly took her to a public toilet. Thereafter, he removed her clothes and then raped her. Her cousins were able to open the door and save her after receiving information from Renu. She further deposed that accused used to do such act every Sunday and that she did not disclose anything to anyone due to fear of the accused.



15. Prosecution has sought to corroborate her version by drawing attention to the testimony of her cousin brothers who reached the spot immediately and rescued her.

16. Said cousins have been examined as PW3 and PW5.

17. Both PW3 and PW5 have, of course, deposed that on 11.10.2015, at around 07.00-7.30pm, they were informed by girl (Renu) that X had been taken away by the accused.

18. Fact, however, remains that Renu has denied knowing anything about the aforementioned occurrence. She stated in her deposition that she was not acquainted either with the accused or with the victim. She could not even identify the accused. She denied that she was with X or that accused had kidnapped her and that she had informed her cousins about said fact. Her unsupportive and hostile testimony has created a serious doubt about the veracity of the case of prosecution.

19. We must also refer to testimony of mother of 'X'.

20. According to her deposition, cousins of her daughter had brought back her daughter and also the accused and police apprehended accused from their house. Such fact is not in consonance with the version of 'X' who rather claimed that accused had gone from there to his house.

21. Moreover, when mother of 'X' was asked whether she had made any supplementary statement, she categorically denied having made any such statement on 13.10.2015 (Ex. Mark Y) which rather talks about commission of penetrative sexual assault. We also note that according to mother of 'X',



she was told by such cousins that when they had rescued 'X', she was naked but such cousins i.e. PW5 & PW3 have not uttered even a single word in this regard in their deposition. They simply claimed that they were told about the incident by one girl and then they rushed towards the spot. After reaching the spot, when they knocked the door as it was bolted from inside and when it was opened up, they saw 'X' and Raja Ram inside the toilet. They, however, nowhere claimed that at that time, 'X' was in naked condition.

22. It is also admitted by prosecution that place of alleged occurrence is not an isolated area. IO has also admitted in his deposition that there were many shops, jhuggis and houses near the place of incident and many people were available there. Fact, however remains, that no independent person was requested to join investigation.

23. From an overview of the above, and perusal of record, it is apparent that there are serious infirmities and discrepancies *inter alia* in the version of prosecution witnesses on various aspects.

24. First and foremost, no allegation was made by 'X' regarding penetrative sexual assault when her first statement was recorded. There is no explanation as to why such an important aspect was not revealed by her immediately. Secondly, the key spot witness i.e. Renu (PW6), who had allegedly seen the accused kidnapping X, has turned completely hostile and has categorically denied the fact that she was playing with X or that she was her friend. She also denied that she had informed about the incident to the cousins of 'X'.



25. Moreover, strangely enough, 'X' did not identify her own clothes which she had been allegedly wearing at the time of incident. As per seizure memo, one blue printed shirt and salwar were seized but X has failed to identify these by claiming that said clothes did not belong to her. DNA report also does not help prosecution as neither any blood stain nor semen was found on such clothes.

26. The fact that she was minor at the time of incident is also not very clear.

27. As per prosecution, her date of birth is 20.08.2003.

28. The victim and her mother deposed so before the court.

29. In order to substantiate the aforementioned fact, prosecution placed on record the school documents collected during the investigation which included the certificate issued by the Principal (Ex. PX1), copy of the relevant entry in admission register (Ex. PX2) and copy of affidavit (Ex. PX3). Certificate Ex. PX1 indicates that as per school record, 'X' has been admitted in the said school on 04.05.2011 in class I and her date of birth was 20.08.2003. According to school record, no document except for one affidavit (Ex. PX3) of the father of 'X', had been submitted to the school indicating her date of birth.

30. Father of X, in his examination-in-chief, has, to our astonishment, deposed that he had no knowledge when X was born, supplementing that her mother was the one who had secured her admission in the school. Affidavit



(Ex PX-3) was also not shown to him during recording of his evidence. Thus, there is utter confusion with respect to the correct age of 'X'.

31. Given the established principle of criminal jurisprudence in India, in case of any uncertainty, the benefit should go to the accused instead of to the prosecution, the evidence indicating the victim's approximate age would never be sufficient to determine her exact age. Moreover, any entry with respect to the date of birth made in the school can be said to have evidentiary value only when there is some definite material available on the basis of which such date was recorded. As noted, there is no documentary proof of the age of 'X' and to make things worse, the father of 'X' is himself not sure about her year of birth and, therefore, learned Trial Court was fully justified in holding that prosecution has failed to establish that at the time of alleged commission of offence, she was less than 18 years. We may also refer to one judgment pertaining to the similar issue passed by this Coordinate Bench i.e. *State v. Rohit* 2024 SCC OnLine Del 1793 wherein it has been observed that any entry with respect to the date of birth made in the school can be said to have evidentiary value only when there is some definite material available on the basis of which such date was recorded.

32. Learned counsel for appellant/State has placed reliance upon *State of NCT of Delhi v. Dharmender* 2018 SCC OnLine Del 8259; *Anwar Ul Haque v. State of NCT of Delhi* 2014 SCC OnLine Del 4535, *Mohd. Afsar v. State* (2022)1 HCC (Del) 75, *Ganesan v. State* (2020) 10 SCC 573. The factual matrix was different in those cases as accused therein had been convicted on the basis of medical evidence coupled with the sterling quality of evidence of the prosecutrix. In *Mohd. Afsar (supra)*, the court had observed that the



categorical statement of the prosecutrix which had been tested on extensive cross examination falsified the claim of the accused in his statement made under Section 313 CrPC that the prosecutrix had gone with him of her own free will and performed the Nikah, hence, proving the commission of offence punishable under Section 376 IPC. In *State v. Dharmender* (supra) the affidavit regarding date of birth of the victim was given by the mother of victim and she had corroborated the same in her deposition as well. However, in the case in hand, the affidavit was given by the father of 'X', who has rather deposed that he did not know about the age of the victim. Hence, these judgments do not advance the case of State in view of the peculiar facts of the present case.

33. In view of the foregoing discussion, we are of the firm opinion that the testimony of the victim does not inspire much confidence. Indubitably, in cases of sexual assault, testimony of a child witness can form the basis of a conviction. However, crucial pre-requisites are that such testimony should be of sterling quality and should be free from any kind of tutoring. Here, we are mindful of the fact that she has vastly improved upon her previous version and the reason thereof has not been explained.

34. To make things worse, the key witness (PW6) has turned hostile. Forensic report is also of no avail to prosecution as the clothes in question have been disowned none other than by 'X' herself.

35. We need not emphasize that order of acquittal is not, generally, interfered with when view taken by the learned Trial Court is found to be reasonable and plausible one. Appellate Court cannot reverse the decision



merely because a different view was also possible. Presumption of innocence, which is in favour of the accused, gets strengthened by such order of acquittal and he, thus, even otherwise becomes entitled to get the benefit of doubt.

36. Nothing has been canvassed before us which suggest that the other view i.e. conviction of respondent was the sole possibility.

37. Resultantly, we do not find any merit in the appeal.

38. Appeal stands dismissed.

SURESH KUMAR KAIT
(JUDGE)

MANOJ JAIN
(JUDGE)

MARCH 14, 2024/sw/ss