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* **IN THE HIGH COURT OF DELHI AT NEW DELHI***Date of decision: 24th September, 2024*

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CRL.L.P. 169/2021

STATE

.....Petitioner

Through: Mr. Ritesh Kumar Bahri, APP for the
State with Mr. Lalit Luthra, Advocate.
SI Kunal Kishor, PS Roop Nagar.

versus

OM PRAKASH

.....Respondent

Through: Mr. H. K Naik, Advocate.

CORAM:**JUSTICE PRATHIBA M. SINGH****JUSTICE AMIT SHARMA****Prathiba M. Singh, J. (Oral)**

1. This hearing has been done through hybrid mode.
2. The present petition under Section 378(3) of the CrPC has been filed seeking leave to file an appeal challenging the impugned judgment dated 9th November, 2020 by which the Respondent/Accused has been acquitted of all the charges framed against him under Section 6 of the POCSO Act in Sessions Case No. 28146/2016, arising out of FIR No. 70/16, under Sections 376/376(2)(n)/(i)/(j)/(k)/506 of the IPC and Section 6 of the POCSO Act, registered at PS Roop Nagar.
3. The allegation against the Respondent was that he had committed aggravated penetrative sexual assault against the survivor who was merely 7 years of age at that time. The incident allegedly took place on 1st February, 2016 around 8:30 PM. As per the complaint, when the survivor was playing in her room, the Respondent came in and gagged her mouth and committed



inappropriate acts with her. The survivor also alleged that he thereafter committed aggravated penetrative sexual assault. It was under these circumstances that the chargesheet was filed before the Court of competent jurisdiction and charges were framed against the Respondent.

4. The MLC (Ex.PW-5/A) on the survivor was conducted in Aruna Asaf Ali Hospital by Dr. Ruchita, Medical Officer (PW-5). The prosecution thereafter led evidence in the matter of 22 witnesses. The survivor herself, her cousin-brother, her mother were examined as PW-2, PW-3 and PW-14 respectively. Initially in the examination-in-chief the survivor had supported the case of the prosecution. However, due to non-production of certain case material, the matter was adjourned and then the survivor was cross-examined. In the said cross examination she took an opposing stand and was declared hostile as she did not support the case of the prosecution. The Trial Court records that the mother of the survivor, *i.e.*, PW-14 also has not supported the case of the prosecution. The relevant finding of the Trial Court are as under:-

“35. It is pertinent to note however in her cross-examination by Ld. Counsel for accused, the Prosecutrix took a complete turnaround from her examination in chief recorded in the matter and stated that she had deposed in her examination in chief at the behest of one Manju Auntie, In her cross-examination, the Prosecutrix stated that she white-wash was. being carried out in her house and a box of liquid 'paint had fallen down because of her and that due to spilling over of the paint, accused / painter had scolded the children and also slapped the Prosecutrix and when she came downstairs while weeping, she informed about the incident to her mother in the presence of their neighbour Manju Auntie. The Prosecutrix also affirmed that the accused had not done anything wrong with her and that she had deposed earlier at the instance of what was told to her by Manju Auntie; Accordingly, at the stage of her cross-examination by Ld. Counsel for the accused, the Prosecutrix categorically



denied that any offence of sexual assault had been committed by the accused.

36. The Prosecutrix was thereafter re-examined by Ld. Addl. PP for State and when the version of the Prosecutrix given by her in her examination in chief was put to her, the Prosecutrix deposed that "aisa kuch nahi hua tha maine Manju Auntie ke kehne par sab bola tha" . When a specific question was asked as to what was told to her by the said Manju Auntie, she started that she did not remember what the said Manju Auntie told her. However, the Prosecutrix denied the suggestion that nothing was told to her by said Manju Auntie and therefore she was unable to recall the same.

37. Hence the Prosecutrix in her cross-examination did not support the allegations of penetrative sexual assault by the accused and stated that the accused had been implicated in the present case owing, to the accused scolding and slapping her, as when she came downstairs crying, her mother was present and the accused was falsely implicated at the behest of one Manju Auntie.

38. It is noteworthy that the Prosecutrix was examined in chief initially on 28.09.2016 and on 11.10.2017 and on the said dates of hearing, the Prosecutrix supported the allegations of sexual assault by the accused, It is also relevant to note that on 11.10.2017, the Prosecutrix was declared hostile by Ld. Addl. 'pp for State and was cross-examined by him wherein though the Prosecutrix denied the fact that the accused had gagged her mouth while taking her to the room and also denied that the accused threatened to beat her, however, the Prosecutrix maintained that she made the allegations of sexual assault in her .complaint. The Prosecutrix also maintained that she stated to the police in the complaint that the accused had done wrong act with her 3-4 times prior to the abovesaid incident also.

39. The examination in chief of the Prosecutrix was initially recorded on 28.09.2016 and her further cross-examination was deferred as the FSL report and case property had not been received. Further examination in chief of the Prosecutrix took place on 11.10.2017 and after putting the clothes of the Prosecutrix to her for identification, the Prosecutrix was declared hostile by Ld. Addl. PP for State



and was cross-examined by him wherein she deposed as discussed hereinabove. Thereafter, the cross-examination of the Prosecutrix was deferred as the Counsel for accused was not available owing to Lawyers abstaining work due to strike. The cross examination of the Prosecutrix was thus conducted by Counsel for accused on 23.03.2018 and on that date, the Prosecutrix did not support the prosecution version and took a U-turn and gave a different version viz-a-viz her version given in her examination in chief.”

5. The Prosecution relies upon the decision of the Hon’ble Supreme Court in *Khujji @ Surendra Tiwari v. State of Madhya Pradesh*¹, to argue that in cases where initially in the examination-in-chief, if the survivor has supported the case of the prosecution, then adequate weightage ought to be given to the same. The relevant paragraph is extracted hereunder:

“6.The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such a witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof.”

The Trial Court, however, had considered the medical evidence in the matter, including the MLC, and had finally acquitted the Respondent-Accused.

6. This Court has also considered the medical evidence which shows that on the 7 year old prosecutrix there was no external injury which was fresh on any part of the body or the genitalia and even the hymen was intact.

7. Considering that the age of the prosecutrix, the above medical evidence belies the allegation of aggravated penetrative sexual assault. Moreover, the

¹ (1991) 3 SCC 627



survivor has also tried to give an explanation as to why she had changed her version from the examination-in-chief in the cross-examination, wherein, she has stated that she was told by her *chachi* to give such evidence against the Respondent.

8. With respect to other witnesses PW-14's (mother of the prosecutrix) testimony is also contrary to the case of the prosecution. Both the survivor and her mother have not given any evidence in support of the complaint on the basis of which the FIR in the present case was registered. PW-3 who is the cousin brother of the survivor was neither an eye-witness nor was he present at the time of the incident and he was merely apprised as to what transpired by his *chachi* upon which he made the call to the police. Thus, no personal knowledge can be attributed to PW-3.

9. In the overall facts and circumstances, as also considering the fact that the Trial Court has given the benefit of doubt to the Respondent, the Trial Court judgement does not warrant interference.

10. Under these circumstances no case is made out for grant of leave to appeal against the judgement of acquittal of the Respondent. The leave petition is accordingly dismissed.

11. Pending application(s), if any, also stand disposed of.

PRATHIBA M. SINGH
JUDGE

AMIT SHARMA
JUDGE

SEPTEMBER 24, 2024/sn/Am