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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.L.P. 486/2017 & CrI. M. A. No.13841/2017**

STATE

..... Petitioner

Through: Mr Amit Gupta, APP for State.

versus

RAJU

..... Respondent

Through Mr. Harsh Vardhan Sharma,
Advocate.
W/SI Prabha, P.S. R. G. Metro.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
07.02.2020

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VIBHU BAKHRU, J

1. The petitioner has filed the present leave to appeal against a judgment dated 10.01.2017 rendered by Special Judge (POCSO Act)/ASJ-01 (Central Delhi) Tis Hazari Courts, whereby the respondent was acquitted of the charges of committing offences punishable under Sections 363/354/354A of the Indian Penal Code, 1860 (IPC) and Section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act).

2. The said proceedings arose from the FIR No. 130/2014 under Sections 308/323/354B/34 of the IPC, registered with PS Prasad Nagar. The case of the prosecution is that on 15.03.2014, on the basis of information received from one Brij Mohan, police officials reached at

House No. 16/226 I, Bapa Nagar, Delhi where they found the respondent alongwith a young child 'R' (her name is withheld for protecting her identity). Initially, R claimed herself to be the daughter of the respondent, however, on verification, it was found that she was not his daughter. Thereafter, the child was taken to her father and her statement led to the registration of the FIR in question (FIR No. 130/14).

3. The victim's statement was recorded under Section 164 of the CrPC, wherein she stated that on the day of *choti holi*, she was going to her father. On her way, she met her father's friend Raju (accused/respondent) who took her to Anand Parbat in an auto-rickshaw. She stated that he took her to a room in his house and closed the door of the said room. Thereafter, he started misbehaving with her and touched her inappropriately at her private part (*galat jagah*; "*bathroom ki jagah par haath laga rahe the*"). She raised an alarm and thereafter, his nephew came and asked the accused to leave her or he would call the police. Both accused and his nephew had an altercation thereafter and then, the said bhaiyya called the police. After the police arrived at the spot, the accused asked the victim to tell the police that he was her father otherwise he won't drop her to her father's place. She stated that under fear of this threat, she told the police that the accused was her father. Thereafter, the police took the accused to the police station.

4. On the basis of the allegations, charges for commission of offences under Sections 363/354/354A of the IPC and Section 10 of the POCSO Act, were framed against the petitioner. He pleaded not guilty

to those charges and the matter was set down for trial.

5. During the trial, the prosecution examined seven witnesses. The victim (R), who was 10 years old at the material time, deposed as PW2. She was examined in question-answer format, wherein she stated that she knew the respondent and he used to come to their house as he was her father's friend. She further deposed that one day, the respondent had met her on the way at about 3 pm while she was coming back from school. She was going to her father's shop after school. In the pretext of giving her *pichkari* and balloon, he took her Anand Parbat in auto-rickshaw. He took her to the first floor of his house and after taking her inside the room, he touched her private part (*shushu*) over the clothes. She raised an alarm and as a result, one person (*bhaiyya*) came there. Thereafter, the accused (respondent herein) asked her to not raise the alarm otherwise he would not take her to her father's shop. She further deposed that the said person enquired from the accused as to why he had brought R there. In reply, the accused told him to mind his own business. There was a small altercation between the accused and the said person. Thereafter, the said person called the police. According to R, the accused had asked her to tell the police that he was her father. Thereafter, the police arrived and she told the police that she was the daughter of the accused. Thereafter, the police took her to her father's shop, from where she alongwith her sister and father went to the police station. She stated that her statement was recorded in the police station.

6. In her cross-examination, she stated that the accused had taken her to his home with the permission of her father and the purpose of

taking her was to buy “*pichkari*” and balloons for her. She further deposed that the accused had met her at 02:45 pm and the police had arrived at 03:00 pm. She stated that after they had reached the accused’s house, he left her in the room and went outside to bring *pakoras* for her. Thereafter, the “*bhaiyya* (the informant PW6) *had come there after about five minutes when we ate pakoras.*” She further deposed that she did not raise any alarm when she was eating *pakoras* with the accused and when the said *bhaiyya* came to the room. She accepted that the said informant had reached there by chance and not by any alarm. She had further told police that the accused had touched her *shushu* over her clothes.

7. It was the case of the defence that there were no public witnesses despite the presence of persons at the said place and the FIR in question was registered after about six hours. Further, the victim (the child) was of ten years of age and after her statements in her cross-examination, she could not be treated as a reliable witness. It was further contended that the child was taken by the accused (the respondent herein) with her father’s consent and thus, no offence of kidnapping could be made out.

8. The Trial Court, after examining the evidence as obtaining in the case, observed that the prosecution’s case rests solely on the testimony of the child (the victim). The court observed that and while evaluating her testimony, it had to be kept in mind that the child is of impressionable age (10 years of age). The Trial Court, in the light of observations made in *Dattu Ramrao Sakhare v. State of Maharashtra: (1997) 5 SCC 341* regarding the reliability on the evidence obtained

through a child witness, held that in the circumstances of the case, expecting PW2 to be precise about the time would be unreasonable specially keeping in view her age and understanding. The Trial Court perused her testimony and found out that the incident occurred in the afternoon on 15.03.2014 and this fact was corroborated by the testimony of other witnesses – PW3 Ct. Irfan Mohd., PW4 HC Naresh Kumar and PW6 Brij Mohan. According to PW3, he went to the spot at about 03:45 pm. Further, it was deposed by PW4 – who was working as the duty officer – that he recorded DD No. 20A on 15.03.2014 at about 03:42 pm. PW6 deposed that the timings of the arrival of the accused alongwith the victim at Bapa Nagar, Pyare Lal Road, I Block Gali No. 2, Delhi was at about 03:00 pm - 03:30 pm. Thus, it was evident that the incident had occurred at around 03:00 pm or so and thus, any minor discrepancies in the timings were of no consequence.

9. As regards to the non-joining of public witnesses, the Trial Court observed that although 10-15 persons had gathered at the spot, the non-joining of other public witnesses was inconsequential as the informant Brij Mohan (PW-6) was a member of the public.

10. However, the Trial Court held that the statements made by the victim in her cross-examination proved fatal to the case of the prosecution, as she had deposed in her cross-examination that she was taken by the accused to his house with the permission of her father and the accused had done the same in order to buy *pichkari* and balloons for her. In the circumstances, the allegations under Section 363 of the IPC could not be sustained against the accused, as he did not take away the

victim from her lawful guardian by any foul means. The Court further observed that in her examination, the victim had stated that the accused had taken her inside the room and had inappropriately touched her over the clothes and thereafter, she raised an alarm. Whereas, in her cross-examination, she stated that the accused, after taking her to his house, had gone outside to bring *pakor*s which were eaten by both of them together. PW6 had arrived at the spot after about five minutes of the consumption of the *pakor*s and she further confirmed that PW-6 had arrived there by chance as she did not raise any alarm.

11. The Trial Court observed that the testimony of PW-6 was contrary to that of the victim, as PW6 had deposed that he had noticed the accused coming alongwith the victim in his room and he had gone to the room of the accused and enquired about the girl. He was not satisfied and got suspicious, thereafter, he made a call to the PCR suspecting some foul-play. According to the Trial Court, this indicated that he arrived at the spot without any alarm or reason and there is no explanation as to how the accused, after having a small altercation with PW-6, went to fetch *pakor*s and ate the same as well along with the victim. In the circumstances, the Trial Court held that the *“corroborative piece of evidence in the shape of PW6 was unable to corroborate, supplement and substantiate the testimony of the victim, rather his own testimony comes under cloud.”*

12. The Trial Court further held that during the incident, the victim was helpless for a period of 15-20 minutes and in the scenario, the accused could have made an attempt to do something inappropriate by

taking her clothes off but no such attempt was made on his behalf. Thus, the intention to commit the molestation or outrage the modesty of the child could not be inferred. Although the victim had stated that she was touched inappropriately, the possibility of she getting touched unintentionally could not be ruled out.

13. In view of the above, the accused was given the benefit of doubt and was acquitted of all the charges put against him.

14. The case of the prosecution rested, principally, on two witnesses – the victim who was examined as PW2 and one Brij Mohan (the nephew of the accused) who was examined as PW6. Undeniably, the testimony of both – the victim and PW6 – raise doubts as to the case set up by the prosecution. PW6 has testified that he had gone to the room of his *chacha* (the accused) and had seen that he had brought a little girl in his room. He stated that he enquired from his *chacha* as to who is the girl and in response, he stated that she was his daughter. The respondent (accused) is unmarried. PW6 stated that the accused had asked him to go to his house and he released that there was something wrong happening and he made a PCR call.

15. It is relevant to note that PW6 did not state that he arrived on the spot on hearing any alarm from the victim. On the contrary, he stated that he went to the room as he had seen that he had brought a little girl to his room. In his cross-examination, he stated that he had followed the respondent when he was taking the girl into his room. This testimony is inconsistent with the statement made by PW2 (victim). In her initial

statement, she had stated that the respondent had taken her inside the room and he had touched her private part over her clothes and she had raised an alarm. In response to a question whether any person had come after hearing the alarm, she responded that one *bhaiya*, identified as PW6, had come there. In here cross-examination, the victim stated that she had reached the house at about 03:00 pm to 03:30 pm and *bhaiya* (referring to PW6) had come there after about 15 to 20 minutes. She also stated that the respondent had left her in a room and had gone outside to bring *pakor*s for her. Thereafter, she and respondent had eaten them. Her statement was contrary to PW6. Her testimony raises serious doubts as to the testimony of PW6 that he had followed the respondent and the girl to his room. If the victim's statement is accepted, it would mean that she was in the room for a considerable period of time before PW6 had arrived there. This would also include the time she was alone in the room on account of the respondent having gone to fetch *pakor*s.

16. There is a serious doubt whether the victim had raised any alarm, as stated by her in her initial examination. This is so because PW6 does not testify of hearing any alarm. The victim in her cross-examination also confirmed that PW6 had come there by chance and not by hearing any alarm. In fact, she had responded in the negative to a question whether she had raised any alarm when she was eating *pakor*s with the accused and when the said *bhaiya* had come to the room.

17. It appears from her statement that the accused had gone out to get *pakor*s leaving her in the room. He had come back with *pakor*s and

they both had eaten them and at no point she had raised any alarm. PW6 had come to the room about five minutes thereafter and even at that stage, she had not raised any alarm. This has raised doubt as to whether the alleged incident had, in fact, occurred. According to the victim, she had raised an alarm immediately. If her testimony regarding raising the alarm is discounted, a doubt as to her statement regarding the commission of the alleged offence would inevitably follow.

18. It is also important to note that the prosecution's case was of the victim being kidnapped. In the context of this allegation, the act and the actions of the respondent taking her into his room has sinister overtones. However, the prosecution's case that the respondent had kidnapped the victim has been unambiguously demolished, as he had taken the petitioner with the due consent of her father. The fact that he had brought *pakor*s for her also give an impression that he was indulging her as one would indulge any child. The Trial Court had also noted that if the respondent had any further evil designs with regard to the victim, he had sufficient opportunity to execute the same but the fact that he did not do so, raises a doubt as to whether he had, in fact, touched her private part over the clothes, as alleged.

19. Although the Court is normally reluctant to entertain the testimony as to the statement made by child witness, however, in the present case, part of the statement made by the victim is not found to be correct and thus, a doubt is raised as to her statement as to the alleged offence. The statements made by the victim also remained uncorroborated. It is important to bear in mind that in the present case,

there is no possibility of any medical or any forensic evidence as no offence, which would possibly leave any such footprint, is alleged to have been committed. The punishment for offences under the POCSO Act is severe and thus, it becomes necessary for the prosecution to clearly establish the same. The prosecution is required to meet the necessary standards of proof – establishing that the respondent was guilty of the offence charged beyond any reasonable doubt.

20. In *Ghurey Lal v. State of Uttar Pradesh: (2008) 10 SCC 450*, the Supreme Court had observed as under: -

“69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappraise the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.
2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.
3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.”

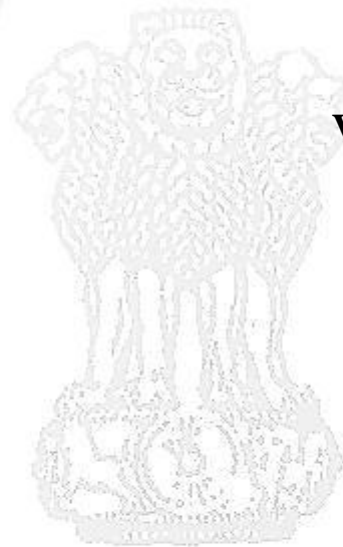
21. In the present case, this Court is unable to find any substantial or

compelling reason for overruling the decision of the Trial Court to acquit the respondent. The Trial Court has evaluated the evidence and its opinion that the prosecution has failed to meet the standard of proof (beyond reasonable doubt) required to convict the respondent, is a plausible one.

22. The petition is, accordingly, dismissed. The pending application is also disposed of.

FEBRUARY 07, 2020
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VIBHU BAKHRU, J



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