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

*Date of Decision: 05<sup>th</sup> November 2019*

+ **CRL.L.P. 687/2018**

STATE (NCT OF DELHI)

..... Petitioner

Through:

Mr. Amit Gupta, APP for the State with  
Insp. Sukrampal, PS Bharat Nagar

versus

OM PRAKASH@FUFAJI

..... Respondent

Through:

Mr. D.S. Paweriya, Advocate with  
Mr. Amrish Kumar, Advocate

**CORAM:**

**HON'BLE MR. JUSTICE MANMOHAN**

**HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL**

**J U D G M E N T**

**SANGITA DHINGRA SEHGAL, J (Oral)**

1. By the present Leave Petition filed under Section 378 (1) of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.') the State seeks leave to appeal against the judgment dated 21.08.2018 passed by the learned Additional Sessions Judge-01, Special Court (POCSO) North West District, Rohini Court, New Delhi, whereby the respondent (accused before the Trial Court) was acquitted of the charges punishable under Sections 363/376/506/511 of the Indian Penal Code (hereinafter referred to as 'IPC') and Sections 8/10/12 of

Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO').

2. The brief facts of the case, as mentioned by the learned Trial Court are reproduced as under:

*“Brief facts of the prosecution case are that DD No.28A dated 25.07.2013 was recorded on a PCR call at about 8.00 p.m. regarding attempt of rape with 4 years old daughter of the caller by the neighbour. IO reached the spot where he came to know that victim has already been taken to BJRM hospital. IO reached there and collected the MLC of the victim and recorded the statement of the mother of the victim who stated that today at about 1.30 p.m. she sent her victim daughter to the shop of one Tulsi Ram to take some eatables. After some time, victim daughter returned weeping and on inquiry informed that fufaji had taken her to his jhuggi on the pretext of giving some money and there he removed her underwear and applied oil on her private part and tried to commit wrong act. When the victim started weeping, he gave her 5 rupee coin and told her not to tell about this to her mother. The victim children purchased some eatables of Rs.2/- out of Rs.5/- given by the accused and balance Rs.3/- were given to the complainant. The complainant waited for her husband who came home at about 8.00 p.m. and he was informed about the incident and then PCR was called. On her statement, present FIR was registered and accused was arrested. IO prepared the site plan and got the statement of the victim u/s 164 Cr.P.C. recorded where she stated that Om Prakash who is her fufa had removed her underwear and had applied oil at her shu shu wali jagah and also put knife on her throat and when she started crying he gave her 5 rupees and asked her not to tell her mother. IO collected the age proof of the victim and after*

*completion of investigation, chargesheet was filed. Copy supplied to the accused.*

*Charges for commission of offence punishable under Sections 363/506 IPC and Section 10 of the POCSO Act were framed against the accused on 07.02.2014 to which the accused pleaded not guilty and claimed trial.”*

3. In order to bring home the guilt of the accused person, the prosecution examined 10 witnesses in all. The incriminating evidence and circumstances were put to the accused person under Section 313 of Code of Criminal Procedure wherein he pleaded to have been falsely implicated in the present case and examined three witnesses in his defence.
4. The Trial Court in the impugned judgment while acquitting respondent-accused has held as under:-

*“11. Coming to the main incident, the victim has materially changed her statement as far as act of the accused is concerned while deposing in the court. In her statement given to Ld. M.M. u/s 164 Cr.P.C. Ex.PW8/B she has stated that “unhone meri kachhi utar di. Wo meri shu shu jagah par tel lagate hain Unhone mere gale par chaku lagaya. Mein jor jor se rone lagi. Fir fufaji ne mujhe 5 rupey diye aur mujhe bola ki ghar main mummy ko mat batana. Wo bahut gande hain.” (he removed my underwear. He applied oil on my shu shu. He put knife on my throat. I started crying. Then accused gave me 5 rupees and asked not to tell my mother. He is bad). However, in the statement given by victim in the court, she altogether changed the alleged act of the accused and stated that accused did wrong act after removing her underwear and his underwear. After removing underwear, he was putting knife and he was doing gandhi baat with his ‘punnu’ and he inserted his ‘punnu’. This act of the*

*accused stated in the court is altogether different as the victim nowhere talks about applying oil while deposing in the court whereas she never stated about doing any act with the punnu while giving statement u/s 164 Cr.PC .....*

*12. In the present case, admittedly the child has deviated materially from her version given to the Ld. M.M. while deposing in the court and as such conviction on her sole testimony which is not corroborated by any other evidence cannot be based. Further, it is relevant to note that in the medical examination of the victim, not only that there was no sign of any type of injury rather, the doctor has specifically observed that there are no signs suggestive of sexual abuse. The IO who was subsequently cross examined after the matter was remanded back by Hon'ble High Court has admitted that she did not seize the underwear of the victim to establish the oils stains on the underwear alleged to be applied by the accused. Further, IO admitted that the place of occurrence was a densely populated area yet no independent witness was joined in the investigation despite the complainant's claim that after coming to know about the incident she rushed to the house of accused and a quarrel took place and accused ran away and despite her efforts none of the neighbours helped her. In those circumstances, IO should have at least interrogated any of the those neighbours to establish that a quarrel took place between the complainant and the accused immediately after the incident. No such effort was made by investigating agency to corroborate the statement of the victim. Further, it was never the case of the prosecution that accused also removed his underwear at the time of alleged incident and the victim made improvements in this regard while deposing in the court when she said that accused removed her underwear as well as his underwear at the time of alleged act. Entire material*

*on record creates a suspicion regarding the incident and the benefit of suspicion goes to the accused. The prosecution has failed to prove the guilt of the accused beyond reasonable doubt. Accused is acquitted accordingly. He is in judicial. He be released forthwith, if not wanted in any other case.”*

5. Aggrieved by the impugned judgment Mr. Amit Gupta learned counsel appearing for the State argued that the impugned judgment dated 21.08.2018 is based on conjectures, surmises and the learned Trial Court has not appreciated the testimony of the prosecutrix in its right perspective ignoring the well-settled proposition of law that the sole testimony of the victim in the case of sexual assault is sufficient to base conviction of the accused.
6. Learned counsel for the State further contended that the learned Trial Court has placed undue weightage to minor discrepancies in the statements of the prosecutrix (PW-4) contrary to which her statement is consistent and corroborative in nature and there are no major omissions and contradictions in her testimony. He further submits that the Trial Court failed to appreciate that there is a presumption under Sections 29 and 30 of POCSO Act against the respondent-accused and it is for the respondent-accused to prove to the contrary.
7. Learned counsel for the State further relied on the judgment dated 03.11.2015, passed in the captioned case by Mr. Vinod Yadav, learned Additional Sessions Judge-01, North West District, Rohini Court New Delhi, in Sessions Case No. 166.2013, wherein the trial court on the basis of same set of evidence had convicted the

Respondent-accused for five years with a fine of Rs. 5000/- for the offence punishable under Section 10 of the POCSO Act.

8. Per contra, Mr. D.S. Paweriya, learned counsel for the respondent contended that there is no infirmity in the impugned judgment passed by the learned Trial Court and no interference is called for. He further contended that the testimony of prosecutrix is bristled with a lot of contradictions, inconsistencies and improvements. She has given different versions in her statements recorded at different stages. Counsel admitted that it is true that the sole testimony of the prosecutrix in a case of rape can form the basis for conviction of the accused if the same inspires confidence of the Court, but in the instant case, the sole testimony of the prosecutrix is not sufficient to establish a case of rape against the respondent as the medical evidence does not corroborate the oral testimony of the prosecutrix and the above alleged case is based on the foundation of maliciously slandering the respondent.
9. We have heard the learned counsel for the parties and perused the material available on record.
10. It is a settled principle of law that conviction can be based on the sole testimony of the victim of sexual assault without corroboration from any other evidence and where the testimony of a victim of sexual assault instills confidence in the Court the same can be relied upon for conviction of the accused. It is also a well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the victim is not a requirement of law but a guidance to prudence under the given circumstances. In *State of Himachal*

***Pradesh Vs. Manga Singh*** reported in **2018 (15) SCALE 895**, the Apex Court has observed as under: -

*"11. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law; but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.*

*12. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court."*

11. In view of the settled law, we shall now examine whether the evidence adduced by the prosecution, particularly the testimony of the victim is trustworthy, credible and can be relied upon or not. The prosecutrix was examined as PW-4 and the relevant portion from her examination in-chief has been reproduced below:-

*"After being satisfied that the witness is capable of understanding questions and answering them reasonably, considering her age, her testimony is recorded in*

*question answer form as under. However, considering her tender age she has not been administered oath.*

*Q. Kya hua tha?*

*A. Me chij laine gayi thi, uncle pakad kar le gaye.*

*Q. Unka kya naam hai?*

*A. Pardhan.*

*Q. Phir kya hua tha?*

*A. Who apne ghar par le gaye the.*

*Q. Phir kya hua?*

*A. Kachhi uttar kar gandhi baat karne lag gaye the.*

*Q. Beta kiski kachhi uttari thi?*

*A. Meri aur apni.*

*Q. Beta batao uncle ne kya gandhi baat kari thi?*

*A. Kachhi uttar kar chaku laga rahe the, gandhi baat kar rahe the.*

*Q. Kya gandhi baat kar rahe the?*

*A. Apne punnu se.*

*Q. Punnu kya hota hai?*

*A. Punnu se gandhi baat hoti hai.*

*Q. Punnu se kya kiya tha?*

*A. Punnu ke andar ghusaya tha.*

*Q. Phir kya hua tha?*

*A. Mein ghar aa gayi thi aur mummy ko bataya tha. Mummy ne police me pakadwa diya tha.*

*Q. Kya aap pehle bhi Court me aaye the?*

*A. Ha. Aunty ke paas aaye the (the witness of victim u/s. 164 Cr.P.C. has been recorded by learned MM Ms. Vandana.)”*

12. The learned Trial Court has pointed out that there are material contradictions in the testimony of the victim recorded under Section 164 of the Cr.P.C and in her deposition before court. In her statement recorded under Section 164 of the Cr.P.C, she deposed ‘*unhone meri kachi utar di thi. Wo meri shu shu wali jagah par tael lagate hain. Unhone mere gale par chaku lagaya. Mein jor-jor seh roneh lagi. Fir*

*fufaji ne mujhe 5 rupey diye aur mujhe bola ki ghar mai mummy ko mat batana. Woh bahut gande hain.*’ It is also of vital concern that in her statement recorded under Section 164 Cr.P.C, there are no specific allegations of penetrative sexual assault against the respondent, however, in her deposition before court, she has altered her version and has stated that the accused after removing her underwear had penetrated her vagina with his private part.

13. Perusal of the impugned judgment also reveals that the medical evidence on record (i.e. MLC No. 63156) does not corroborate the version deposed to the prosecution. The medical report of the prosecutrix (PW-4) states that the hymen was intact with no fresh external injuries and the doctor had opined that there are no suggestive signs of sexual abuse. Consequently, there is no medical or forensic evidence available on record to corroborate the testimony of the prosecutrix (PW-4) and which could support the offence of rape having been committed upon her.
14. Though this Court finds merit in the submission of learned APP for State that the prosecutrix (PW-4) was a minor on the date of the incident and the presumption under Section 29 and 30 of the POCSO Act would be attracted, yet the contradictory versions of the prosecutrix on material points at various stages of the proceedings create a serious doubt about the truthfulness of the prosecutrix. Further the judgment dated 03.11.2015 passed in Sessions Case No. 166/2013, relied by the learned APP for State is of no consequence as the same was set aside by the High Court vide order dated 16.06.2017. This Court is further in agreement with the finding of the

Trial Court that the discrepancies and inconsistencies in the statements of the prosecutrix (PW-4) at different stages are not minor in nature and go to the root of the matter. Consequently, this Court is of the view that there is no bar in law to convict the accused on the basis of the sole testimony of the victim, however, the Court must be satisfied that the testimony of the victim is of sterling quality and inspires confidence.

15. It is settled law that any acquittal order cannot be lightly interfered with by the Appellate Court, though it has wide powers to review the evidence and to come to its own conclusion. Further, the power to grant leave must be exercised with care and caution because the presumption of innocence is further strengthened by the acquittal of an accused. In similar circumstances, in *State v. Kaishar Ali [CRL.L.P. 188/2018, decided on 30th August, 2019]*, we have held as under:-

*“13. The Apex Court in Ghurey Lal vs. State of Uttar Pradesh, (2008) 10 SCC 450 has held 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 re-appreciate 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.***

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

***This list is intended to be illustrative, not exhaustive.***

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached—one that leads to acquittal, the other to conviction—the High Courts/appellate courts must rule in favour of the accused.

*71. Had the well-settled principles been followed by the High Court, the accused would have been set free long ago. Though the appellate court's power is wide and extensive, it must be used with great care and caution."*

*(Emphasis Supplied)*

16. For the abovementioned reasons, this Court does not find any reason to interfere with the impugned judgment.
17. Accordingly, the present leave petition, being bereft of merit, is dismissed.

**SANGITA DHINGRA SEHGAL, J.**

**MANMOHAN, J.**

**NOVEMBER 5, 2019**

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