IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on:07.03.2025

\+ **CRL.L.P. 602/2019**

STATE .....Petitioner

versus

SACHIN ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Utkarsh, APP for the State
SI Deepak Kumar, PS- Jh.Puri

For the Respondent : Ms. Sunita Arora (DHCLSC), Adv.

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HON'BLE MR JUSTICE AMIT MAHAJAN

JUDGMENT

1. The present petition is filed under Section 378 of the Code of Criminal Procedure, 1973 ('**CrPC**') seeking leave to challenge the judgment dated 07.09.2019 (hereafter '**the impugned judgment**'), in Sessions Case No. 57862/2016 arising out of FIR No. 237/2013, registered at Police Station Jahangir Puri, whereby the learned Trial Court had acquitted the respondent of the offences under Section 354B of the Indian Penal Code, 1860 ('**IPC**') and Section 10 of the

Protection of Children from Sexual Offences Act, 2012 ('**POCSO Act**').

2. The brief facts of the present case are that on the intervening night of 14.07.2013 and 15.07.2013, when the complainant (victim's mother) along with her family members was sleeping on the terrace of her house, she woke up suddenly around 3 AM. It is alleged that the complainant allegedly saw that the respondent was removing the *pajami* of her daughter 'L', who was 10 years old at that time, and that he had also unzipped his pant. It is alleged that the complainant caught hold of the respondent and raised an alarm, due to which, her family members woke up and a call was made to the police.

3. Thereafter, FIR No. 237/2013 was registered at Police Station Jahangir Puri for offence under Section 354 of the IPC. Chargesheet was filed against the respondent for offences under Section 354B of the IPC and Section 10 of the POCSO Act.

4. It is the case of the prosecution that the accused respondent was apprehended by the father of the victim and handed over to the police, whereafter, he was arrested

5. The learned Trial Court initially framed alternative charges against the respondent by order dated 17.10.2013 for the offences under Section 354B of the IPC and Section 10 of the POCSO Act. Later on, it was found that the alleged act was covered under both the aforesaid Sections and the amended charge was framed on 03.08.2019. Both the prosecution as well as the accused conceded that no fresh witness was to be examined and no existing witness was

required to be cross-examined. It was also conceded that there was no requirement for modification of the statement of the accused under Section 313 of the CrPC.

6. The learned Trial Court, by the impugned judgment, acquitted the respondent of the charged offences and observed that testimony of the complainant was unreliable due to contradictions and inconsistency, and the respondent was entitled to benefit of doubt in such circumstances.

7. The learned Trial Court took into consideration the testimonies of the prosecution witnesses and observed that it was only the complainant who was the eye witness of the incident as according to the evidence of the paternal aunt (PW6) and father of the victim (PW7), they were asleep at the time of the incident and woke up when the complainant raised alarm.It was noted that the victim child did not notice anything amiss and it was only the complainant, who woke up suddenly, and saw the incident. The learned Trial Court also took note of a number of other discrepancies in the version of the complainant and also took into account that even though the incident took place in a crowded locality where abundant people would have been sleeping in the *galis* as well as the terrace of their small houses, however, nobody saw the accused respondent going to the terrace of the victim's house. It was also noted that although as per the father of the victim, a number of persons gathered on the spot after the respondent was apprehended, however, no independent witness was joined to corroborate the same.

8. The learned Additional Public Prosecutor for the State submitted that the impugned judgment is based on conjectures and surmises and as such cannot stand the scrutiny of law and liable to be set aside.

9. He submitted that the learned Trial Court has acquitted the respondent on account of some discrepancies in the statement of the complainant. He contended that the learned Trial Court had failed to appreciate the evidence that surfaced during the course of the trial.

10. He submitted that the statement of the victim is consistent throughout and she has implicated the accused with certainty and attributed specific role to him. He submitted that the learned Trial Court disbelieved the victim without any plausible reason and gave undue importance to minor contradictions.

11. He submitted that it is trite law that conviction can be sustained on the sole testimony of the victim and in the present case the prosecutrix has clearly named the accused in her statements.

12. He submitted that the learned Trial Court also erred in not giving due weightage to the testimony of the complainant (PW2) and the father of the victim (PW7) who had reiterated the allegations.

13. He submitted that there is evidence of unimpeachable character which supports the case of the prosecution and the accused ought to be convicted in the present case.

14. He submitted that in view of Section 29 of the POCSO Act, the Court is bound to draw a presumption in favour of the victim.

15. The learned counsel for the respondent submitted that the learned Trial Court has rightly acquitted the respondent after duly considering the evidence of the prosecution witnesses.

ANALYSIS

16. It is trite law that this Court must exercise caution and should only interfere in an appeal against acquittal where there are substantial and compelling reasons to do so. At the stage of grant of leave to appeal, the High Court has to see whether a *prima facie* case is made out in favour of the appellant or if such arguable points have been raised which would merit interference.The Hon'ble Apex Court in the case of ***State of Maharashtra v. Sujay Mangesh Poyarekar*: (2008) 9 SCC 475** held as under:

> *"**19.** Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.*
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> ***20. In our opinion, however, in deciding the question whether requisite leave should or should not be granted, the High Court must apply its mind, consider whether a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside.***
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> ***21. It cannot be laid down as an abstract proposition of law of universal application that each and every petition seeking leave to prefer an appeal against an order of acquittal recorded by a trial court must be allowed by the appellate court and every appeal must be admitted and decided on merits.** But it also cannot be overlooked that at that stage, the court would not enter into minute*

details of the prosecution evidence and refuse leave observing that the judgment of acquittal recorded by the trial court could not be said to be "perverse" and, hence, no leave should be granted.

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24. *We may hasten to clarify that we may not be understood to have laid down an inviolable rule that no leave should be refused by the appellate court against an order of acquittal recorded by the trial court.* ***We only state that in such cases, the appellate court must consider the relevant material, sworn testimonies of prosecution witnesses and record reasons why leave sought by the State should not be granted and the order of acquittal recorded by the trial court should not be disturbed. Where there is application of mind by the appellate court and reasons (may be in brief) in support of such view are recorded, the order of the court may not be said to be illegal or objectionable.*** *At the same time, however, if arguable points have been raised, if the material on record discloses deeper scrutiny and reappreciation, review or reconsideration of evidence, the appellate court must grant leave as sought and decide the appeal on merits. In the case on hand, the High Court, with respect, did neither. In the opinion of the High Court, the case did not require grant of leave. But it also failed to record reasons for refusal of such leave."*

(emphasis supplied)

17. In the trial, to prove its case, the prosecution examined twelve witnesses. The learned Trial Court briefly discussed the testimonies of the six formal witnesses and two witnesses of investigation, that is, PW5 (teacher from victim's school), PW4 (Magistrate who recorded the statement of the victim under Section 164 of the CrPC), PW8 (police officer who got the subject FIR registered), PW9 (police officer who reduced the receipt of information at 3:25AM into writing), PW11 and PW12 (both of whom are doctors who evidenced the signing of the MLC by their colleagues who had since left the hospital).

18. Thereafter, the learned Trial Court examined the evidence of the four material witnesses– the victim (PW1), her mother/ complainant (PW2), her father (PW7) and her aunt (PW6), on the basis of which, the prosecution has essentially tried to prove the allegations. It is an admitted case that that the same is not corroborated by any other independent evidence.

19. It has been argued by the learned APP that the respondent ought not to have been acquitted merely on account of minor discrepancies in the statements of the victim and the complainant. It is pointed out that the victim has not been considered as an eye witness to the incident as well.

20. As the entire case of the prosecution as well as the grounds of challenge are based on the statements of the material witnesses, including the victim and her family members. Considering the judgment in the case of ***State of Maharashtra v. Sujay Mangesh Poyarekar*** (*supra*), it is imperative to consider their evidence before determining whether leave ought to be granted to the State.

21. Coming to the statement of the victim (PW1), she stated that on the night of the incident she was sleeping on the same cot as her father (PW7) and brother. She also corroborated her statement under Section 164 of the CrPC and stated that the respondent had come to her terrace and removed her *pajami*. The victim further deposed as to the topography of the terrace and stated that there are two ways of coming to the terrace–either from the staircase that was constructed on the

outside or crossing over the adjoining roof, and admitted that the house of the respondent is not adjacent to her house.

22. The victim is a child victim and minor contradictions in her statement would not adversely impact the matter. It is trite law that the accused can be convicted solely on the basis of evidence of the complainant / victim as long as same inspires confidence and corroboration is not necessary for the same [Ref. ***Nirmal Premkumar v. State*** **: 2024 SCC OnLine SC 260**].

23. However, as also appreciated by the learned Trial Court, the victim in her cross-examination stated that she did not notice the respondent removing her *pajami* as she was sleeping. It was noted that the victim did not notice anything amiss even though the act of lowering her *pajami* would have disturbed her. It was also noted that strangely, the two other persons sleeping on the cot with the victim also did not notice anything amiss.

24. It was due to this that the learned Trial Court rightly treated only the complainant as the eye witness to the incident as the father of the victim (PW7) stated that he woke up when his wife (the complainant) raised alarm and the paternal aunt of the victim (PW6) also stated that she found out about the incident after alarm was raised by the complainant and did not witness the incident herself. The said conclusion does not appear to be erroneous. Even so, from a bare perusal of the impugned judgment, it cannot be said that the evidence of the victim was not duly appreciated by the learned Trial Court. The initial testimony suggests that the victim herself saw the incident

happen, however, she has later categorically stated that she was asleep. The same goes to the very root of the matter and has rightly been taken note of by the learned Trial Court.

25. It is also argued by the learned APP that due consideration has not been given to the statements of the complainant (PW2) and PW7.

26. At this juncture, this Court first considers it apposite to take note of the discrepancies in the statement of PW2 that led to the decision of the learned Trial Court. The relevant portion of the impugned judgment is reproduced hereunder:

> *"39. This leaves us, at the end, with , and therefore her testimony needs to be scrutinized with due care and caution, especially since in. a crowded locality, in hot summer month, when people would have been present In abundance, sleeping in the gali as well as on the terraces of their small houses in the neighbourhood of the victim's house in Jahangir Puri, nobody else ever saw the accused going up to the terrace of the victim.*
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> *40. As per PW 2, as deposed by her in her examination in chief, the incident took place at about 3.00 PM, when she suddenly woke up and found that the accused was lowering pajami of her daughter and that the zip of his pant was in open condition. In her examination in chief, PW 2 deposed that her daughter was sleeping on the terrace of his house on the cot, while she was sleeping on the ground on the terrace itself, whereas in her cross-examination, she stated that she was sleeping on the cot adjoining to the cot, on which her daughter was sleeping, and the position of her daughter was towards her. If that be the case, either there was no space between the two cots, then where exactly was the accused sitting and removing the pajami of the victim, is not clarified, or if there was space between the two cots, on which cot had the accused sat for doing the alleged nefarious act, is not explained.*
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> *42. In her examination In chief, PW 2 stated that she woke up at 3.00 AM, when she saw the alleged offence being committed by the accused, but In her cross-examination, she stated that the Incident had happened at around 2.00 AM. Strangely she added a new fact In her cross examination to the effect that the Incident happened at*

around 2.00 AM when she heard the voice of her daughter and thereafter noticed the time on the clock to be about 2.00 AM. As per the testimony of PW 1, who Is daughter of PW 2, she did not notice the accused removing her pajami as she was sleeping, and she did not raise any voice, then from where PW 2 heard the voice of her daughter, is not explained.

43. Further more, a glaring discrepancy comes to the fore on a minute scrutiny of the testimony of the sole eye witness of the occurrence i.e. PW 2, who in her cross-examination, on one hand, stated that the incident took place at about 2.00 AM, though in her cross-examination, she stated the timing of the incident to be 3.00 AM. She also admitted that she had gone to sleep after consuming 'Sehri' (food eaten early in the morning during Ramzaan), may be at 2.00 PM and that after consuming Sehri with her daughter and Jethani, she woke up only in the morning. She also admitted that no incident took place before eating Sehri and that after taking Sehri, she lied down in a room, which was constructed on the terrace and that after taking Sehri, she fell asleep and woke up only in the morning.

44. This being her admission that after consuming Sehri, she went to the room to sleep and woke up only in the morning, makes her version not beyond doubt, as admittedly she never got up before morning, while the alleged occurrence took place after she had consumed Sehri around 2.00 AM or 3.00 AM. A clarification, on this aspect, was brought forth in the re-examination of this witness, but since accused was not afforded an opportunity to cross examine the said witness, as regards her reexamination, the same cannot be considered by the court.

45. At this stage, if the testimony of the husband of PW 2, who has been examined as PW 7, is revisited, in his cross-examination, he has stated that he alongwith his daughter and sister-in-law ate Sehri at about 4.00 AM, while in his examination in chief he has stated that his wife raised an alarm at about 3-3.15 AM, when he had apprehended the accused, which makes the timing of the alleged incident questionable and not established, and even raises a doubt as to whether the incident did actually take place, or not.

46. Noteworthy it Is, at this stage that while in her examination in chief, PW 2 stated that the accused was wearing a pant, the zip of which was in open condition, in her cross-examination, she stated that the accused was wearing only his undergarments, thus bringing out a vital and material contradiction, which goes to the root of the matter.

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> *53. Though, no defence witness has been brought forth by the accused to corroborate his version, but with the ever changing and contrary version of the mother of the victim, the only alleged eye witness who from her own contradictions, makes her presence on the spot of alleged occurrence, and she having witnessed the alleged incident, highly doubtful, and makes the defence of the accused more plausible.*
> *54. In view of the testimony of the only eye witness i.e. mother of the victim examined as PW2, who sometimes stated that she was sleeping in the room, sometimes stated that she was sleeping on the floor, and sometimes stated that she was sleeping on the cot adjoining to the victim, the timings of her going to sleep, her contradictions as regards the clothing of the accused, and the victim herself not having noticed the accused lowering her pajami, I am of the opinion that the prosecution has failed to establish the guilt of the accused, beyond a shadow of reasonable doubt. The contradictions and inconsistency in the testimony of the eye witness, necessarily demand that the benefit of doubt be given to the accused."*

27. To summarise, the learned Trial Court found issue with inconsistency in the evidence of PW2 in relation to where she was sleeping, the time at which she went to sleep, her changing version as to the clothing of the accused and why she woke up in the first place.

28. It is not the case of the prosecution that the learned Trial Court erroneously took note of any fact in the evidence of PW2 but that the inconsistencies are minor in nature. The said argument is meritless.

29. The discrepancies in the statement of PW2 raise a doubt as to her very presence at the spot of occurrence and her having witnessed the incident. First PW2 said that she was sleeping on the ground, then in her cross examination, she first stated that was sleeping on the adjacent cot and then stated she went to sleep in the room constructed on the terrace. She also stated that no incident took place prior to Sehri at around 2 AM and thereafter, she only woke up in the morning. The

learned Trial Court found it dubious as to where the accused was positioned while committing the alleged act. The most clinching aspect that creates a doubt in the testimony of PW2 is that as per her, she woke up due to the voice of the victim, while the victim herself made no mention of raising any alarm and instead said that she was asleep and did not notice anything amiss. If that be so, it is unclear as to what caused PW2 to rouse from her sleep and why PW7 and the victim's brother, who were sleeping on the same cot as her, did not wake up. There is also some inconsistency in relation to the very time of the incident where she first deposed that the incident took place at 3AM and stated in her cross examination that the incident had taken place at 2AM. She further also substantiated that she had seen the time on the clock when she woke up as well.

30. This Court finds no infirmity in the observations made by the learned Trial Court. The said inconsistencies are material in nature and cast a doubt on the case of the prosecution, which has warranted the acquittal of the accused in the present matter. When the entire case is essentially hedged on the testimony of PW2, who allegedly saw the incident and raised alarm, her evidence is to be sifted minutely.

31. Insofar as the testimony of PW7 is concerned, it cannot be said that the same was not appreciated by the learned Trial Court. It was noted that he stated that PW2 had raised alarm around 3- 3:15AM. He stated in his cross-examination and he had eaten Sehri around 4 AM. The learned Trial Court rightly noted that the same creates a doubt as to the timing of the incident. It is also pertinent to note that PW2

stated that no incident took place prior to the Sehri. The relevant portion of the impugned judgment is reproduced hereunder:

> *"45. At this stage, if the testimony of the husband of PW 2, who has been examined as PW 7, is revisited, in his cross-examination, he has stated that he alongwith his daughter and sister-in-law ate Sehri at about 4.00 AM, while in his examination in chief he has stated that his wife raised an alarm at about 3-3.15 AM, when he had apprehended the accused, which makes the timing of the alleged incident questionable and not established, and even raises a doubt as to whether the incident did actually take place, or not.*"

32. The learned Trial Court was also rightly weighed by the absence of independent witnesses who corroborated the version of events and implausibility of the commission of the offence. It was noted that the incident allegedly took place in a thickly populated area in Jahangirpuri and it was the month of Ramzan when people of the Muslim religion would have woken up to eat Sehri around 3-4 AM, despite which, nobody saw the accused coming to the terrace by either skipping through roofs or using the sole staircase leading to the terrace.

33. As also noted by the learned Trial Court, there is a peculiar absence of any MLC or joinder of independent witnesses to show that the accused had sustained any injuries at the hands of public persons when he was apprehended after the incident, as stated by PW7, which would lend corroboration to the version of events.

34. Insofar as the argument regarding the presumption of guilt under Section 29 of the POCSO Act is concerned, the same comes into play once the prosecution establishes the foundational facts. It can be rebutted by discrediting the witnesses through cross-examination as

well [Ref. ***Altaf Ahmed v. State (GNCTD of Delhi)*: 2020 SCC OnLine Del 1938**]. In the present case, as noted by the learned Trial Court, there are grave inconsistencies in relation to spot of incident as well as the time of incident. Moreover, as discussed above, the presence of the accused at the spot has been found to be doubtful. It was in such circumstances that the learned Trial Court opined that while the accused had not led any defence evidence to corroborate his version of being falsely implicated due to religious acrimony, the case of the prosecution was doubtful and the guilt of the accused had not been proved beyond a shadow of doubt.

35. In view of the aforesaid discussion, the possibility of the respondent's false implication cannot be ruled out. This Court is of the opinion that the State has not been able to establish a *prima facie* case in its favour and no arguable ground has been raised to accede to the State's request to grant leave to appeal in the present case.

36. The leave petition is therefore dismissed in the aforesaid terms.

AMIT MAHAJAN, J

MARCH 07, 2025