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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 22.01.2024

+ CRL.L.P. 24/2022 & CRL.M.A. 375/2022

STATE

..... Petitioner

Through: Ms. Manjeet Arya, APP for the State
with SI Jyoti Joshi, PS Mehrauli.

versus

KULDEEP

..... Respondent

Through: Mr. Vineet Mehta, Advocate.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

1. The present petition has been filed by the State under Section 378(1)(b) of Cr.P.C. seeking leave to appeal against the judgment dated 12.09.2019 passed by the learned Trial Court whereby the respondent herein has been acquitted of all the charges.
2. Notice was issued to the respondent who has appeared and contended that the impugned order does not suffer from any infirmity and the learned Trial Court has rightly acquitted him after due appreciation of testimony of both the victims.
3. We have given our thoughtful consideration to the rival contentions and carefully perused the learned Trial Court record.



4. There are two minor victims who have been referred to as 'S' (PW1) and 'PK' (PW2).

5. It is not in dispute that when the matter was first reported to the police, there were very grave allegations against the accused. Both the aforesaid minor girls also made statements under Section 164 Cr.P.C. indicting the accused and keeping in mind the same, the accused was charged.

6. The accused was driver of a school van and both the minor girls used to go to the school in the van driven by him and there are allegations that he had sexually assaulted both of them. As per the charge framed against the accused, the accused had committed rape upon 'PK' (aged about 3 years 9 months) during the period 09.03.2015 to 16.03.2015 and committed aggravated penetrative sexual assault upon her at the school in question and used criminal force against her and even threatened her. Qua the other victim 'S' (aged about 3 years 3 months), he committed aggravated sexual assault upon her in the school in question. The charges were framed against him for the offences punishable under sections 376 (2) IPC (qua victim Ms. 'PK') / 354 IPC (qua victims Ms. 'PK' and Ms. 'S') / 506 IPC and for the offences under section 6 read with section 5 (qua victim Ms. 'PK') and section 10 read with section 9 (qua victims Ms. 'PK' and Ms. 'S') of the Protection of Children from Sexual Offences Act 2012 (POCSO), to which the accused pleaded not guilty and claimed trial.



7. In order to bring home the guilt of accused, prosecution examined 10 witnesses.

8. Fact, however, remains that the entire outcome of the case is dependent on the testimony of the aforesaid minor victims.

9. We have gone through the testimony of both the victims and it is quite obvious that they both have diluted the nature of allegations to a very large and substantial extent.

10. The statements made by them under Section 164 Cr.P.C. were clearly suggestive of rape and aggravated penetrative assault and of aggravated sexual assault but fact remains that nothing of that kind stood proved when they entered into witness box and deposed before the Court.

11. As per the testimony of victim 'PK', who has been examined as PW2, the accused had merely touched her on her stomach and hands and did not take her anywhere either. She deposed that the accused had touched her with his hands only and that too only once on the day there was a function in the school. She categorically denied that the accused had ever taken off her clothes and indulged in any further act. Specific and pin-pointed questions were put to her but she never came up with any incriminating response against the accused. Her testimony was, thus, not indicative of commission of any rape or penetrative sexual assault or touching of her private part/vagina or removing of her clothes.



12. 'S', who was examined as PW1 has also categorically denied that the accused had touched her vagina or had removed her clothes. In her testimony before the Court, she never said that the accused had removed her clothes. She also merely stated that the accused had touched her. She also failed to elucidate the circumstances under which the accused had touched her.

13. Learned Trial Court, taking note of the fact that there were stark variation in their testimony given before the Court vis-à-vis their statements made under Section 164 Cr.P.C, came to the conclusion that they were unreliable witnesses and that keeping in mind their tender age, the possibility of tutoring could not have been ruled out. Learned Trial Court also took note of the fact that the accused was a school cab driver and quite possibly, he might have touched them while making them sit in the school cab or while deboarding them from the school van.

14. It also cannot be lost sight of the fact that the victims were not the only children who were travelling in the van driven by the accused. Surprisingly, no other school child or employee or teacher has been examined or arrayed as witness. This assumes importance as the incident had taken place in the school. Moreover, it is not a case where the Court is having any benefit of medical or scientific evidence. Thus, keeping in mind the peculiar facts and circumstances of the case, the learned Trial Court was of the view that the victims could not be treated as sterling witnesses and resultantly granted benefit of doubt to the accused.



15. On careful perusal of trial Court record, we also do not find any compelling reason to take a different view.

16. We are also mindful of the statutory presumption enumerated under Section 29 of the Protection of Children from Sexual Offences Act, 2012. However, the essential precondition remains that it is still the bounden duty of the prosecution to, at least, establish and prove the foundational facts before such presumption is invoked. It is only when the foundational facts are proved, the onus stands shifted on the accused to prove to the contrary.

17. The core duty of the Trial Court remains the meticulous analysis of the evidence led before it and mere fact that there is a statutory presumption would not mean that the prosecution is absolutely relieved of its indispensable obligation of proving basic facts.

18. On careful perusal of the entire record, we are of the view that the learned Trial Court has examined the evidence in a very meticulous manner. If we analyze the statements made by the victims under Section 164 Cr.P.C., and compare those with what they stated before the Court, it would become very obvious that they have diluted to the case to the extent of virtual exoneration of accused. Despite specific questions, they did not make any statement which may indicate any sort of penetrative or aggravated sexual assault.

19. We also can't be oblivious of the fact that the accused had remained behind the bars for a considerable period of 16 months



during the trial and even the learned Addl. P.P. for the State fairly concedes that in view of the testimony of the victims, it, certainly, is not a case of penetrative sexual assault or aggravated sexual assault.

20. Be that as it may, keeping in mind the testimony of both the victims, we are of the considered view that the State has not been able to make out a case compelling us to grant them leave to appeal.

21. Resultantly, we decline leave to appeal. The petition stands dismissed accordingly.

(SURESH KUMAR KAIT)
JUDGE

(MANOJ JAIN)
JUDGE

JANUARY 22, 2024
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