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

+ **CRL.A. 930/2024**

SHIVAM

.....Appellant

Through: Mr. Rajesh Mishra, Adv.

versus

STATE GOVT. OF NCT OF DELHI

.....Respondent

Through: Ms. Kiran Bairwa, APP for the State.

SI Rahul Tomar, PS Gandhi Nagar

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Date of Decision: 03.12.2024

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

CRL.A. 930/2024 and CRL.M(B) 1668/2024

1. The present appeal under Section 415(2) B.N.S.S. of 2023 read with Section 528 of B.N.S.S. of 2023 has been filed against the judgment dated 27.03.2024 and the order on sentence dated 27.05.2024, passed by the Court of ASJ-06, Special Judge (POCSO Act), East District, Karkardooma Courts, Delhi, in S.C. No. 86/2017, arising out of FIR No. 348/2016, under Sections 363/366/354A/354D IPC and 8/12 POCSO.



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2. Vide judgment dated 27.03.2024, the appellant was convicted for offences punishable under Sections 10/12 POCSO along with Sections 354/354A/354D/511 IPC. Vide order on sentence dated 27.05.2024 the appellant was sentenced to SI for 05 years with fine Rs.5000 and in default of fine further SI for 15 days for offence under Section 10 POCSO, SI 03 years with fine Rs.3000 and in default of fine further SI of 10 days for offence under Section 12 POCSO, SI 03 years with fine Rs.3000 and in default of fine further SI of 10 days for offence under Section 354 IPC, SI 03 years 6 months with fine Rs.3000 and in default of fine further SI of 10 days under Section 511 IPC for attempt to commit offence under Section 363 IPC and SI 05 years with fine Rs.5000 and in default of fine further SI of 15 days under Section 511 IPC for attempt to commit offence under Section 366 IPC. All the sentences were ordered to run concurrently.
3. Facts in brief are that on 09.08.2016, the police received a call subsequent to which they went to Gandhi Nagar where the victim's father and uncle had detained the accused/appellant, Shivam. The 12-year-old victim (at the time of incident), a Class-V student, stated that the appellant had been harassing her for the past 4-5 days on her way back home from school, thereby asking her to come to his house and by inappropriately touching her. Furthermore, the victim stated that on the day of the incident, the accused/appellant again approached the victim and tried to drag her towards Som Bazar. The accused was detained by the passer-by and uncle of the victim.



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4. Investigating Officer, SI Neelam, during the course of investigation collected age-related documents of the victim and after completion of investigation charge sheet was filed. Charges were framed against the appellant on 06.01.2018 under Sections 10 and 12 of the POCSO Act and Sections 354, 354A, 354D, and 363/366 IPC.
5. During trial total nine witnesses were examined. The accused/appellant was examined under Section 313 Cr.P.C., wherein he claimed to be not guilty and stated that he had falsely been implicated in the case. It is pertinent to mention that the parents of the victim were not produced by the prosecution and stated to be non traceable.
6. In the present appeal filed, the impugned judgment has been assailed on the following grounds:
 - a) The victim's statement under Section 164 Cr.P.C. contradicts the police report, suggesting manipulation to falsely implicate the appellant. The Trial Court failed to consider that key prosecution witnesses, including the victim (PW1), gave inconsistent statements. The police fabricated a false story, and the appellant did not commit the alleged offenses. PW-2, an eyewitness, did not identify the appellant as he was not cross-examined by the prosecution. The prosecution did not prove the case beyond a reasonable doubt, and the impugned judgment is liable to be set aside.
 - b) The appellant submitted that the place of incident is in a



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residential area, yet the Investigating Officer (IO) did not join any public/independent witnesses. Instead, the police fabricated a false story and created a case against the accused/appellant. Furthermore, in her statement under Section 164 Cr.P.C., PW-1 (the victim) did not allege kidnapping or molestation and did not support her earlier version recorded by the police.

- c) Both PW-1 and PW-2 gave inconsistent statements, making their testimonies unreliable. Learned Trial Court failed to provide proper legal aid, as the counsel was unavailable during PW-1's testimony, rendering it invalid. Additionally, the court erred by relying on unproven hypothesis instead of the required credible evidence.

7. Learned Counsel for the Appellant has submitted that there were no allegations against him in the victim's statement under Section 164 Cr.P.C., and that the police manipulated the FIR to falsely implicate him. Furthermore, it has been submitted that the prosecution witnesses, including the victim (PW1), gave inconsistent statements at different stages. Learned counsel submits that crucial witnesses like PW2 did not support the prosecution's case and even failed to identify the appellant. Moreover, learned counsel submitted that the Trial Court did not provide proper legal aid to the appellant, and the testimony recorded without the appellant's counsel cannot be considered valid evidence.

8. *Per Contra*, learned APP has opposed the present appeal, submitting



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that the learned Trial Court correctly recorded the judgment of conviction of the appellant, emphasizing that the appellant committed a very serious offense and the appeal ought to be construed strictly.

9. It is pertinent to note that PW-1/victim was not cross-examined. Moreover, PW-2/brother of the victim who was stated to be at the place of the incident failed to identify the appellant and was also not cross-examined. The record further reveals that witnesses mentioned at SI. No.3 and 4 i.e. the father and uncle of the victim were not traceable, whereas the mother of the victim was not even included in the list of prosecution witness and hence, were not examined. An application under Section 311 Cr.P.C. was filed for recalling PW-1/victim for cross-examination, which was dismissed by the learned Trial Court vide order dated 13.12.2023, on the ground that the application is filed at a very belated stage and further observed the fact that since father of the victim was not traceable since 2018, so no useful purpose will be served even if the said application was allowed.
10. In ***Harendra Rai vs. State of Bihar*** 2023 SCC OnLine SC 1023 the Apex Court inter alia held that the purpose of Section 311 CrPC is not to reopen trial, but the same is to ensure that the court may recall a witness and re-examine the witness if the evidence of such witness appears to be essential for the just decision of the case. In the facts of the present case, the cross-examination of the star witness has not been conducted and also the examination of the father and uncle of the victim, which violated the principles of natural justice and the



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right of the accused to fair trial.

11. As per the statement of victim under section 164 dated 10.08.2016, placed on record, there are no allegations of molestation or kidnapping qua the accused/appellant. The statement of the victim under section 164 Cr.P.C. is as under;

MS. SWATI KATTIYAR
Metropolitan Magistrate
Court No. 15
Karkardooma Court, Delhi

After being satisfied with the voluntariness of the victim to make the statement, I am proceeding to record the statement U/s. 164 Cr.P.C. Only victim and myself are in the chamber and the proceedings are neither visible nor audible to anyone except victim and myself.

Statement of victim Sunita D/o Sh. Tej Narayan aged about 12 years R/o 9/1211, Multani Mohalla, Subhash Road, near Kishan Dutt Gali, Gandhi Nagar, Delhi.

W/O SA.

एक आदमी मैं शिवम नाम का। यह एक हफ्ते पहले मैं रोज मेरा पीछा कर रहा है। कल दोपहर जब स्कूल की सुई ली गई थी, तब हम पानी पीने गये थे तो यह शिवम आया और मुझे बिसकुट देकर भाग चलने को कहा। उसने मेरा हाथ जोर से पकड़ा और खींचने लगा तो मैंने हल्का अच्चा दिया तो अब लोग इन्दका हो गये और इसे भारा। फिर पुलिस को जा गई।

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10/8/16
Metropolitan Magistrate (Karkardooma Court, Delhi-110032)

Thus, there are material inconsistencies in the statement of the prosecutrix which makes her unreliable.



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12. In regard to the statutory presumption under Section 29 of the Act, it cannot be said that the prosecution version has to be accepted as the gospel truth. The presumption can never be absolute. It is a settled proposition that the Court should strive to find out the true genesis of the incident in cases where witnesses are neither wholly reliable nor wholly unreliable. In the present matter the closure of right of cross-examination has prejudiced the accused/appellant. Though in serious offences the statement of the prosecutrix can be relied upon without further corroboration, but the quality and credibility must be exceptionally high and such testimony should be of sterling quality.
13. Perusal of the record also indicates that statement under Section 313 Cr. P.C. has not been properly recorded by learned Trial Court as the incrimination evidence has not been put properly.
14. The requirement of section 313 of the Cr.P.C. is salutary and is not a mere formality. The object of recording the statement of the accused under section 313, Cr.P.C. is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution.
15. In *Asraf Ali vs. State of Assam* (2008) 16 SCC 328, it was *inter alia* held that the object of a statement recorded under Section 313 Cr.P.C. is that to establish a direct dialogue between the court and the accused. The court further held that it is the right of accused to be questioned about the matter and any important point in evidence



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leading to an opportunity to explain himself in the said statement under Section 313 Cr.P.C.

16. In the present case, it is imperative to say that the examination of accused/appellant under Section 313 Cr.P.C. is improper and defective and has thereby caused prejudice to him. It is well settled that, merely on the account of non-compliance/inadequate compliance of section 313 CrPC, or defective examination of the same does not vitiate the trial unless prejudice is shown to be cause to the accused. In the present case, prejudice has been caused to the accused by way of improper and defective examination under section 313 Cr.P.C. leading to his conviction.
17. This Court finds that the failure to cross-examine critical witnesses undermines the reliability of the evidence on record. The contradictions in the statement of the prosecutrix go to the root of the allegations and create reasonable doubt regarding the veracity of the complainant/victim's case. This procedural lapse, combined with the inconsistencies in the complainant's statements, raises doubts about the case of the prosecution. Learned Trial Court's reliance on uncorroborated and inconsistent evidence is erroneous, and the appellant's conviction cannot sustain in these circumstances.
18. In view of the above findings, the appeal is allowed, the judgment of conviction and order on sentence dated 27.03.2024 and 27.05.2024, respectively, passed by the learned Additional Sessions Judge-06, Special Judge (POCSO Act), Karkardooma Courts, Delhi, in FIR No.



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348/2016, are hereby set aside and the appellant is acquitted and be released from the concerned jail, if appellant is not required in any other case.

19. Accordingly, the present appeal along with pending application stands disposed of.

DINESH KUMAR SHARMA, J

DECEMBER 3, 2024/SC/KR/NA