

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.REV.P. 351/2018**

Date of decision: 18th FEBRUARY, 2021

IN THE MATTER OF:

JITENDER KUMAR GOSWAMI Petitioner

Through Mr. Nilanjan Bose, Advocate

versus

THE STATE NCT OF DELHI Respondent

Through Ms. Meenakshi Chauhan, APP for
State

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This revision petition filed under Section 397/401 Cr.P.C is directed against the order dated 25.01.2018, passed by the Special Judge-07, Central Tis Hazari Courts, Delhi in Criminal Appeal No.280/2017 where by the learned Additional Session Judge has affirmed the judgment and order dated 27.11.2017 and the order dated 29.11.2017, passed by the Metropolitan Magistrate-04 (Central), Tis Hazari Courts, Delhi. The learned Metropolitan Magistrate by order dated 27.11.2017 has convicted the petitioner for offences punishable under Sections 377, 323 and 506 IPC. By a separate order dated 29.11.2017, the accused has been sentenced to undergo rigorous imprisonment for two and a half years (30 months) for the offence punishable under Section 377 IPC, rigorous imprisonment for one year for

offence punishable under Section 506 IPC and rigorous imprisonment for six months for offence punishable under Section 323 IPC, all the sentences shall run concurrently.

2. FIR No.200/12, dated 16.06.2012 was registered at Police Station Sarai Rohilla for offences under Sections 377, 323, 506 IPC. The FIR was lodged by Anil Kansal who is the father of the victim.

3. On investigation charge-sheet under Sections 377, 323, 341, 506 IPC has been filed on 04.09.2012. The brief facts as narrated in the charge-sheet are:

- a) A PCR call was received at Police Station Sarai Rohilla, Delhi regarding unnatural sexual assault. On receiving the call, SI Abhijeet alongwith Constable Praveen reached at the spot i.e. L-264, Shastri Nagar, Delhi where the victim aged about 7 years met him alongwith his parents. Victim stated that he was sexually assaulted by a male person. The person was identified as the accused. The victim stated that on the fateful day he had not gone to school due to summer vacations and when he was playing at his terrace in the afternoon, he found an injured pigeon. The victim took that pigeon downstairs and went to a friend's house, one Harsh Mishra, and asked him whether he would keep the pigeon. His friend told him that he could not keep the pigeon but he knew one person who keeps pigeons as pets and the victim could give the injured pigeon to that person. The victim further stated that he went to that house to find the person referred to by his friend. He was informed that the person who keeps the pigeons as pets is at the terrace of the house. The victim took the pigeon to the terrace

where he found the accused. When the victim asked him whether he keeps pigeons as pets the said person answered in affirmative and the victim handed over the injured pigeon to him. When the victim was about to leave, the accused called him and asked him to remove his *nicker* and when the victim refused, the accused slapped him and also threatened that if the victim would not remove his *nicker*, he would kill him as well as the pigeon. It is stated in the charge-sheet that the accused removed his *nicker*. The accused removed his own pant, made the victim lie down on the floor and penetrated his private part forcibly into the private part (anus) of the victim. The victim further stated that the accused threatened him but he somehow ran away from the said house and returned back home. He narrated the said facts to his mother (PW-4 Poonam Kansal) and father (PW-2 Anil Kansal). It is stated that the victim took his father to the residence of the accused. The father of the victim apprehended the accused and called the Police. The victim as well as the accused were medically examined at Hindu Rao Hospital, clothes of the victim as well as of the accused were seized. IO also took the anal swab of the victim. Exhibits were sent for analysis and expert opinion. The statement of the victim was recorded under section 164 Cr.P.C. Chargesheet was filed against the petitioner on 04.09.2012 under Sections 377, 323, 341, 506 IPC. The accused was sent for trial where he pleaded not guilty. The prosecution examined 20 witnesses.

- i. PW-1 is the victim.
- ii. PW-2 is the father of the victim.

- iii. PW-3 is the uncle of the victim.
- iv. PW-4 is the mother of the victim.
- v. PW-5 Vijay Bahadur Mishra is the father of Harsh Mishra, friend of victim, to whom the victim took the pigeon.
- vi. PW-6 Vijay Kumar is the uncle of the victim.
- vii. PW-7 K.V. Singh is the Record Clerk of Hindu Rao Hospital who proved the MLC of the accused/convict.
- viii. PW-8 Dr. Dharamraj examined the victim on the fateful day.
- ix. PW-11 Dr. Abhishek Pachori had medically examined the accused regarding his potency.
- x. PW-13 Dr. Sorav Khan was posted as Senior Resident at Hindu Rao Hospital on the fateful day when the victim was brought by Constable Parveen.

4. The trial Court by its order dated 27.11.2017, found that the accused is guilty for offences under Sections 377, 323 and 506 IPC. By order dated 29.11.2017, the accused has been sentenced to undergo rigorous imprisonment for two and a half years (30 months) for the offence punishable under Section 377 IPC, rigorous imprisonment for one year for offence punishable under Section 506 IPC and rigorous imprisonment for six months for offence punishable under Section 323 IPC, all the sentences were to run concurrently. The said order was challenged in a Criminal Appeal being CA No. 280/17 which was upheld by the Additional Session Judge by an order dated 25.01.2018. The said order is challenged herein.

5. Mr. Nilanjan Bose, leaned counsel for the petitioner points out that the victim in his cross-examination stated that blood was coming from his

anus whereas PW-8 Dr. Dharamraj had stated that there was no bleeding. The learned counsel for the petitioner further states that PW-8 had categorically stated that he cannot opine as to whether the injuries seen by him were old or not. He further argues that PW-8 has also deposed that the victim had not told him how he sustained these injuries and that there was no swelling in the person of the victim. The learned counsel for the petitioner contends that the MLC which was done on the very same day and the fact that there was blood in anus and the fact that PW-8 could not state that the injury was old or fresh creates a doubt as to whether the petitioner is guilty of the offence as alleged against him. Mr. Nilanjan Bose, learned counsel for the petitioner places reliance on the FSL report dated 11.04.2017. The FSL report concludes that *“the DNA fingerprinting/STR analysis is performed on the source of exhibits '5' (Anal swab of victim) and '7' (Blood sample of accused) is sufficient to conclude that the source of exhibit '7' is not accounted in the alleles from the source of exhibit '5'.”* He would state that it is conclusive from the FSL report that the petitioner cannot be convicted for an offence under Section 377 IPC. It is also stated that there was a dispute between the father of the child and the accused and that the petitioner has been falsely implicated.

6. Learned counsel for the petitioner further contends that out of 30 months, the petitioner has already undergone more than 28 months of imprisonment. He would contend that the petitioner is a tutor and a family man. He would further plead that in case this Court finds that the petitioner is guilty of the offence he should not be asked to serve the remaining portion of the sentence rather he should be let off on the sentence already undergone by him.

7. *Per contra* Ms. Meenakshi Chauhan, learned APP for the State contends that the testimony of the child witness has been accepted by two Courts. They have found the witness to be reliable. The learned APP would contend that PW-8, Dr. Dharamraj, who examined the patient on the same day has found a small tearing of around 1 cm on perineal area and abrasion over the nose. She would also rely on the FSL report which shows that blood was detected on exhibit '5' which is anal swab of the victim. She would say that the version of the petitioner that there was animosity between the father of the victim and the petitioner is not believable and further when two Courts have not accepted that fact that there was any animosity between the father of the victim and the accused this Court while exercising its jurisdiction under Section 397/401 Cr.P.C ought not to come to a different conclusion.

8. Heard Mr. Nilanjan Bose, learned counsel appearing for the petitioner and Ms. Meenakshi Chauhan, learned APP appearing for the State and perused the material on record.

9. The deposition of the child witness has been accepted by the two Courts. The victim has been consistent in his deposition and there is no reason as to disbelieve the deposition of the victim.

10. The learned counsel for the petitioner has not been able to bring anything to show that the analysis of the deposition of the witness and the material by the two Courts is perverse. PW-13, Dr. Sorav Khan who examined the victim in the casualty has stated that there were abrasions over the nose of the victim.

11. The scope of the revision petition under Sections 397/401 Cr.P.C. read with Section 482 Cr.P.C. is narrow. In State v. Manimaran, (2019) 13

SCC 670, the Supreme Court observed as under:

“16. As held in State of Kerala v. Puttumana Illath Jathavedan Namboodiri [State of Kerala v. Puttumana Illath Jathavedan Namboodiri, (1999) 2 SCC 452 : 1999 SCC (Cri) 275] , ordinarily it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as by the Sessions Court in appeal. When the courts below recorded the concurrent findings of fact, in our view, the High Court was not right in interfering with the concurrent findings of fact arrived at by the courts below and the impugned order cannot be sustained.” (emphasis supplied)

In State of Haryana v. Rajmal, (2011) 14 SCC 326, the Supreme Court observed as under:

“14. In State of A.P. v. Pituhuk Sreeinvasa Rao [(2000) 9 SCC 537 : 2001 SCC (Cri) 642] this Court held that the exercise of the revisional jurisdiction of the High Court in upsetting the concurrent finding of the facts cannot be accepted when it was without any reference to the evidence on record or to the finding entered by the trial court and the appellate court regarding the evidence in view of the fact that revisional jurisdiction is basically supervisory in nature.

It has been also held by this Court in Amar Chand Agarwalla v. Shanti Bose [(1973) 4 SCC 10 : 1973 SCC (Cri) 651 : AIR 1973 SC 799] that the revisional jurisdiction of the High Court under Section 439 CrPC is to be exercised, only in an exceptional case, when there is a glaring defect in the procedure or there is a manifest error on a point of law resulting in a flagrant miscarriage of justice. (SCC p. 20, para 17 of the

Report.)”

(emphasis supplied)

In State of Kerala v. Puttumana Illath Jathavedan Namboodiri, (1999) 2 SCC 452, the Supreme Court observed as under:

*“5. Having examined the impugned judgment of the High Court and bearing in mind the contentions raised by the learned counsel for the parties, we have no hesitation to come to the conclusion that in the case in hand, the High Court has exceeded its revisional jurisdiction. In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. **In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice. On scrutinizing the impugned judgment of the High Court from the aforesaid standpoint, we have no hesitation to come to the conclusion that the High Court exceeded its jurisdiction in interfering with the conviction of the respondent by re-appreciating the oral evidence. The High Court also committed further error in not examining several items of evidence relied upon by the Additional Sessions Judge, while confirming the conviction of the respondent. In this view of the matter, the impugned judgment of the High Court is wholly unsustainable in law and we, accordingly, set aside the same. The conviction and sentence of the respondent as***

passed by the Magistrate and affirmed by the Additional Sessions Judge in appeal is confirmed. This appeal is allowed. Bail bonds furnished stand cancelled. The respondent must surrender to serve the sentence.”

(emphasis supplied)

12. After perusal of the entire material on record, the deposition of the witnesses and the documents, this Court is of the opinion that the judgment of the Court below is sound and has been rendered after appreciating the evidence in its correct perspective. Both the courts after going through the entire evidence came to the conclusion that the house of the accused is very near to the house of the victim and therefore it is not impossible for the victim to go to the house of the accused. The Courts below have also considered the evidence of PW-5, father of Harsh Mishra (friend of the victim) who had stated that the accused does keep pigeons. PW-5 has been found to be a trust worthy witness. PW-2 the uncle of the victim has deposed that the victim took him and PW-3 (father of the victim) to the house of the accused and that the accused was sitting outside his house. He has deposed that the accused was identified by the victim and he was apprehended by them. The Courts below after taking into account the testimony of PW-1 the victim, PW-2 the uncle of the victim, PW-3 the uncle of the victim and appreciating the topography of the area came to the conclusion that the prosecution had proved the guilt of the accused beyond reasonable doubt. No doubt the FSL report came only after five years of the incident but the report does not in any event show that the petitioner is not guilty. It only says that the blood sample of the accused is not accounted in the alleles from the source of exhibit '5'. This report therefore cannot outweigh the deposition of the child witness who has pointed his finger to the accused as

the perpetrator of the crime. This FSL report dated 11.04.2017 does not create any doubt in the mind of the Court regarding the innocence of the accused.

13. Mr. Nilanjan Bose, learned counsel for the petitioner would contend that the petitioner has been sentenced to undergo rigorous imprisonment for two and a half years (30 months) for the offence punishable under Section 377 IPC and he has already undergone more than 28 months of imprisonment. It is stated that the petitioner is a teacher and a family man. He would therefore plead that he petitioner should be let off with the imprisonment already undergone. This has been very strongly opposed by the learned APP. The Statement of Objects and Reasons as to why the Protection of Children from Sexual Offences (POCSO) Act, 2012 was legislated reads as under:

“STATEMENT OF OBJECTS AND REASONS

1. *Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Further, Article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.*

2. *The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires that State Parties to undertake all appropriate national bilateral and multilateral measures to prevent (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual*

practices; and (c) the exploitative use of children in pornographic performances and materials..

3. The data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the ‘Study on child Abuse: India 2007’ conducted by the Ministry of Women and Child Development. Moreover, sexual offences against children are not adequately addressed by the existing laws. A large number of such offences are neither specifically provided for nor are they adequately penalised. The interests of the child, both as a victim as well as a witness, need to be protected. It is felt that the offences against children need to be defined explicitly and countered through commensurate penalties as an effective deterrence.

4. It is therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences.

5. The Bill would contribute to enforcement of the right of all children to safety, security and protection from sexual abuse and exploitation.

6. The notes on clauses explain in detail the various provisions contained in the Bill.

7. The Bill seeks to achieve the above objectives.”

14. An offence involving abuse of child victim is unpardonable. The first appellate Court was not happy with the sentence awarded to the petitioner and in fact it has observed that the sentence awarded to the accused is on the lower side. Keeping in mind the nature of offence, this Court is not inclined to accept the submission made by the learned counsel for the petitioner to reduce the sentence awarded to the petitioner to one of sentence already undergone. Releasing the petitioner by reducing the sentence will send a wrong signal to the society and will be against the purpose for which POCSO Act was enacted.

15. The judgment dated 25.01.2018, passed by the Special Judge-07, Central Tis Hazari Courts, Delhi in Criminal Appeal No.280/2017 is sustained.

16. Accordingly, the petition is dismissed along with the pending application.

17. The petitioner is directed to surrender before Jail Superintendent, Central Jail No.13, Mandoli, Delhi, on 19.02.2021 so that he undergoes the remaining part of the sentence.

SUBRAMONIUM PRASAD, J.

FEBRUARY 18, 2021

Rahul