

(2020) 03 DEL CK 0287

In the Delhi High Court

Case No : Criminal Leave Petition No. 186 Of 2020

State (Nct Of Delhi)

APPELLANT

Vs

Saan Mohd.@ Sonu & Anr

RESPONDENT

Date of Decision : 03-03-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 207, 313, 378, 378(3), 386

Indian Penal Code, 1860 — Section 34, 120B, 363, 364, 366, 376

Protection of Children from Sexual Offences Act, 2012 — Section 6, 17, 29, 30

Citation : (2020) 03 DEL CK 0287

Hon'ble Judges : Manmohan, J; Sangita Dhingra Sehgal, J

Bench : Division Bench

Advocate : Aasha Tiwari

Final Decision : Dismissed

Judgement

Sangita Dhingra Sehgal, J

CRL. M.A.4692/2020 (exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

CRL.L.P. 186/2020

1. By the present Leave Petition filed under Section 378 (3) of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C.") the State

seeks leave to appeal against the judgment dated 23.10.2019 passed by the learned Additional Sessions Judge-09 (POCSO) West District, Tis Hazari

Courts, New Delhi, whereby the respondent No. 1/ Saan Mohd. @ Sonu was acquitted of the charges punishable under Sections 363/366/34 of the

Indian Penal Code (hereinafter referred to as "IPC") and Sections 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter

referred to as 'POCSO') and Respondent No. 2/Neeraj was acquitted of the charges punishable under Sections 363/366/34 IPC and Sections 17 POCSO.

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

1. The accused persons namely SaanMohd. @ Sonu and Smt. Neeraj have been sent for trial by Police Station Ranhola for the offences

punishable under Section 363/364/34 of Indian Penal Code (hereinafter referred to as IPC); accused Smt. Neeraj under Section 17 of

Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act) and accused Shan Mohd. @ Sonu for trial

under Section 6 of POCSO Act.

2. The accused persons have been prosecuted on the allegations that on 22.07.2014 at about 04.00 pm at House No. R-4, R-Block, Vikas

Nagar, Delhi within the jurisdiction of PS Ranhola, they in furtherance of their common intention had kidnapped the victim with an intent

that she might be forced to illicit intercourse. Accused Neeraj has also been prosecuted on the allegations that in the intervening night of

22/23.07.2014 at DDA Park, Hastal Village, Uttam Nagar, she intentionally aided the commission of offence of penetrative sexual assault

by the accused Shan Mohd. @ Sonu with the prosecutrix and accused Shan Mohd. @ Sonu has been prosecuted on the allegations that in

the intervening night of 22/23.07.14 at DDA Park, Hastal Village, Uttam Nagar, he had committed penetrative sexual assault with the

prosecutrix.

3. The case of the prosecution is that upon receipt of DD No.13A dated 23.07.2014, H Ct. Ram Nath alongwith Ct. Vikas Kumar reached the

spot where complainant 'A' (identity withheld) met them and got recorded his statement Ex.PW3/A which is translated as under:

'I reside at H.No.R-4 R Block, Vikas Nagar, Uttam Nagar, Delhi and do the work of welding. On 22.07.2014 at about 04.00pm, my

daughter (victim) went with Neeraj, who lives in our neighbourhood, to the house of brother in law (Jija) of Neeraj. When I asked Neeraj

about my daughter, she told that she has left my daughter at the milk dairy near the house and went to her sister's in law (Bhabhi)

house. I searched for my daughter but she did not find. Now, I am very sure that my daughter has been seduced by someone and she went

away. My daughter should be searched and legal action should be taken.â??

On the basis of the complaint Ex.PW3/A, H.Ct. Ram Nath got registered the FIR of this case. In search of victim, SI Neelam alongwith staff

reached at Vikas Nagar and when the victim was not found, they returned back to PS at about 07.00 pm. Meantime, mother of the victim

came in the PS along with victim and informed that the police officials of Dabri area left victim to her house; she did not ask the names of

those police officials nor she knows them. SI Neelam recorded the statement of the victim and got conducted her medical examination from

SGM Hospital. The exhibits of the victim handed over by the doctor was also seized and Section 376/120B/34 IPC and 6 POCSO Act were

added in the investigation. The statement of the victim under Section 164 Cr.P.C. through Ld. M.M. after taking the victim from Nirmal

Chhaya was recorded.

On 24.07.2014, the accused Shan Mohd. @ Sonu and on 26.07.2014, the accused Neeraj was arrested. During the investigation,

motorcycle used by accused Shan Mohd. @ Sonu in the crime was recovered. Date of birth of the victim and accused Shan Mohd. @ Sonu

was verified and exhibits collected during the investigation were sent to FSL for expert opinion. After completion of investigation, charge

sheet was filed.

4. Compliance of Section 207 Cr.P.C. was done. Thereafter, vide order dated 19.12.2014, charges for the offences punishable under

Section 363/366/34 IPC was framed against both the accused persons. Charges under Section 17 of POCSO Act against the accused Neeraj

and Section 6 of POCSO Act against the accused SaanMohd. @ Sonu was also framed. Both the accused persons pleaded not guilty to the

charges framed against them and claimed trial.â??

3. In order to bring home the guilt of the accused persons, the prosecution examined 10 witnesses in all. The statement of accused persons were

recorded under Section 313 Cr.PC wherein they pleaded to have been falsely implicated in the present case and chose not to lead any evidence in

their defence.

4. After appreciating the arguments addressed on behalf of the parties and the material adduced by the prosecution, the learned Trial Court acquitted

the accused persons for the charged offences. The relevant portion of the impugned judgment is reproduced below :

18. The testimony of the prosecutrix recorded in the court is reproduced as below:

4. 22/7/2014 ko mai apne parivar mummy, papa, bhai, behan ke sath Pradhan Chowk, Delhi (pura pata nahi maalom) may kiraye ke

makan may rehti thi. Mai us roj ghar par akeli thi waha bagal wali aunty Neeraj ne mujhe bola ki unhe Bhabhi kai yaha se chatri (dish)

lane jana hai aur mai nahi ja rahi thi par unhone kaha ki jaldi aa jayenge mai unke saath gayi. Chatri lekar unhone kaha ki Sai Baba

Mandir chalna hai. Waha par unhone ek uncle se phone maang kar, phone karke Sonu ko bulaya. Phir Neeraj aur Sonu ne bola ki ghum

ne chaltey hai, phir khet ki taraf gaye the. Fir waha se wapas ghar aa rahey the to Sonu humey battakh bazar mein chod kar chala gaya

tha. Neeraj ne bola ki way ghar ke raasta bhool gaye hai tab tak raat ho gayi the aur raat ko Neeraj ne kisi uncle se phone lekar Sonu ko

phone karke bulaya. To Sonu aa gaya. Phir maine bola ki mujhe ghar jaana hai to unhone mujhe ghar jaane nahi diya. Wo mujhe park me

lekar chaley gaye. Phir raat ko Sonu ne mere saath badtamiji ki. Q. Badtamiji se aapka kya matlab hai?

Ans. Usne apni toilet karne wala hissa mere toilet karne wali jagah mai dala. Toilet karne wala matlab susu karne wala. Mera matlab hai

ke usne apna susu karne wala bhag mere susu karne waaley bhag mai dala.

Jab mai chilla rahi thi to usne (Sonu) mere muh band kardiya. Aunty (Neeraj) ne bola kei ssey kaat-kar naale mai daal daitey hai. Mai

bahut rorahi thi aur mujhe wahi bathaney ko bola. Subah wo dono tempo mai bath kar chale gaye. Waha se mai seedhee seedhee chaltey

chaltey aa gayi aur main ek aunty se bola ke mujhe Pradhan Chowk jaana hai. Tab us aunty ne mujhe Dabri Thana chod diya tha.

Phir Thaane mai mujhse Police ne poocha aur maine unhe saari baat bata de and unhone mujhe ghar par chor diya.

5. Police mujhe mere ghar se mummy papa ke saath dosre thane (naam yaad nahi hai) lai gai. Phir police ne puch tach ki aur maine saari

baat batai aur phir police mujhe haspatal (naam yaad nahi) lai gayi aur meri janch hui.

6. At this stage, MLC of the prosecutrix is shown to her and after showing the same and explaining it to her, she is further examined.

I was medically examined vide MLC dated 23.07.14, at the MLC is now Ex.PW2/A and it bears my thumb impressions at point A.

7. I was also taken before a Lady Judge and I have told the Lady Judge about the incident. My statement was recorded by her. Witness has

identified her statement recorded under Section 164 Cr.P.C.

8. I was produced before a Lady Judge at Tis Hazari Courts who had recorded my statement. My statement u/s 164 Cr.P.C. is Ex.PW2/B and

it bears my signatures at point A. Whatever has been written in such statement. I had told the Lady Judge in such statement.

(At this stage, the accused persons SaanMohd. @ Sonu & Neeraj who are sitting in a separate closure is shown to the witness through the

one way visibility window on her screen. After the witness has seen the accused persons SaanMohd. @ Sonu and Neeraj, she is further

examined.)

9. I have seen the accused persons Sonu & Neeraj who have been shown to me on screen. They are persons SaanMohd. @ Sonu and

Neeraj. They are the same persons who have done the above noted activities with me and about whom I have stated above.

Witness has correctly identified the accused persons.â??

19. The statement of the witness Ex.PW2/B recorded under Section 164 Cr.P.C. on 24.07.2014 which is translated below:

â??On 22.07.2014, my neighbour Auntie Neeraj took me and said letâ??s go to temple. Then he had to buy the dish too. She first took me

her brotherâ??s in lawâ??s (Jija) house and then called Sonu to a Bengali Doctor. Q. Who is Sonu?

Ans. Sonu is the boy friend of Auntie Neeraj. Sonu did not visit Bengali Doctor. Then we went to the temple. Sonu came there. Me and

Neeraj auntie went to a farm with Sonu on his motorcycle. There they said me to take a walk and they went down. Sonu then left us at the

Bengali Doctor. Then we went to buy the dish but we forgot the way. Then auntie took a phone from an uncle and called Sonu. Sonu came

there and took us to the park. I was getting very late so I said that I am afraid and I have to go to home but they did not allow me and said

me to stay in the park today. Then both of them put me to sleep and went to the other side. Then after a while they lay down where I was

sleeping. Then Sonu forced me and do wrong thing with me (Sonu ne mere sath jabardasti ki galat kaam kiya).

Q. What do you mean by galat kaam?

Ans. Sonu touched me there (points at her private parts). Took out my pant and underwear. Sonu also took of his clothes. He put his private

part into my private part. When I started crying, the aunty said nothing happened. I even screamed but Sonu shut my mouth. My stomach

hurt so much.

After that we also fell asleep. The next morning, we woke up and they left me on the way and said "go straight ahead". Both of them

quickly got into the auto. I told an aunty that I have to go to Vikas Nagar. She left me in the PS. Police officials then left me at my home."

20. The accused persons Neeraj and SaanMohd. @ Sonu were known to the prosecutrix as apparent from her statement. In her statement

recorded in the court, there is no reference of visiting temple by the victim whereas it is referred in her statement under Section 164 Cr.P.C.

As per her examination in chief, co-accused Neeraj called Sonu nearby Sai Baba Mandir whereas there is no reference of calling him at

Mandir rather near Bengali Doctor in statement Ex.PW2/B. As per statement under Section 164 Cr.P.C., the accused Neeraj and the victim

went to the temple where other accused SaanMohd. @ Sonu joined them and there is no reference of shop of doctor in her examination in

chief. The most important evidence in the case i.e. call details record of the accused SaanMohd. @ Sonu are not produced or collected or

the person whose phone was used to call the accused Sonu has also not been examined, neither the guard of the park who was admittedly

present has been produced including the tempo driver who was taken the accused persons; the lady who took the victim to the PS Dabri or

the police officials who left her at her home. During cross-examination, the witness (PW2) admitted that she did not disclose that she is

going with accused Neeraj to any person of the locality including her brother and

sister; they had gone to take a dish to the Bengali Doctor

and there is no reference of visiting the house of brother in law (Jija) of the accused Neeraj on the day of incident. It is relevant to note that

she left the park at 06.00 am in the morning and reached at PS Dabri at about 03.00 pm and the time taken is not explained. There appears

to be inherent contradictions in the testimony of PW2 and the same does not inspire confidence or trustworthy.

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25. At this stage, it would be relevant to mention the medical evidence on record.

PW5 Dr. Neha Saluja, SR, Gynae, SGM Hospital, Mangol Puri identified the handwriting and signatures of Dr. Supriya Parashar and Dr.

Anubha on the MLC No.440 dated 23.07.14 of the victim Ms. 'CH' (identify withheld) aged about 12 years vide Ex.PW2/A. The testimony

of the witness was not challenged by the defence and there is nothing incriminating against the accused in his testimony.

It is also relevant to refer the FSL report Ex.PX6 wherein nothing incriminating is found against the accused. The relevant portion of the

report is reproduced as below:

""No male profile could be generated from the source of exhibits '1a' (Cotton Wool Swab & Microslides), '1b' (Cotton Wool Swab) &

'1c' (Microslides). Therefore no comparison could be drawn from source of exhibits '1a' (Cotton Wool Swab & Microslides), '1b'

(Cotton Wool Swab) & '1c' (Microslides) with the source of exhibit '2' (blood in gauze of accused Mohammad @ Sonu). However,

a male DNA Profile from the source of exhibit '1e4' (underwear of victim) was generated. The alleles from the source of exhibit

'2' (blood in gauze of accused Mohammad @ Sonu) are not accounted with the alleles from source of exhibit '1e4' (underwear

of victim).

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38. Keeping in view the settled law and the material available on record, this court is of the considered view that the prosecution failed to

establish the case against the accused persons beyond reasonable doubt. It is the primary duty of the prosecution to prove the case against

the accused beyond reasonable doubt and the prosecution cannot take the benefit for any lapse or weakness in defence. In view of the doubtful features and infirmities in the evidence, it is not safe to rely upon the testimony of the witnesses examined by the prosecution which needs to be scrutinized with great care and caution. There are fatal infirmities in the entire prosecution case. The entire genesis and the manner of the incident is doubtful and the entire story deserves to be rejected. It would not be safe to convict the accused persons and in these circumstances, the accused would be entitled to benefit of doubt and acquittal from the charge framed against them. In view of the aforesaid discussions and the material available on record, I am of the considered view that the prosecution has failed to establish the circumstances in which the accused persons committed the offence. The testimony of the witnesses examined by the prosecution is insufficient to prove the involvement of the accused in the incident. As the prosecution has failed to bring home the guilt of the accused persons namely Saan Mohd. @ Sonu and Neeraj, they are hereby acquitted of the charges framed against them.

5. Aggrieved by the impugned judgment, Ms. Aasha Tiwari, learned APP appearing for the State argued that the impugned judgment dated 23.10.2019 is based on conjectures, surmises and the learned Trial Court has failed to appreciate 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 the conviction of the accused.

6. Learned counsel for the State further contended that the learned Trial Court has given undue weightage to the minor discrepancies in the statements of the prosecutrix (PW-2). She further stated that the statement of the prosecutrix is consistent, corroborative and without any major omissions and contradictions.

7. Learned APP for the State further added that as per the MLC of the prosecutrix, hymen was found torn thus, corroborating the testimony of the victim. She further submits that the learned Trial Court failed to appreciate that there is a presumption under Sections 29 and 30 of POCSO Act against the respondents-accused persons and it is for the respondents-accused

persons to prove to the contrary.

8. We have heard the learned APP for the State at length and perused the available material on record.

9. 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 if the testimony of a victim of sexual assault instills confidence in the Court. 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 of 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.”

10. 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. From the perusal of the statement/ testimony of the prosecutrix we find that in her initial statement, she

deposed “market meh ghumne keh baad hum ghar aaneh lage toh neeraj

aunty boli ki rasta bhul gaye sonu ko bulate hain. Phir 09.00

baje raat kareeb sonu aagaya. Phir main neeraj aur sonu seh ghar chalne ko boli toh yeh dono bole aap raat park meh hei rukenge. Phir

hum park main soh gaye tab sonu mere pass soh gaya aur sonu neh mere sath galat kaam kiya. Phir sonu ne doh baar aur galat kaam

kiya. Uske baad hum soh gaye. Subha sonu vah neeraj mujhe bole ki agar kissi ko batlaya toh tumhe pitayi karenge.â??

11. However, when her statement was recorded under Section 164 of the Cr.P.C, she stated that â??Phir aunty neh ek uncle seh phone lekar

sonu ko phone karke bulaya. Sonu vaha aaya or hume park leh gaya. Vaha bahot late horaha tha toh maine kaha mujhe dar lag raha

hain, ghar jana hain toh bole ki nahi aaj park main hei rehna hain. Dono mujhe sulla kar dusri taraf chale gaye. Phir thori der baad

jaha main soh rah thi waha aakar late gaye. Phir sonu neh mere sath zabardasti ki. Galat kaam kiya.

Q. Galat kaam ka matlab kya hua?

Ans. Mujhe vaha chua tha(points at her private parts). Meri salwar or chaddi utaar dei thi. Apne bhi kapre utaare the aur apni toilet

wali cheej mere toilet wali jagah main daali thi. Main roneh lag gayi toh aunty boli kuch bhi nahi hua, kuch bhi nahi hua. Meneh chillaya

bhi tha toh sonu neh merah muh band kar diya. Mere peth dard hua tha bohot tej.â??

12. It is also of vital concern that in her initial statement recorded on 24.07.2014, the prosecutrix failed to attribute any act like penetrative sexual

assault against the respondent/accused Saan Mohd. @ Sonu whereas she took a U-Turn in her statement under Section 164 Cr.P.C. and her

deposition before court and stated that the accused penetrated her vagina with his private part.

13. Moreso, the FSL Report No. FSL 2014/DNA-5599 on record does not support the case of the prosecution as alleles from the source of exhibit

â??2â?? (Blood in gauze of accused Sonu) were not accounted with the alleles from the source of Ex.â??1e4â?? (Underwear of the victim).

Relevant portion of the said FSL report is reproduced below:

â??RESULT OF ANALYSIS

No male profile could be generated from the source of exhibits â??1aâ?? (Cotton

Wool Swab & Microslides), â??1bâ?? (Cotton Wool Swab) & â??1câ?? (Microslides). Therefore no comparison could be drawn from source of exhibits â??1aâ?? (Cotton Wool Swab & Microslides), â??1bâ?? (Cotton Wool Swab) & â??1câ?? (Microslides) with the source of exhibit â??2â?? (blood in gauze of accused Mohammad@Sonu). However a male DNA Profile from the source of exhibit â??1e4â?? (underwear of victim) was generated. The alleles from the source of exhibit â??2â?? (Blood in gauze of accused Mohammad@Sonu) are not accounted with the alleles from source of exhibit â??1e4â?? (underwear of victim).

CONCLUSION

The DNA profiling (STR analysis) performed on the exhibits provided is sufficient to conclude that the DNA profile generated from the source of exhibit â??1e4â?? (underwear of victim) is not similar with DNA profile generated from the source of exhibit â??2â?? (Blood in gauze of accused Mohammad@Sonu).â??

14. Consequently, this Court is of the opinion, that the prosecution has failed to connect the respondents-accused to the present case in as much despite the MLC confirming that the hymen of the prosecutrix been torn, there is no evidence to link the respondents-accused with the incident.

15. Since, the prosecution has failed to establish its case against the respondent-accused, inasmuch as DNA of respondent No. 1 has not matched with the male DNA recovered from the undergarments of prosecutrix, the submission advanced on behalf of learned APP for the State regarding the presumption under Section 29 and 30 of the POCSO Act, cannot be taken into account.

16. Undoubtedly, the testimony of the prosecutrix must be free of any blemish or suspicion, must impress the court as wholly truthful, must appear to

be natural. In the instant case, we find that the testimony of the prosecutrix failed to inspire confidence to base the conviction of the accused persons.

We are in agreement that the Trial Court has rightly recorded that the discrepancies and inconsistencies in the statements of the prosecutrix (PW-2)

at different stages are not minor in nature and go to the root of the matter.

17. 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 reachedâ?"one that leads to acquittal, the other to convictionâ?"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)

18. For the abovementioned reasons, this Court does not find any reason to interfere with the impugned judgment.

19. Accordingly, the present leave petition, being bereft of merit, is dismissed.