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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : October 14, 2015

DECIDED ON : January 08, 2016

+ CRL.A.258/2015 & Crl.M.B.443/2015

JNANEDAR NATH DAS

..... Appellant

Through : Mr.Rajeev K.Malik with
Mr.Sanjeev K.Malik, Advocates.

versus

STATE

..... Respondent

Through : Mr.Amit Ahlawat, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 08.01.2015 of learned Additional Sessions Judge in Sessions Case No.59/13 arising out of FIR No.60/13 registered at Police Station Sagarpur by which the appellant was held guilty for committing offences punishable under Section 10 POCSO Act, the present appeal has been preferred by him. By an order dated 16.01.2015, the appellant was sentenced to undergo Rigorous Imprisonment for five years with fine of ₹10,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that sometime in the Winter Session 2012-2013 at premises Chunmum Nursery School, RZ-74, Dabri Extension, New Delhi, the appellant committed aggravated sexual assault by showing his penis to the prosecutrix/child victim 'X' (Assumed name) and by making her touch it.

3. On 18.03.2013, Rekha 'X's mother reported the incident to the police at Police Station, Sagar Pur. The Investigating Officer recorded 'X's statement in question-answer form (Ex.PW1/B) and lodged First Information Report. In her complaint 'X' gave detailed account as to how and under what circumstances, the appellant had asked her to touch his penis in the latrine/bathroom of the school. 'X' was medically examined; she recorded her 164 Cr.P.C. statement (Ex.PW-1/A). The accused and his wife Minoti Das were arrested during investigation. Statements of witnesses conversant with the facts were recorded. Certain documents were seized and taken on record. Upon completion of investigation, a charge-sheet was filed against both the appellant and Minoti Das in the court on 23.04.2013. It is relevant to note that by an order dated 06.01.2014, Minoti Das was ordered to be released as no case was made out against her. The State did not challenge the said release order. To prove its case against the appellant, the prosecution examined six

witnesses in all. In 313 statement, the appellant denied his involvement in the crime and pleaded false implication. DW-1 (Narender Gola), DW-2 (Ms.Anita Soni), DW-3 (Nirmala Gahlot) and DW-4 (Smt.Minoti Das) appeared in defence. After considering the rival contentions of the parties and on appreciation of the evidence, the Trial Court by the impugned judgment held the appellant guilty under Section 10 POCSO Act. Being aggrieved and dissatisfied, the instant appeal has been preferred.

4. I have heard the learned counsel for the parties and have examined the record minutely. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. Victim's parents had failed to pay the fee and other dues of the school run by his wife in time and when they were scolded for default, the appellant was falsely implicated in this case. The prosecutrix, aged around five years, has given divergent and inconsistent statements. She is not clear if the incident had taken place 'inside' or 'outside' the latrine. It is not believable that in the presence of so many children outside the latrine in the school, the appellant would dare to exhibit such an abnormal behaviour. An 'aaya' used to always accompany the kids to the toilet to assist them. DW-2 (Ms.Anita Soni) has supported on this aspect. The delay in lodging the FIR has not been explained. Statement under Section

164 Cr.P.C. was recorded after four days of the lodging of the FIR. The exact date of the incident has not surfaced. Defence version has been overlooked by the Trial Court for no cogent reasons. Refuting the contentions of the appellant's counsel, learned Additional Public Prosecutor urged that there are no sound reasons to disbelieve the prosecutrix, aged around five. She has fully supported the prosecution and despite lengthy cross-examination, nothing material could be extracted to disbelieve her.

5. Admitted position is that the appellant's wife Minoti Das used to run a play school, namely, Chunmum Nursery School, RZ-74, at Dabri Extension on the ground floor. On the first floor, the appellant and his family members used to live. 30 to 35 children were studying in the said school at the relevant time. The victim had joined the said school in July, 2012.

6. The exact date of the occurrence has not emerged on record. The incident was reported to the police on 18.03.2013. In her statement (Ex.PW-1/B), the prosecutrix, aged around five years, disclosed that it was winter when she had gone to the bathroom in the school to answer the call of nature. Husband of her madam present there made her to touch her hand on his 'Popo' (penis). He further inquired if she had the similar

‘Popo’, she answered in negative. Thereafter, she came to the prayer meeting and the appellant went away. In response to a question if the husband of her madam had done the mischief on that day or prior to that also, she responded that it was done only that day. The victim was categorical and certain in her initial version given to the police that the appellant whose identity is not in dispute had committed aggravated sexual assault upon her inside the latrine of the school during her visit there. In her statement recorded under Section 164 Cr.P.C. (Ex.PW-1/A) on 23.03.2013, she reiterated her version. It is relevant to note that the application for recording statement under Section 164 Cr.P.C. was assigned to Ms.Navita Kumari, learned Metropolitan Magistrate, New Delhi vide order dated 19.03.2013. The proceedings under Section 164 Cr.P.C. (Ex.PW-1/A) records that as the prosecutrix was a small child of five years, the learned Presiding Officer deemed it appropriate to get the proceedings of recording of the statement videographed and vide order dated 20.03.2013, directed the Investigating Officer to make arrangements for conducting videography. It belies the appellant’s plea that there was inordinate delay in recording the 164 Cr.P.C. statement.

7. Victim’s statement under Section 164 Cr.P.C. (Ex.PW1/A) was recorded in a congenial atmosphere. Learned Presiding Officer put

number of preliminary questions before recording her statement to ascertain if she was comfortable and free to make statement voluntarily without any fear, pressure or influence. After recording her satisfaction that the victim was able to understand the questions put to her and she was comfortable to give rational answers, her statement was recorded. In 164 Cr.P.C. statement also, she implicated the accused for the crime. Portion of her statement needs reproduction:-

“Q. Kya kara tha bachee?

Ans. Woh uncle ne muje popo-susu mein haath lagva rahe the.

Q. Kiske susu mein?

Ans. Apne susu mein... Pata hai main haath chhudwa rahi thi aur woh baar baar mera haath pakad ke apne popo meing lagva rahe them. Pata hai bahar prayer hone wala tha... Maine na apni Mummy ko Shukarvvar (Friday) ko raat mein bataya tha.

Q. Achha aap ne kaha ke bahar prayer hone wala tha, to ye sab uncle kahan kara rahe the?

Ans. Latrine ke bahar.

Q. Yeh latrine kahan pe hai?

Ans. Jahan prayer hota hai na wahi pe hai.

Q. Yeh uncle kya school mein padate hain?

Ans. Nahin....Woh na kuch nahi karte, akhwar (newspaper) mein aya tha. ...Muje akhwar padna nahin aata, jab meri mummy ne pada tab pata chala.

Q. Achha aap latrine ki taraf kudh gaye the ya koi le kar gaya tha?

Ans. Main khud gayi thi... latrine lag rahi thi.... Woh uncle waha pe the....unno ne apni longi upar kar ke kaha-kya tumara popo bhi aisa hai?... Maine kaha nahi. Muje prayer mein jana tha per woh jane nahi de rahe the...Main rone lag gayi.

Q. Phir kya hua?

Ans. Phir main bhaag gayi aur prayer mein chali gayi.... Main na bata rahi thi ke na who baar baar hath lagva rahe the, mein rone lag gayi thi, mann ghar jane ko kar raha tha.

Q. Achha yeh kab ki baat hai?... Kuch yaad hai kya?

Ans. Muje yeh nahi pata....Muje Sunday-Monday to aata nahi tha.... aur na hi muje tarikh aati thi.

Q. Bachhe aap ko jnaneder uncle ke baare mein kuch aur batana hai?

Ans. Haan. Woh uncle pooch rahe the ke Mahak kaha hai...per woh to gaon gayi hui thi.

Q. Aur kuch?

Ans. Aunti bataun....Niche school ha, upar ghar hai...Chhota sa school hai....Chunmun naam ha.

Q. Ghar kis ka hai?

Ans. Maám ka hai.... Jo-jo waha per rahte hain unka ghar hai.

8. While recording her Court statement as PW-1, the learned Presiding Officer ensured that she was making her statement voluntarily without any fear or pressure. She was able to answer the questions

intelligently; she counted upto 100 and recited alphabets ABCD and poems. In her statement, she deposed that accused was working in her school and on one day in the latrine “uncle ne apne popo par mere se haath lagwaya”. She revealed that the latrine was near her classroom and the occurrence took place only once. On being asked when the act was committed, she immediately responded that ‘sardiyo ke din they’. She disclosed that the incident was reported to her mother after a few days. She did not immediately tell her mother about it as she was afraid of the ‘uncle’; husband of the Principal of her school. In the cross-examination, she informed that her father used to drop her at school every day and her mother used to pick her up in the afternoon. She fairly admitted that she had not disclosed the incident to her friends. She admitted that the accused had not scolded her. She denied if her parents had tutored the statement to be given in the court.

9. On perusal of various statements made by the child witness at different stages of the investigation/trial, it reveals that her version is consistent throughout. In all her statements, she has implicated the accused with certainty and has attributed specific role to him. She was fair enough to admit that the mischief was done only on one occasion; the accused had not scolded or threatened her. No material infirmity

could be extracted in the cross-examination of the witness to suspect her version. No ulterior motive was assigned to her for making false statement. 'X' being a little kid had no extraneous consideration to level serious allegations of sexual assault against her Principal's husband. The material facts deposed by the witness remained unchallenged in the cross-examination. No suggestion was put to her if the accused had not visited the latrine at the relevant time. Nothing was suggested to her if at the time of her visit to the bathroom, any 'aaya' had accompanied her there. Presence of the accused who had no concern with the activities of the school in the laterin/bathroom has remained unexplained. There are no cogent reasons to disbelieve the statement of the child witness. It is true that the Court must be extremely cautious and careful in placing reliance on the testimony of a child witness as there are chances of coaching or tutoring. A child witness is prone to tutoring and hence the court should look for corroboration. In the instant case nothing has emerged to infer if 'X' was a tutored witness. For a trivial controversy (if any) regarding payment of school-fee, 'X's parents would not invent a false story to bring their little kid in disrepute.

10. PW-3 (Rekha), 'X's mother has corroborated her version.

She deposed that on 16.03.2013 when she along with her husband and

children was watching T.V. in night hours, 'X' apprised her that a few days back i.e. in the end of February, when she had gone to attend call of the nature in the toilet in the school, husband of the Principal Madam had met her there. He made her to touch his private part (penis). She further told that Principal's husband had asked her whether she was having such organ (penis) like him and she replied in the negative. When she inquired from 'X' whether she had complained to the Principal Madam, she replied in the negative. When inquired whether similar act was done several times, she replied that it was done only once. She informed the incident to her husband and they decided to take action after pondering for two days. Finally, on 18.03.2013 her husband went to the police with 'X' to lodge the report. 'X' was medically examined. In the cross-examination, she admitted that number of other play schools have sprung up in the area where Chunmun Play School is situated. She denied if the appellant was implicated at the instance of the owners of other play schools to bring the school in disrepute. She denied that they were defaulter in paying the school fee regularly and in order to avoid the payment of school fee, a false case was registered. She disclosed that she was having all the receipts of the fee paid to the school and one such receipt of the month of August, 2012 was given to the Investigating Officer. She disclosed that

her daughter had gone to school for about 5/6 months. The incident had taken place in winter as disclosed by her daughter.

11. Again, despite searching cross-examination, no material discrepancy or infirmity could be elicited to disbelieve her version. The child was admitted in Chunmum Nursery School knowing that the school fee was ₹200/- p.m. It is unbelievable that for non-payment of petty fee of ₹200 p.m., 'X's parents would go to the extent of inventing a story of sexual assault without any rhyme or reason at the cost of honour of their little child. The Trial Court has gone into this aspect and has given detailed findings that there was no default in the making of payment of fee by 'X's parents. Fee receipt book (Ex.PW6/G) contained receipt No.629 whereby fees had been deposited on behalf of the prosecutrix on 12.03.2013 itself. Nothing is on record that a false complaint was lodged at the behest of owners of other play schools in the area.

12. Delay in lodging the FIR is inconsequential. The victim, a child aged around five years was a student in the school. She was to take her exam there. It needs a lot of courage to report such an incident against the Principal or her relatives. In large number of cases, children are abused by persons known to them or who have influence over them. The victims often keep mum due to social stigma, community pressure or total

dependency on the perpetrator etc. Parents choose not to report such crimes to protect the child from social stigma.

13. Defence version inspires no confidence and deserves outright rejection. DW-1 (Narender Gola), who had taken the photographs of the school, has nothing to do with the occurrence. DW-2 (Anita Soni), a teacher in the school is an interested witness. PW-3 is Nirmala Gahlot to whom the accused is known for a long time. Merely because no such incident had taken place earlier, it cannot be inferred that the statement given by the prosecutrix is false. DW-4 (Minoti Das), appellant's wife was earlier an accused in this case. Her statement in court does not exonerate accused's crime. The Trial Court did not find merit in her plea that false implication of her husband was due to non-payment of school fee in time. She failed to explain as to how there were missing pages in the Register (117 to 128, 137 to 140, 147 to 148, 151 and 152).

14. In the absence of any prior animosity or ill-will, the child and her parents are not imagined to level such serious allegations against the husband of the Principal of the school with whom they had no prior acquaintance. Discrepancies or inconsistencies pointed out by the learned Defence counsel are insignificant and inconsequential.

15. The impugned judgment based upon fair appraisal of the evidence needs no intervention. Minimum sentence prescribed under Section 10 POCSO Act is Rigorous Imprisonment for five years which cannot be modified or altered.

16. In the light of the above reasoning, the appeal being devoid of merits is dismissed. Trial Court be sent back forthwith along with the copy of the order. Intimation be sent to Superintendent Jail.

(S.P.GARG)
JUDGE

JANUARY 08, 2016
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