

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 31.05.2016
Judgment Pronounced On: 14.07.2016

CRL. A. 1119/2014

BOBY

..... Appellant

Through: Mr. Dinesh Malik, Mr. Akash Saini,
and Mr. Gurpreet Singh, Advocates.
Appellant (in custody).

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Radhika Kolluru, APP.
SI Uma Dutt PS Mangolpuri.

CORAM:

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present appeal under section 374(2) of the Code of Criminal Procedure (hereinafter referred as 'the Code') assails the judgment and order

of conviction and order on sentence dated 31.08.2013 and 11.09.2013 respectively, in Sessions Case No. 25/13, titled as 'State vs. Bobby', in FIR No. 479/12, whereby, the Ld. Additional Sessions Judge-01, North, Rohini Courts, Delhi, convicted the appellant under section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and section 323 of the Indian Penal Code (IPC).

2. By way of order on sentence dated 11.09.2013, the appellant has been sentenced to undergo rigorous imprisonment for a period of 5 years along with a fine of Rs. 5000/- (Rupees Five Thousand) in default of payment of fine to further undergo simple imprisonment for a period of 6 months for an offence under section 10 of POCSO Act. Further, the appellant has been sentenced to undergo rigorous imprisonment for a period of 6 months along with a fine of Rs. 1000/- (Rupees One Thousand) and in default of payment of fine to further undergo simple imprisonment for a period of 2 months for offence under section 323 IPC. Both the sentences have been directed to run concurrently.

3. The facts as are relevant for the adjudication of the present appeal are stated as under:

- i. On 17.12.2012, an information was received, vide DD No. 18A, at Police Station Mangolpuri, by way of a phone call, regarding an incident that 'the uncle of a three year old girl has committed 'wrong act". The said DD was assigned to SI Bijender Dahiya (PW-9), who further intimated IO-WSI Suman Kumari (PW-10). WSI-Suman Kumari (PW-10) recorded the statement of the mother of the prosecutrix, namely, Smt. Kaushalya Devi (PW-4).
- ii. In her statement Smt. Kaushalya Devi (PW-4) stated that on 16.12.2012 at about 5 pm, she had gone to the market to get some vegetables and that her daughter/prosecutrix as well as her son were at home. When she came back from the market she heard her daughter/prosecutrix weeping. Smt. Kaushalya Devi (PW-4) went into the room on the first floor where she saw that the appellant had seated her daughter/prosecutrix on his lap and covered her with a quilt. When she removed the quilt she saw that there were no clothes on the body of her daughter/prosecutrix and that she was continuously crying. Upon inquiry from the appellant as to what he was doing to her daughter, the latter replied that he was playing with her daughter/prosecutrix.

However, when she asked her daughter/prosecutrix as to what had happened, the prosecutrix informed her that the appellant had removed her clothes and had put his hand in her urinating part. In the evening, when her husband came, she narrated the incident to him. Subsequently, she informed her brother in law, who made the call to the police on 17.12.2012.

- iii. Thereafter, WSI Suman Kumari (PW-10) made an endorsement on the said statement of the mother of the prosecutrix (PW-4). The statement of the prosecutrix (PW-2) was recorded under section 164 of the Code before the concerned Magistrate.
- iv. The prosecutrix (PW-2) was medically examined, however, the mother of the prosecutrix (PW-4) refused the internal medical examination of the prosecutrix (PW-2).
- v. After investigation, the date of birth certificate of the prosecutrix was collected by the IO and after investigation, a chargesheet was filed under sections 376/307/511 IPC and under section 8/10 of POCSO Act, against the appellant.
- vi. After compliance with section 207 of the Code the case was committed to the Court of Sessions.

- vii. Thereafter, charges under section 10 of POCSO Act and section 307 IPC were framed vide order dated 27.02.2013. The accused pleaded not guilty and claimed trial.
- viii. At the stage of evidence, in support of its case, the prosecution examined 10 witnesses. The list of witnesses as examined by the prosecution is as under:
- PW1-Dr. Monika Tondon, Medical Officer, SGM Hospital, prepared the MLC qua the prosecutrix (Ex. PW1/A), along with PW5-Dr. Ankur Jain Medical Officer, SGM Hospital.
 - PW2-the prosecutrix.
 - PW3- ASI Rajbir Singh, No. 356/OD, PS Mangolpuri, working as duty officer, who recorded the FIR (Ex. PW3/A).
 - PW4- Smt. Kaushalya Devi, the mother of the prosecutrix.
 - PW6- Dr. Bina, Casualty, Medical Officer, SGM Hospital, who examined the appellant and prepared the MLC qua the appellant (Ex. PW6/A).

- PW7- W/Ct Shashikala, No. 1814/OD, PS Mangolpuri, who took the prosecutrix along with her mother for her medical examination.
- PW8- Const. Ampit, No. 2689/PCR, who participated in the investigation with the IO and arrested the appellant vide arrest memo (Ex. PW4/A).
- PW9- Bijender Dahiya, who received the PCR call from the brother in law of the mother of the prosecutrix and further intimated WSI Suman.
- PW10- WSI Suman, the main IO of the subject case.

ix. Thereafter, the statement of the appellant/accused was recorded under section 313 of the Code, wherein, he pleaded not guilty and claimed trial. The appellant/accused led no defence.

4. After going through the testimonies of the witnesses and after hearing the arguments on behalf of the parties, the Ld. trial court convicted the appellant under section 10 of POCSO Act and section 323 IPC, as aforestated.

5. Mr. Dinesh Malik, learned counsel appearing on behalf of the appellant would urge that the Ld. trial court failed to appreciate that the

prosecutrix (PW-2) has admitted in her cross-examination that her father used to quarrel with the appellant, and also that Smt. Kaushalya Devi (PW-4) had in her testimony suggested that she wanted to throw the appellant out of her house. Mr. Malik, would then urge that in order to throw the appellant out of the house, Smt. Kaushalya Devi (PW-4), falsely implicated the appellant in this case. In this regard, it is pointed out that the appellant in his statement under section 313 of the Code stated that he had only taken off the jersey of the prosecutrix on the latter's asking since she was feeling uncomfortable, and that he only lifted the prosecutrix out of love and had touched the urinating part of the prosecutrix without any bad intentions.

6. Mr. Malik, would lastly urge that there are contradictions in the depositions of Smt. Kaushalya Devi (PW-4) and WSI Suman Kumari (PW-10), in as much as, Smt. Kaushalya Devi has admitted in her cross-examination that the statement of her husband was recorded in her presence on 17.12.2012 at about 5-6 pm, whereas WSI Suman Kumari (PW-10) has admitted in her deposition that she did not record the statement of the husband of Smt. Kaushalya Devi (PW-4) on 17.12.2012 or later on.

7. On the other hand, Ms. Radhika Kolluru, learned APP on behalf of the State would urge that the prosecutrix (PW-2) has unequivocally supported

the case of the prosecution and her statement on all material grounds has been corroborated by the statement of her mother (PW-4). Ms. Kolluru, learned APP would further urge that the appellant has in fact acknowledged that he had touched the prosecutrix inappropriately in his statement under section 313 of the Code.

8. I have heard counsel appearing on behalf of the parties and perused the evidence on record.

9. Insofar as the argument on behalf of the appellant, with regard to the ill intentions of Smt. Kaushalya Devi (PW-4) is concerned, the same does not find any corroboration as the appellant led no defence in this behalf.

10. Thus, the solitary issue that remains for consideration is whether the appellant can be found guilty on the basis of the clear and unambiguous testimony of the prosecutrix?

11. It is a settled proposition of law that in cases involving sexual harassment, molestation, etc., the court is duty-bound to deal with such cases with utmost sensitivity. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The statement of the

prosecutrix is more reliable than that of any injured witness as she is not an accomplice. (Ref: *State of Punjab vs. Gurmit Singh*, reported as (1996) 2 SCC 384). Thus, a conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. (Ref: *Vishnu (alias) Undrya vs. State of Maharashtra* reported as (2006) 1 SCC 283; *State of M.P vs. Dayal Sahu* , reported as (2005) 8 SCC 122)).

12. In the present case, the prosecutrix (PW-2) in her testimony identified the appellant as her *chacha* (paternal uncle) and stated as under:

"The name of my uncle (*chacha*) is Bobby, who is present in the court. At this stage, witness pointed out towards the accused Bobby present in the court today. My uncle is a bad man. (*mere chacha gande hain*). My chacha used to beat me. One day when I was alone in the house as my mother has gone to take vegetables, at that time my chacha was came from the roof of my house, my uncle lifted me in his lap and touched his hand on my private part. (*mujhe godi mein uthaya aur mere susu pe haath lagaya*). My chacha had removed my kachi and thereafter touched my private part. Thereafter, he removed my clothes and took me into the quilt (*mere kapre utare aur mujhe rajai mein lita liya*). He has removed jersy which was of red colour. thereafter my mother came and asked my chacha to go away. (*mummy aai aur chacha ko bhaga diya*). My uncle had pressed my neck and beat me. (*mere chacha ne mera gala ghonta tha aur mara tha*). I had narrated all the facts and circumstances to my mother.

Earlier also, I along with my mother came to the court and one uncle had asked me questions and I had told him what my uncle had done.

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My father used to have quarrel with my uncle. But I am not aware the reason of quarrel. My mother has told me to state the facts as told by me. My chacha was residing in a room on the first floor. My both

brothers are younger to me and very small. The name of my brother who is younger to me is Bhanu and the youngest is Deepanshu. *Main jab manjan kar rahi thi tho mere chacha ne us samay mujhe utha liya aur mere susu pe haath lagaya aur usi samay mera gala ghonta aur rajai mein kuch nahi kiya.* My mother had gone to market for purchasing articles after bolting kundi from outside. My uncle used to ask for food to my mother. Police had beaten my chacha in my presence. At that time Bhanu had gone with my mother and Deepanshu was at home and playing on the floor. I was cleaning my teeth by manjan while sitting on the patra/stool. My chacha entered into the room after opening the door. At that time, my father had gone to his workplace. *Mere papa bijli jorte hain.* My uncle is married. My chachi does not reside with my chacha. *Meri chachi bohot door rehti hain.* It is wrong to suggest that my uncle had not lifted me or that he had not touched my private part. It is wrong to suggest that I am deposing as told by my mother."

13. The testimony of Smt. Kaushalya Devi, PW-4, corroborating the testimony of the prosecutrix (PW-2) is as under:

"On 16.12.2012 at about 5pm, when I had gone to purchase the vegetables from the market. At that time my daughter and youngest son and accused were present in the house. I have bolted the exit door from outside when I had gone to the market, because my children were small. When I returned to my house, I listened the weeping voice of my daughter. When I entered inside the house and inquire about the reason of weeping my daughter, I saw that, on the room of the first floor, accused Bobby had taken my daughter on his lap and covered with quilt. When I removed the quilt then I saw that there was no cloth on the body of my daughter and my daughter was weeping. When I asked from the accused, what were you doing?, in reply he had stated that, I was playing with my daughter (kila raha tha). I console my daughter and taken her in my lap and accused was sent from my room. I asked my daughter, what was happened, then my daughter had replied that, accused had taken in his lap from the kitchen and lay down her on the bed and he also slapped her and pressed her neck and removed her clothes and further touches her private parts (vagina) and accused was also inside the quilt. I also

abused the accused. I had narrated the entire incident to my husband when he came from his work place.

On the next day, I had called my sister in law (nanad) and her husband (nandoi) Tilak Raj, who had made a call at 100 number and police visited my house and recorded my statement Ex. PW4/A, signed by me at point A. I alongwith my daughter, my sister in law and her husband went to the PS, who had taken my daughter for medical examination, but I and my daughter have refused for internal medical examination and I have signed the endorsement in this respect at point C on the MLC Ex. PW1/A. Further, in the evening statement of my daughter's statement got recorded under section 164 CrPC in the Rohini Court before the magistrate.

Accused Bobby was arrested on 17.12.2012, vide memo Ex. PW4/A, bearing my signatures at point A. Accused Bobby is present in the court today (correctly identified by the witness). At the time of incident, my daughter was aged around 4 years. The date of birth of my daughter is 20.12.2007. I had also given the date of birth certificate to the IO, the copy of the same is marked as Mark B. I can produce the original date of birth certificate of my daughter.

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It is wrong to suggest that police has not recorded the statement of my husband. It is wrong to suggest that there was a dispute between accused and us. It is wrong to suggest that we wanted to throw out the accused from our house therefore we falsely implicate him. It is wrong to suggest that no such incident was happened therefore I refused for the internal medical examination of prosecutrix. It is wrong to suggest that accused was not arrested in my presence or that police has obtained my signatures on blank papers. It is wrong to suggest that the accused has been falsely implicated in this case."

14. The testimony of the prosecutrix (PW-2) is clear to the effect that her uncle lifted her in his lap and touched her private part (vagina), as well as removed her clothes. This statement has remained unshattered in the cross-examination of the prosecutrix (PW-2). The statement of the prosecutrix is

worthy of credence and inspires confidence. In view of the afore-stated legal position, the statement of the prosecutrix requires no corroboration.

15. Even otherwise, the statement of the prosecutrix finds full support and corroboration from the testimony of her mother, Smt. Kaushalya Devi (PW-4), wherein she stated that on the date of the incident, when she returned back from the market, she found her daughter was weeping, and saw that the appellant had taken the prosecutrix in his lap and had covered her with a quilt. Smt. Kaushalya Devi (PW-4) further stated that when she lifted the quilt, she saw that her daughter was not wearing any clothes. When she asked the prosecutrix as to what had happened, the latter told her that the appellant had touched her private parts.

16. Moreover, the appellant has admitted in his statement under section 313 of the Code that he had touched the private parts of his niece but without any sexual intention. Further, the appellant chose not to lead any defence in regard to the submissions now being made before this court and qua his false implication in the case.

17. At this juncture, it would be relevant to consider the relevant provisions of POCSO Act as attracted to the factual matrix of this case:

Section 10. Punishment for aggravated sexual assault. - Whoever, commits aggravated sexual assault shall be punished with imprisonment for either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Aggravated sexual assault has been defined in section 9 of POCSO Act as under:-

Section 9. Aggravated Sexual Assault- (m) Whoever commits sexual assault on a child below twelve years: or

(n) Whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits sexual assault on such child;

Sexual Assault has been defined under section 7 of POCSO Act:

Section 7. Sexual assault : Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

18. After going through the provisions of law and the testimonies of relevant witnesses in the present case, it is observed that the appellant is admittedly the paternal uncle (*chacha*) of the prosecutrix (PW-2). Further, that the prosecutrix was below 12 years of age at the time of the incident. It is further evident that the appellant self confessedly touched the vagina of the prosecutrix on the date of the commission of the offence inside the

shared household. Therefore, there is no manner of doubt that the appellant is guilty of the offence of 'aggravated sexual assault' within the meaning of the provisions of sections 9(m) and 9(n) read with section 7 of the POCSO Act, punishable under section 10 of the POCSO Act. The appellant has been awarded the minimum sentence of imprisonment for a period of five years as provided under Section 10 of the POCSO Act.

19. Further, the contention of the appellant that he has been falsely implicated in the present case lacks merit, in view of the circumstance that there is clear and unambiguous testimony of the prosecutrix (PW-2), corroborated by the testimony of the mother of the prosecutrix, Smt. Kaushalya Devi (PW-4), implicating the appellant for the said offence.

20. In view of the above-stated facts and circumstances, I see no infirmity in the finding arrived at by the learned Trial court based upon just appreciation of the material evidence on record available in the case. All the relevant contentions made on behalf of the appellant have been dealt with appropriately in the impugned judgment. The same warrants no interference.

21. The issue raised in the present appeal is decided against the appellant, and his conviction under section 10 of POCSO Act and section 323 IPC as well as the sentence imposed on him is upheld.

22. In view of the foregoing the present appeal lacks merit and is accordingly dismissed.

23. The Trial Court record be sent back.

SIDDHARTH MRIDUL, J

JULY 14, 2016

