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

% *Date of Decision: 18th May, 2016*

+ **CRL.A. No.778/2015**

AALAM KHAN Appellant

Through: Mr. Azhar Qayum, Advocate.

versus

STATE Respondent

Through: Mr. Amit Ahlawat, APP for the State.

PRATIBHA RANI, J. (Oral)

1. This appeal has come up for hearing pursuant to the directions issued for expediting hearing in appeals filed by persons in custody (with sentence more than seven years and upto ten years).
2. Pursuant to the production warrants issued against the appellant, he has been produced from J/C. He is represented by Mr. Azhar Qayum, Advocate.
3. The present appeal has been preferred by the appellant challenging his conviction for committing the offence punishable under Section 6 of POCSO Act and sentence awarded to him to undergo RI for ten years with fine of ₹ 1000/- and in default, to undergo SI for three months.
4. I have heard the appellant, who has been produced from judicial custody, as well as his counsel.
5. The FIR in this case has been registered on the basis of complaint made by Smt. Jagwanti – grandmother of the child victim ‘P’. Briefly stating, the case of the prosecution against the appellant is that on 01.12.2013 her elder son Jai Kanwar (Tau of the victim), who is mentally

weak, had taken his niece 'P' aged about eight years, who is daughter of her younger son Harish, for treatment to Masjid Wala *Hakim* i.e. Appellant for the white spots. Her elder son returned at 4.00 pm after taking the medicines from *Hakim*. At about 5.00 pm, she saw her grand-daughter 'P' was crying while passing urine. On being asked about the reason for crying, 'P' informed that the *Hakim* had kissed on her lips and also lied down on her and had inserted his finger in her private part. She immediately informed her husband about the incident and matter was reported to the police.

6. The child victim 'P' was medically examined at Sanjay Gandhi Memorial Hospital, Mangol Puri on the night intervening 1/2-12-2013 at 12.30 am. Her statement under Section 164 CrPC was also got recorded wherein she narrated the incident of she being kissed on her lips by the appellant and also putting of finger in her private part by the appellant.

7. During trial the prosecution examined 14 witnesses in order to bring home the guilt of the appellant. The Appellant Alam Khan was also examined under Section 313 CrPC to enable him to explain the incriminating evidence appearing against him. In his statement recorded under Section 313 CrPC in answer to the question 'Do you want to say anything else?', the appellant has stated that he is innocent and he has been falsely implicated by *Tau* of the child victim who had taken a loan of ₹10,000/- from him 2-3 months prior to the incident. In order to avoid repayment of the said loan, he has been falsely implicated in this case. The appellant did not lead any defence evidence.

8. After appreciating the testimony of child victim, which was supported by medical evidence, and referring to the decisions in the case of ***Dattu Ramrao Sakhare vs. State of Maharashtra*** (1997) 5 SCC 341, ***Panchhi vs. State of U.P.*** AIR 1998 SC 2726 and ***State of U.P. vs. Krishan Master*** AIR

2010 SC 3071, the learned ASJ convicted the appellant for committing the offence punishable under Section 6 of POCSO Act for the following reasons:

'30. In the present case, not only does the testimony of victim child/PW-4 inspires confidence, but even other her testimony is duly corroborated by that of PW-9 Jai Kanwar and PW-8 Smt. Jagwanti as well as the medical evidence on record as already observed hereinabove. I find no reason as to why a child of tender age, would implicate an innocent person for an offence which was undisputedly committed with her. The testimony of Prosecutrix clearly bring out the traumatic experience she suffered at the hands of the accused.'

9. Mr.Azhar Qayum, Advocate for the appellant has submitted that it is a case where the appellant had been falsely implicated as PW-9 Jai Kanwar – *tau* of the child victim had borrowed ₹10,000/- from the appellant and in order to avoid its repayment, this false case was got registered.

10. Learned counsel for the appellant has also contended that the appellant was a *Hakim* by profession. The child victim had been taken to him for treatment of *safed daag* (white spots). The child victim has not complained to her *tau* when he returned to *Hakim* after bringing the water bottle as directed by the appellant. It has been urged before this Court that the appellant is a very old man whereas the alleged child victim was aged about 8 years at the time of occurrence and the possibility of she being tutored by her *tau* cannot be ruled out. There being no eye witness to the occurrence, statement of PW-3 'P' – the child victim cannot be considered sufficient to prove the guilt of the appellant beyond reasonable doubt.

11. Learned counsel for the appellant has submitted that there are material contradictions in the statement of prosecution witnesses which make the entire prosecution case doubtful. There is no evidence to prove the child

victim being sexually assaulted by the appellant, the MLC also does not show that the child received any injury on her private part, still the appellant has been convicted for committing the offence punishable under Section 6 of POCSO Act. The appellant has prayed for his acquittal in this case.

12. Mr.Amit Ahlawat, learned APP for the State has submitted it is not a case of false implication of the appellant for the reason that not only in her statement under Section 164 CrPC, the child victim has fully narrated the incident but also during her examination before the learned Trial Court she has given all the details and the manner in which she was sexually assaulted by the appellant. The child victim had no motive to make a false statement against the appellant. Thus, her testimony, which is reliable in all respects, is sufficient to sustain the conviction and sentence of the appellant.

13. I have considered the rival contentions and carefully perused the record.

14. The only precaution which the Court should take in assessing the testimony of the child victim is that the witness must be reliable and there is no likelihood of she being tutored. In the instant case, it is not disputed that the child victim 'P' was taken by her *tau* PW-9 Jai Kanwar to the appellant who was practicing as *Hakim*, for taking medicines for the white spots. The appellant asked PW-9 Jai Kanwar to bring water bottle and when he brought the same, after reading something that water bottle was returned alongwith some *pudia* of medicine. The child victim returned home alongwith her *tau*. If it was a case of false implication of the appellant to avoid repayment of alleged loan of ₹10,000/-, PW-9 Jai Kanwar could have created a scene when the child was alone with the appellant for purpose of treatment. The mere fact that PW-9 Jai Kanwar brought the child back home alongwith the medicine and 'treated' water bottle, falsifies the defence of the appellant of

it being a case of false implication to avoid repayment of loan of ₹10,000/-. It is necessary to mention here that the cross examination of PW-9 by learned counsel for the appellant is limited to giving the following suggestion:

'It is wrong to suggest that I has taken loan of ₹10,000/- from the accused 2-3 months prior to the incident or that in order to avoid making the payment of the said loan I falsely implicated the accused in the present case.'

15. Thus even to PW-9 Jai kanwar neither the date, month of time of giving loan is mentioned nor it is the case of the appellant that he was doing some kind of money lending business or that it was a friendly loan. Thus, the contention of the appellant of his false implication by PW-9 Jai Kanwar to avoid repayment of loan, is liable to be rejected.

16. The next question is about the reliability of the testimony of the child victim and whether she can be considered to be a tutored witness.

17. A child witness cannot be termed as incompetent or unreliable witness as was discussed by the Supreme Court in the decision reported as ***State of Madhya Pradesh Vs. Ramesh & Anr. (2011) 4 SCC 786***. The credibility of a child witness was dealt with in para 7 of the judgment. While referring to the decision of the Supreme Court in ***Rameshwar v. State of Rajasthan AIR 1952 SC 54***, it was held as under :

'Every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age, extreme old age, disease whether of body or mind or any other cause of the same kind and that there is always competency in fact unless the court considers otherwise'.

18. In another case ***Bharwada Bhoginbhai Hirjibhai vs State of Gujarat (183) 3 SCC 217***, it has been held as under:

'9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focused on the Indian horizon.'

19. The incident in this case is dated 01.12.2013 and statement of child victim under Section 164 CrPC has been recorded on 02.12.2013 and prior to that she has been medically examined on the night intervening 1/2.12.2013 at 12.30 am. After preparing her MLC, she was referred to Gynae S/R for further examination and opinion. She was examined by the Gynecologist at 1.10 am. The history recorded and opinion given is extracted hereunder:

'P' 8 yr. old girl brought by lady police Constable and her grand mother (Jagwanti) with h/o sexual assault by a quack (unknown) at around 3-4 pm on 1.12.13. Quack resides at F-Block Mangol Puri Masjid. As told by child, child had gone with her uncle to some ojha (quack) for her ciencoderma seen around her eyes, the ojha asked her uncle to get some water and oil and meanwhile ojha pulled her pant down and fingered inside her pant and then asked her to lie in prone pose and also slept on her and then left her and then her uncle arrived. Ojha did not remove his cloth or pant and she told all the incident to her mother after reaching home.'

20. Testimony of PW-4 'P' was recorded in the Court on 15.07.2014 i.e. after seven months of the incident and at that time also she has narrated the incident very clearly explaining that she had gone to the appellant alongwith

her *tau* to take medicine for *safed daag*. Mulla (appellant) sent her *tau* to bring bottle of oil and water. When her *tau* left she was asked to lie down. She was kissed on her lips by Mulla. Mulla also put hand in her panty and put finger in her *susu* thrice. When her *tau* came alongwith bottle, she was brought home. She has further stated that as she was feeling pain while passing urine, she narrated the incident to her mother who informed her grandmother and matter was reported to the police and thereafter she was taken for medical examination. She has correctly identified the appellant to be the same person who kissed on her lips and put finger in her *susu*. The testimony of PW-4 has also been extracted by the learned Trial Court in paras 25 to 28 of the impugned judgment.

21. Statement of PW-8 Smt.Jagwanti – grandmother of the child victim PW-4 ‘P’ has corroborated the version of PW-4 as to how the incident came to her notice and the action taken thereafter against the appellant.

22. Section 3 (b) of POCSO Act provides :

‘3. Penetrative sexual assault – A person is said to commit “penetrative sexual assault” if –

(a) xxx xxx

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) xxx xxx

(d) xxx xxx’

23. Section 6 of POCSO Act reads as under :

‘6. Punishment for aggravated penetrative sexual assault – whoever, commits aggravated penetrative sexual assault, shall

be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.'

24. The version of child victim 'P' about the manner in which she was sexually assaulted is fully corroborated by her MLC. It is highly improbable that just to avoid payment of ₹10,000/- to the appellant which was allegedly taken as loan by PW-9 Jai Kanwar from the appellant, they would have registered FIR and taken their daughter for internal medical examination at such a tender age i.e. eight years. The fact that the child victim was medically examined on the same night i.e. intervening night of 1/2.12.2013 and in her statement from inception PW-4 – the child victim has mentioned about she being kissed on her lips by the appellant and also fingers being put in her private part by him, make her testimony worthy of credence and no trace of tutoring her can be noticed.

25. In view of above discussion, I do not find any ground to interfere with the finding of learned Trial Court holding the appellant guilty for committing the offence punishable under Section 6 of POCSO Act.

26. So far as sentence awarded to the appellant is concerned, he has been sentence to undergo RI for ten years with fine of ₹1000/- and in default of payment of fine, to undergo SI for three months.

27. Since the substantive sentence awarded to the appellant for committing the offence punishable under Section 6 of POCSO Act is RI for ten years, which is the minimum sentence for the said offence, the appellant is not entitled for any leniency on this count.

28. However, the sentence awarded to the appellant in default of payment of fine of ₹1000/- i.e. to undergo SI for three months, is on higher side. Accordingly, while upholding the conviction and substantive sentence awarded to the appellant for committing the offence punishable under

Section 6 of POCSO Act as well as fine of ₹1000/-, the period of sentence required to be undergone by him in default of payment of fine is reduced from three months to one week.

29. The appeal stands disposed of in above terms.

30. TCR be sent back alongwith copy of this order.

31. A copy of this order be sent to the concerned Jail Superintendent for information and necessary compliance.

32. A copy of the order be also sent to the appellant through concerned Jail Superintendent.

PRATIBHA RANI, J.

MAY 18, 2016

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