

#4

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 07.12.2018

CRL.L.P. 418/2018

STATE (GNCT OF DELHI)

..... Appellant

Versus

VICKY @ KARAN & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Ravi Nayak, APP with Insp. Satya Pal Singh with SI
Sanju Rai, PS Bharat Nagar

For the Respondents : Ms. Aishwarya Rao, Advocate for R-1
Mr. Manu Sharma, Mr. Kartik Khanna and Mr. Vijay Singh,
Advocates for R-2

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SIDDHARTH MRIDUL, J (ORAL)

1. There can be no manner of doubt that a conviction for committing penetrative sexual assault can be sustained on

the sole testimony of the prosecutrix. [Ref: **Boby vs. State**, CrI.A 1119/2014; **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)]. However, it is equally well established that, the testimony of the prosecutrix must be creditworthy and inspire confidence.

2. The State has instituted the present petition seeking grant of leave to assail the judgment dated 04.04.2018, in Session Case No.106/2014, arising out of FIR No.170/2014(hereinafter referred to as the ‘subject FIR’) under sections 376D/109 Indian Penal Code, 1860, read with sections 04/06/17 of Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO’) registered at Police Station-Bharat Nagar; whereby the Trial Court has specified the operative portion.
3. In sum and substance, it is the case of the prosecution that the prosecutrix (hereinafter referred to as the ‘victim’), along with her mother came to the police station at 11:50 pm on 25.03.2014 and made the following statement:

“बयान किया कि मैं उपरोक्त पते पर अपने मम्मी पापा के साथ रहती हूँ और 4th class में पढ़ती हूँ। कल दिनांक 24.03.14 को साथ करीब 2:30 बजे लक्ष्मी जो मेरी friend है मुझे Vicky के घर लेकर गयी थी तब वहां पर कोई नहीं था। घर की कुण्डी बंद थी और खुला हुआ ताला लटका था और वहां पर कोई नहीं था कुछ देर बाद वहां पर तीन लोग आये वो लोग खाना लेकर

आये थे, जिसमे से एक ने drink कर रखी थी, उसके बाद हमने खाना खाया, फिर लक्ष्मी ने मुझसे कहा कि आज काम करवा ले तो मैंने कहा तू मुझे पहले घर छोड़ कर आजा तू चाहे जितना रह लेना, उसने कहा कि मैं तुम्हे सुबह छोड़ दूँगी, पर मैंने कहा कि नहीं मुझे जल्दी छोड़ दे तो बोली कि मैं तेरी मम्मी को सब कुछ समझा दूँगी, और मुझसे बोली कि तू गन्दा काम करवा ले तो तुझे पैसे मिलेंगे तो मैंने मना कर दिया फिर उसने मुझे मम्मी की कसम दी तो मैं लक्ष्मी के साथ सो गयी। फिर रात में लक्ष्मी ने Vicky और उसके uncle के साथ गलत काम किया फिर Vicky मेरे पास आ गया और बोला कि मेरे साथ कर ले तो तुझे पैसे मिलेंगे नहीं तो मेरे से बुरा कोई नहीं होगा और फिर vicky ने मेरे साथ गलत काम किया, फिर सुबह को लक्ष्मी जब अनपेन घर जाने लगी तो मैं भी पीछे से निकल गयी और अपने घर आ गयी फिर अपनी मम्मी को साड़ी बात बता दी। तब लक्ष्मी मुझे लेकर थाने में आ गयी। उनके खिलाफ कानूनी कार्यवाही की जाए आपने मेरा बयान लिखा, सुन लिया ठीक है।

तभी शिकायत ने हाजिर थाना आकर अपना बयां पुस्तहजा तहरीर कराया, जिस सरसरी तौर पूछताछ के बाद NGO को बुलाकर लड़की की Counselling करवाई तथा BJRH Hospital से vide MLC No.-75587/14 पर medical कराया जिसमे Dr. ने A/H of Sexual assault तहरीर फ़रमाया, जिस पर लड़की के बयान से हालात से मुलाहिजा MLC से व Counselling Report न से अपराध u/s-376 IPC तथा 4POCSO का सरज़द होना पाया जाता है लिहाजा तहरीर हजा बर्गज कायमी मुकदमा बदस्थ Ct. Ramchander no.1536/NW अरसाल थाना है। मुकदमा दर्ज रजिस्टर करके न० मुकदमा से इत्तला दी जाये। मन SI मशरूफ बातफतीश हू।”

4. On her statement, the subject FIR came to be registered and the victim was both medically examined, as well as, counselled.

5. Subsequent thereto, at the instance of the victim, the IO is stated to have prepared the site plan of the place of incident, but was unable to arrest the accused, since the premises was found locked. Subsequently, the statement of the victim was also recorded under section 164 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') by the Magistrate concerned on 28.03.2014 and the respondents herein, as well as, a juvenile Laxmi were arrested.
6. After completion of the investigation, a charge sheet was filed. The following charges were framed against the respondents:
- I) Respondent No.1
- (i) Charges for commission of offence punishable under section 363 IPC read with 109 IPC and punishable under section 4 read with 3(a) of POCSO Act and in the alternate section 376(2) (i) IPC
- II) Respondent No.2
- (ii) Charges for the offence punishable 363 IPC read with Section 109 IPC and 16 & 17 POCSO Act read with 107 and 109 IPC
7. In order to bring home the guilt of the accused, the prosecution examined, as many as, 13 witnesses.

8. There is, however, no gainsaying the fact that, the star witness of the prosecution is the victim herself; and resultantly, her testimony is critical to the case of the prosecution.

9. It would, therefore, be necessary and appropriate to extract the victim's testimony *in extenso*:

"Q. Batao beta ghatna ke samay aap kaun si class me padati thi?

Ans. 4th class me padati thi. Ghatna ke baad mummy, papa ne school chudwa diya.

Q. Beta batao kya hua tha ?

Ans. 24 tarikh, saal 2014, tisra mahina (3rd month), karib 2:00-2:30AM, meri saheli Laxmi mujhe apne friend ke ghar party me lekargayi.

Court Ques. Woh apko kis jagah le gayi thi ?

Ans. Woh tdh mujhe pata nahl hai par hum pehle uss gali me rehte the.

Q. Phir kya hua ?

Ans. Uss ghar me kundi lagi huyi thi aur tala latka hua tha (the door of the house was bolted and an unbolted lock was hanging). Uss ghar me koi nahi tha.

Q. Phir kya hua?

Ans. Laxmi ne kaha tu darwaza khol, maine manna kar diya. Laxmi ne darwaza khola. Ghar me koi nahi tha.

Q. Phir kya hua ?

Ans. Laxmi ne bola ki tu beth ja woh aate honge. Thodi derr me 3ladke aa gaye.

Q. Kya aap unn ladko ko pehchanti ho?

Ans. Ha mein unko shakal se pehchan lungi.

Q. Phir kya hua ?

Ans. Woh ladke khana lekar aaye the (they had brought food). Ek ne drink kar rakhi thi. Woh ladka thodi der baad khana khakar chala gaya.

Q. Phir kya hua ?

Ans. Hum dono so gaye.

Court Ques. Hum dono kaun ?

Ans. Mein aur Laxmi.

Q. Phir kya hua?

Ans. Laxmi ne kaha ki tu Vicky ke sath so ja. Maine mana kiya toh usne kaha ki tujhe mummy ki kasam hai. Mein tujhe savere ghar par chhod aaungi.

Q. Phir kya hua ?

Ans. Laxmi ne kaha tu 'kaam karwa le'. Maine kaha nahi behein tu mujhe ghar chhod aa.

Court Ques. 'Kaam karwane' se kya matlab hai ?

Ans. Galatkam.

Q. Phir kya hua?

Ans. Vicky ka uncle Hindu Rao apni wife ko dekhne chala gaya. Usne bahar se tala laga diya.

Q. Phir kya hua?

Ans. Phir Vicky ne mere sath galatkam kiya.

Court Ques.: 'galatkam' se apka kya matlab hai ?

Ans. Usne apni niche wali jagah mere peshab karnewali jagah me dalne ko kaha. Maine manna kiya toh usne gubare jaisi (balloon like) cheej nikali aur

niche apni peshab ki jagah par lagayi aur mere pishab ki jagah me dalne ki kaushish kar raha tha par puri nahi gayi thodi si gayi.

Q. Phir kya hua?

Ans. Vicky ka uncle wapas aa gaya. Tab Laxmi bhi apni chappal pehan kar chalne lagi. Maine kaha ki mujhe bhi ghar le chal par usne kuch nahi bola aur woh nikal gayi. Mein bhi rote rote uske peeche nikal gayi. Laxmi ka baap (father) usse raste me mil gaya aur woh apne baap ke sath chali gayi.

Q. Phir kya hua ?

Ans. Mein apne ghar par aa gayi. Mummy ne pucha toh mein rone lagi. Mummy ne kaha ki nahi marungi tu bata. Tab maine mummy ko sab bata diya.

Court Ques. Beta Jab Vicky apke sath galatkam kar raha tha tab Laxmi kaha thi ?

Ans. Laxmi Manish ke sath galatkam kar rahi thi. Usne mujhe kaha tha ki tujhe paise mileage tu kaam karwa le nahi toh tujhe mummy ki kasam hai.

Q. Phir kya hua?

Ans. Mummy mujhe chowki le aayi. Maine aaj jo bataya woh police ko chowki me bata diya tha.

At this stage, the witness is shown her complaint from the judicial file and she" identifies her signatures at point "A"thereupon. The complaint is now exhibited as Ex.PW-7/A.

Q. Beta kya aap pehle bhi Court aaye the ?

Ans. Ha mein Court aayi thi aur maine sab baat Judge Saheb ko batayi thi.

At this stage, the statement of the witness u/s. 164 CrPC already Ex.PW-3/B is shown to the witness from the judicial file and she identifies her signatures at point "A" thereupon.

Q. Phir police apko kaha le gayi thi?

Ans. Police mujhe hospital le gayi aur phir mujhe meri behein ke ghar le gayi jaha par mere se puchtach karke mere bayaan likhe the.

Q. Phir kya hua?

Ans. Maine police ko Vicky ka ghar dikhaya tha jaha par mere sath galatkam hua tha.

Q. Phir kya hua?

Ans. Ghar par Vicky nahi mila, uske ghar par tala laga hua tha.

Q. Kya pane police ko Vicky ko aur uske uncle Manish ko pehchan karke bataya tha?

Ans. Nahi, police ne Manish ko aur Vicky ko mujhe aur meri mummy ko nahi dikhaya tha.

Q. Kya aap aaj Vicky aur Manish ko pehchan sakti ho?

Ans. Ha.

At this stage, the wooden partition has been removed. The witness identifies the younger accused as accused Vicky, who had committed wrong act with her and the older accused as accused Manish, uncle of accused Vicky, who had committed wrong act with Laxmi.

Court Observation: The witness has correctly identified both the accused persons.

Court Observation: Aap raat ko 2:00-2:30 AM par Laxmi ke sath kyu gaye the?

Ans. Mein 6:00 PM par bazaar gayi thi papa ne mujhe samaan lene bheja tha. Tab mujhe Laxmi mili aur mujhe lekar gayi.

Court Ques.: Abhi apne bataya tha ki Laxmi apko 2:00-2:30 AM par lekar gayi thi aur aap bata rahe ho ki 6:00 PM le gayi thi, dono me se kaun si baat thik hai?

Ans. Who mujhe 6:00 PM par le gayi thi. Maine 2:00-2:30 AM baje ka time galati se likhwa diya kyunki mein bul gayi thi.

XXXXXX By Ms. Urmil Yadav, LAC for accused Vicky and Ms. Babita for accused Manish.

Q. Beta kya aap class me kabhi fail huyi ho?

Ans. Ha.

Q. Kitni baar?

Ans. 6 baar.

Q. Aap kaun si class me fail huye the?

Ans. 2nd Class me.

Q. Beta yeh batao ki Vicky ke uncle Manish kitne baje chale gayi the aur wapas kitni derr baad aaye the?

Ans. Manish 2:00 baje din me gaye the aur thodi derr me hi wapas aa gaye the.

(At this stage, learned counsel for accused Vicky wants to confront the witness contents of her complaint.

Considering that the statement of child witness is being recorded, the request for confrontation is disallowed, however, learned counsels shall be at liberty to point out these modifications in the statement of the witness at the time of final arguments.)

Q. Beta aap Laxmi ko kaise jante the ?

Ans. Laxmi humari gali me hi rehti thi. Woh mere school me nahi padati thi.

Q. Apki dost! Laxmi se kitne samay se thi ?

Ans. Ek mahine se.

Q. Ghatna wale din apki mummy ghar par thi ?

Ans. Nahi, woh 6 baje duty par jati thi aur sham ko 7 / 8 baje aati thi.

Q. Kya yeh sahi hai ki accused Vicky se apke mummy, papa ka pehle se jhagada tha ?

Ans. Yeh galat hai.

Q. Kya yeh sahi hai ki accused Vicky bhi ussi jagah rehta tha jaha aap rehte the ?

Ans. Jaha hum pehle rehte the waha rehta tha.

Q. Kya aap pehle kabhi Laxmi ke sath khelne yah ghumhe gayi ho?

Ans. Nahi.

Q. Kya yeh sahi hai ki aaj aap galat bayaan de rahe ho?

Ans. Nahi mein sach bol rahi hu.

Q. Apki badi behein apse kitni badi hai ?

Ans. Badi hai, pata nahi kitni badi hai."

10. On a conspectus of the material evidence on record, there are two issues that arise for consideration in the present leave petition.

11. The first issue that needs determination is, as to whether the prosecution has been able to establish the date of birth of the victim, so as to bring home the guilt of the accused under the ambit of the provisions of the POCSO Act.

12. The second issue upon which the determination of the present leave petition hinges, is as to whether the testimony of the victim can be said to be creditworthy and reliable.

13. Insofar as, the first question is concerned, it is an admitted position that, although the prosecution filed one school certificate of the victim issued by the MCD Primary School, Wazirpur along with the charge sheet; no witness to prove the same was either cited or examined at the trial. The said certificate not having been proved in accordance with law, was rightly eschewed from consideration by the Trial Court.
14. Insofar as, the more significant second issue is concerned, the learned Trial Court, after examining the material evidence on record and in particular the testimony of the victim and after hearing counsel for the parties, opined as follows:

“8. Coming to the main incident, there is unexplained delay in lodging the FIR. Admittedly the victim went missing around 2:30 p.m. on 24.03.2014 and her parents did not lodge any complaint. She came back of her own around 2:00 pm on 25.03.2014 yet they came to PS at 11:50 pm and the delay remains unexplained. Further, the victim in her statement Ex.PW7/A stated that on the night of 24.03.2014, Vicky committed wrong act with her and prior to that Vicky and his uncle (co-accused Manish) committed wrong act with Laxmi. In her statement u/s 164 Cr.P.C. she stated that Vicky committed wrong act with her and his uncle committed wrong act with Laxmi and she did not know Vicky before that. If she did not know

Vicky before the incident then how he was named in the FIR and the statement u/s 164 Cr.P.C. remains unexplained. Further, in her cross examination, she has stated that Vicky used to live near the place where the victim was earlier residing, it means that her statement u/s 164 Cr.P.C. that she did not know Vicky before the incident is incorrect. Further, in her statement given in the court, she stated that Vicky tried to insert his "pishab ki jagah in her pishab jagah" but he could not do so. She changed the nature of alleged incident altogether. Further in the examination in chief, she has stated that on 24.03.2014 at about 2:00/2.30a.m. Her friend Laxmi took her to a friend's house but subsequently in her examination in chief itself, she stated that she went with Laxmi at about 6.00p.m. and by mistake she stated that Laxmi took her around 2.30a.m. It is relevant to note that in the original FIR she has mentioned that Laxmi took her at around 2.30p.m. There are much variation in the time when allegedly Laxmi took her to the house of her friend. It is also important to note that the mother of victim PW-6 in her deposition has stated that when she went to inquire about her daughter at Laxmi's house, her mother told that Laxmi is at home. If Laxmi was at her home on 24.03.2014 at late night hours then how Laxmi took away victim with her is unexplained. Further, the MLC of the victim does not show any sign of sexual assault. Her hymen was found intact with no sign of recent injury and no vaginal discharge and it rules out possibility of sexual assault. Further, the FSL result also did

not find any semen detected from the exhibits of the victim. IO admittedly did not find any evidence regarding sexual assault in the room where victim was allegedly sexually assault. The prosecution has failed to prove the age of the victim as well as the fact that the victim was sexually assaulted by the accused beyond reasonable doubt. Both the accused Vicky @ Karan and Manish are given benefit of doubt. Accordingly, they are acquitted. Their bail bonds stand cancelled and sureties bonds stand discharged. Endorsement, if any on the documents of accused or their surety be cancelled. The original documents of accused or their surety, if on record, be returned to him forthwith.”

15. Mr. Ravi Nayak, learned Additional Public Prosecutor would vehemently urge that, based on the testimony of the victim, the offences for which the accused was charged had been proved beyond a reasonable doubt, by the prosecution.
16. Mr. Ravi Nayak, learned APP has taken us through the testimony of the prosecutrix in Court as hereinbefore extracted, as well as, her statement made under section 161 of Cr.P.C at the concerned police station on 25.03.2014; and before the Magistrate concerned under section 154 of Cr.P.C on 28.03.2014, to urge that, the same is cogent, consistent and creditworthy.

17. We, however, find ourselves unable to agree with the submissions made on behalf of the State, for the following reasons.
18. Subjected to scrutiny warranted by law, the testimony of the victim unravels, insofar as, the material particulars of the incident are concerned and the same is brought into sharp focus in particular by the victim's answer, to a specific query put to her by the Learned Trial Judge, which clearly demonstrates that her testimony is neither creditworthy nor reliable.
19. In this behalf, it would be profitable to extract the query and the victim's response thereto, and the same is reproduced as follows:

"Court Ques: Aap raat ko 2:00-2:30 AM par Laxmi ke sath kyu gaye the?

Ans. Mein 6:00 PM par bazaar gayi thi papa ne mujhe samaan lene bheja tha. Tab mujhe Laxmi mili aur mujhe lekar gayi.

Court Ques.: Abhi apne bataya tha ki Laxmi apko 2:00-2:30 AM par lekar gayi thi aur ab aap bata rahe ho ki 6:00 PM par le gayi thi, dono me se kaun si baat thik hai?

Ans. Woh mujhe 6:00 PM par le gayi thi. Maine 2:00-2:30 AM baje ka time Galati se likhwa diya kyunki mein bul gayi thi."

20. The above response is completely contrary to her testimony given prior to the answer to the Court question and belies her deposition in toto.
21. Furthermore, there is no explanation offered by the prosecutrix for having specifically named respondent No.1, Vicky in the statement that resulted in the registration of the subject FIR, since it was her assertion that, she was a complete stranger to the latter, at the time of the commission of the offence; juxtaposed when it is with the admitted fact that, Vicky resided in the neighbourhood. The testimony of the victim is therefore contradictory in material particulars and does not have a ring of truth in it; and in our view, is neither reliable nor creditworthy.
22. It would also be pertinent to observe that, at the hour when the commission of the offence is stated to have occurred, the juvenile Laxmi was admittedly with her mother at her house.
23. Lastly, it is also relevant to observe that, the MLC of the victim did not show any sign of sexual assault; her hymen was found intact with no sign of recent injury, and further no vaginal discharge was detected.
24. This leads to but one inescapable conclusion that, there was no sexual assault. Even otherwise, the contradictory testimony of the victim does not inspire confidence and we

are consequently, unable to find ourselves to characterise it as either creditworthy or reliable. The second issue raised in these proceedings is, therefore, also decided against the State and in favour of the respondents.

25. In view of the foregoing, the present leave petition being devoid of merit is accordingly dismissed.

SIDDHARTH MRIDUL
(JUDGE)

SANGITA DHINGRA SEHGAL
(JUDGE)

DECEMBER 07, 2018

as/ns