

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

CRL.A. 333/2020 & CRL.M.(B.) 7465/2020

Reserved on : 08.07.2020

Date of Decision : 17.07.2020

IN THE MATTER OF:

ROHIT

..... Appellant

Through: Mr. Vinay Kumar Sharma, Advocate

Versus

STATE

..... Respondent

Through: Dr. M.P. Singh, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present appeal is preferred under Section 374 Cr.P.C. on behalf of the appellant *Rohit* challenging the judgment on conviction dated 12.02.2020 and order on sentence dated 15.02.2020 passed by the Special Judge (POCSO Act) (Central), Tis Hazari Courts, in SC No. 28233/2016 arising out of FIR No. 616/2015 under Sections 376 IPC & 6 of POCSO Act registered at Police Station I.P. Estate whereby the appellant was convicted for the offence punishable under Section 6 of POCSO Act and under Section 376 IPC. Further, vide order on sentence dated 15.02.2020, the appellant was directed to undergo rigorous imprisonment for 15 years for the offence punishable under Section 6 of POCSO Act alongwith payment of fine of Rs.10,000/- in default thereof, to undergo SI for six months. In view of Section 42 of the POCSO Act,

the appellant was not sentenced under Section 376 IPC as the punishment provided under the POCSO Act is higher.

2. The brief facts as noted by the Trial Court are as under:-

“Law was set into motion upon the written complaint of the victim dated 28.09.2015 (Ex. PW2/A) wherein complainant/victim (prosecutrix in this case has been referred as victim ‘M’ in order to protect her identity) stated that on 28.09.2015 at 2-3 p.m. when she was on study leave and studying for social examination at her house, the accused called her to meet him, however, she replied that she would not come as she was studying but accused insisted her to come to his room for five minutes. The victim went to room of the accused and accused bolted the door from inside and laid her on the bed and forcibly removed her nikkar and gagged her mouth. After removing the nikkar of victim, accused did “galat harkaten i.e. inserted his penis into her vagina and had sex with her for 5-10 minutes. In the meantime mother of the victim came there and on hearing her mother’s voice, accused released the victim. Victim had narrated the incident to her mother. In the meantime, father of the victim also came there and mother of the victim narrated whole incident to him. A 100 number call was made to police and police came at the spot and apprehended the accused. On the statement of victim, FIR u/sec. 376 & 6 POCSO Act was registered.”

3. During investigation, the medical examination of the child victim as well as the appellant was done and the requisite samples were taken and sent to the FSL. After completion of investigation, a charge-sheet was filed under Section 376 IPC and under Section 6 of POCSO Act. Later, on receipt of the FSL report dated 01.02.2018, a supplementary charge-sheet was also filed.

4. The trial court framed the charges under Section 6 of POCSO Act and under Section 376 IPC vide order dated 04.02.2016. The accused pleaded not guilty and claimed trial. The prosecution in support of its

case examined a total of 14 witnesses. The child victim was examined as PW-8, the mother of the child victim Smt. 'M' was examined as PW-13 and the father of the child victim Mr. 'J' was examined as PW-10, Dr. Preeti Yadav who proved the MLC of the victim was examined as PW-12, Ct Sanjeev was examined as PW-7, W/Ct Shakuntala who recorded the statement of the child victim and took her for medical examination was examined as PW-2 and the investigating officer SI Mohit Malik was examined as PW-14.

5. Learned counsel for the petitioner contended that there was no eye witness of the incident and the appellant has been falsely implicated in the case on account of his love affair with the niece of the father of the child victim. It is further contended that at the time of the MLC, no bleeding or physical injury was observed on the private parts of the victim and in support of his submissions, he has relied upon the decisions in Kailash Laxman Khamkar v State of Maharashtra reported as **2010 CriLJ 3255** as well as the decision in Pandurang Sitaram Bhagwat v State of Maharashtra reported as **AIR 2005 SC 643**. He also contended that the testimony of the child victim does not inspire confidence as the same is inconsistent with her earlier statements. It was further contended that though the samples were collected on the date of the incident i.e., on 28.09.2015, however the DNA examination was conducted on 01.02.2018. It is submitted that the samples could not have remained preserved for such a long time and thus no reliance could have been placed on the DNA Analysis Report. Lastly, it was submitted that no public witness or PCR official was examined.

6. Dr. M.P. Singh, learned APP for the State, on the other hand, supported the impugned judgment. He submitted that the testimony of

the child victim is consistent and supported by the testimony of the parents of the child victim as well as by the scientific evidence on record.

7. I have heard learned counsels for the parties and gone through the LCR as well as written submissions placed on the record on behalf of the appellant.

MLC

8. The MLC of the child victim (Ex. PW3/A) was conducted on 28.09.2015 at 9:31 p.m. and proved by Dr. Amit Anand (PW-3) where she was referred to gynecological department for further examination. The gynecological examination was done at about 11:40 P.M. vide MLC (Exhibit PW11/A), proved by Dr. Preeti Yadav (PW-11). As per the gynecological examination, her hymen was found ruptured, although no bleeding or external injury mark was observed on her private part. The MLC of the appellant (Ex. P-1) was conducted on 29.09.2015 at 11:52 a.m. On local examination, a swelling in *left mandibular* was observed. As per the potency test examination (Ex. PW9/A), it was opined that there was nothing to suggest that the appellant was not capable of performing sexual intercourse

FSL

9. The FSL Report (Ex. PW12/A) dated 01.02.2018 was given by Dr. Sarabjit Singh (PW-12), Senior Scientific Officer, Biological, FSL Rohini. As per the FSL Report, the appellant's blood and semen samples were examined. On DNA analysis, the alleles from the sources of exhibit '4a' (Blood collection of accused) are accounted in the alleles from the source of exhibits '1j1', '1j2, (Two micro slides of vaginal secretion), '1j3' (Cotton wool swab of vaginal secretion), '1k' (Cotton wool swab of cervical mucus collection), '1m' (washing from vagina), '1n1', '1n2'

(Two micro slides of rectal examination), '1n3' (Cotton wool swab of rectal examination), '2a' (Baby T-shirt of victim), '2b' (Shorts of victim) and '3' (Vest of victim).

Age of the Child Victim

10. The child victim was examined as PW-8. She stated that her date of birth is 30.11.2004 and on the date of the incident i.e., 28.09.2015, she was studying in Class-V. The date of birth of the child victim was proved by Ansar Alam (PW-5), Office Clerk, Asian Public School. He brought the Register pertaining to admission/withdrawal of admission of students. As per the Register, the child victim was admitted to the School on 01.07.2010 in Nursery Class and her date of birth was mentioned as 30.11.2004. The photocopy of the Admission and Withdrawal Register was exhibited as Ex.PW5/A (OSR). The witness identified the signatures of the then Principal as well as the stamp of the School. He also proved the certificate issued by the Principal (PW5/B) certifying the date of birth of the child victim. He also proved the admission form (Ex. PW5/C) and the affidavit filed alongwith the admission form [Ex. PW5/D(OSR)] and the School leaving certificate [Ex. PW5/E (OSR)]. In the cross examination, only one question was asked and the witness replied that the child victim left the school on 19.04.2012.

11. As per the aforementioned testimonies, I concur with the finding of the trial court that the age of the child victim on the date of the incident was less than 12 years.

Material Witnesses

12. The FIR was registered on the statement of the child victim in which it was stated that on 28.09.2015 (date of the incident), her parents had gone out for work and her brother had also gone to his school. While

she was alone at the house at about 2:00 p.m., the appellant who was residing in the neighborhood called her. The victim refused to go on account of her exams. On repeated calling of the appellant, she went to the house of the appellant, who then bolted the door from inside and asked her to remove her *nikkar*. When she refused, the appellant forcibly removed her *nikkar* and then also removed his own *nikkar*. Thereafter, the appellant inserted his male organ in her private part. When her mother came and found her, she rushed to her crying and narrated the entire incident. The appellant was caught at the spot.

13. The child victim narrated the entire incident in her statement recorded under Section 164 Cr.P.C. (Ex.PW8/A) recorded on 30.09.2015.

14. During her testimony, the child victim identified the appellant. She deposed that on the day of the incident, the appellant came to their house and insisted her to come to his room. The appellant removed her *nikkar* and when she threatened to raise an alarm, he gagged her mouth. About the incident, she deposed that “*usne mere sath galat harkaten kari thi, mere upar lait kar galat karte rahe, meri chappalen bahar padi huyi thin jo mummy ne dekh li thi*”. She clarified “*galat harkaten*” to mean “*usne meri toilet wali jagah par or apni toilet wali jagah se 5-10 minute tak karte rahe*”. She also deposed that she had removed her slippers outside the house of the appellant. The same were seen by her mother when she came looking for her. During cross-examination, she was confronted with the statement where duration of the incident was not mentioned. A suggestion on behalf of the appellant was given to the witness that he has been falsely implicated as the marriage talks between the appellant and the victim’s cousin *Soni* had not materialized.

15. The child victim's mother, Smt. 'M' was examined as PW-13. She testified that on 28.09.2015, she reached her house for lunch at about 1:45 p.m. On not finding her daughter, she looked around for her and found her slippers outside the house of their neighbour *Ashu*, where the appellant also used to live. When she knocked at the door, the appellant opened the door. She found her daughter lying on the bed and her *nikkar* had been removed. The appellant was also without his clothes and was wearing only a *nikkar*. The child victim on seeing her rushed to her crying and narrated her the entire incident. Her daughter told her that the appellant had asked her to remove her clothes and when she refused, he forcibly removed her *nikkar* and also removed his clothes and laid down over her and did *Galat Kaam* with her. When victim tried to shout, the appellant closed her mouth with his hand. In the meantime, her husband also came home for lunch and she narrated all the facts to him. Several persons of the locality had gathered and the appellant was handed over to the police. She proved her consent given on the MLC (Ex. PW11/A) for the medical examination of the child victim.

16. During cross examination, she admitted that when she found her daughter, she did not notice any bleeding on her. She admitted that there were marriage talks between the appellant and the daughter of her husband's cousin about 1 ½ months prior to the incident however, the same did not fructify.

17. The child victim's father, Mr. 'J' was examined as PW-10. He stated that on 28.09.2015, he and his wife had gone to their workplace and the child victim was alone at the home. When he reached back around lunch time, he found many people gathered there. He was told about the entire incident by his wife. Police were called and the appellant

was handed over. During cross examination, he admitted that prior to the incident there were marriage talks between the appellant and his niece however, the talks did not fructify and the marriage could not take place. He denied the suggestion that the appellant was falsely implicated in the present case.

18. Inspector Mohit Malik (PW-14) & Ct. Sanjeev (PW-7) deposed that on receipt of DD 22A, they went to the spot where they met the victim alongwith her parents as well as the appellant. W/Ct. Shakuntala recorded the statement of the child victim (Ex. PW2/A) and also took her to the LNJP hospital for her medical examination.

19. In his statement recorded under Section 313 Cr.P.C., the appellant while answering Question no. 36 stated that he had an altercation with the mother of the child victim just one day prior to the date of the incident. However, no such suggestion of an altercation just one day prior was given to either the mother of the child victim or others.

Analysis

20. A perusal of the statement of the child victim recorded under Sections 161 & 164 Cr.P.C. as well as her testimony before the Court would show that the testimony before the trial court was consistent with her earlier statements. She has consistently stated that on the date of the incident, she was alone at her house when the appellant came and called her. On repeated asking, she went to the appellant's house who was her neighbour. The appellant asked her to remove her *nikkar*. When she refused, the appellant forcibly removed her *nikkar* as well as his own clothes and thereafter inserted his male organ in her private part. When she cried, the appellant put his hand on her mouth. Her mother found her and she narrated the entire incident to her. The testimony of Smt. 'M',

the mother of the child victim corroborates the testimony of the child victim to the extent that the victim was found in the house of the appellant and her *nikkar* had been removed. The appellant was also without his clothes except his *nikkar*. On seeing her, the child victim rushed towards her crying and narrated the entire incident to her. The testimony of Mr. 'J', father of the child victim also lends support to the testimonies of the child victim and his wife to the extent that he found his wife as well as the child victim in the house of the appellant and the appellant was handed over to the police.

21. The law on the evaluation of the testimony of a child victim is well settled. This Court in the case of Sudarshan Mishra v State reported as **2020 SCC OnLine Del 314** while relying on the earlier decisions of the Apex Court and this Court, found the testimony of the child witness to be credible and observed as follows:

“17. In Dattu Ramrao Sakhare v. State of Maharashtra reported as (1997) 5 SCC 341, the Supreme Court held that conviction on the sole evidence of the child witness is permissible, if the witness is found competent and the testimony is trustworthy. Similarly, in State of Rajasthan v. Om Prakash reported as (2002) 5 SCC 745 while reversing the decision the High Court and upholding the conviction of the appellant, the Court held:—

13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In State of Punjab v. Gurmit Singh reported as (1996) 2 SCC 384, referring to State of Maharashtra v. Chandraprakash Kewalchand Jain reported as (1990) 1 SCC 550 this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and

it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr. Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

14. In State of H.P. v. Gian Chand reported as (2001) 6 SCC 71 Justice Lahoti speaking for the Bench observed that the court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined.

18. Similarly, in State of H.P. v. Sanjay Kumar reported as (2017) 2 SCC 51, while relying on the testimony of a child witness to restore the conviction, the following observations were made:—

31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for

corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. 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? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”

19. Recently, this Court in *Mahinder v. State* (NCT of Delhi) reported as (2019) SCC OnLine Del 9548 held as follow:—

It is well settled that in a case of rape, the finding of guilt can be recorded even on the basis of uncorroborated testimony of the prosecutrix provided it is cogent and reliable. Reference in this regard is made to the decisions rendered by the

Supreme Court in Vijay@Chinee v. State of Madhya Pradesh reported as (2010) 8 SCC 191 and Rajinder @ Raju v. State of H.P. reported as (2009) 16 SCC 69.”

22. In the opinion of this Court, the child victim is a competent witness who had consistently stated about the entire incident. Her testimony is both credible and reliable.

23. Dr. Preeti Yadav, who had medically examined the child victim, proved the MLC of the child victim. She also proved her observation that at the time of examination, the hymen of the victim was found ruptured.

24. The FSL report also corroborates the testimony of the child victim. The FSL report (Ex. PW12/A) duly proved by Dr. Sarabjit Singh also corroborates the testimony of the child victim inasmuch as the alleles developed from the source of blood sample of the appellant were found on the source of exhibits i.e., two micro slides of vaginal secretion, cotton wool swab of vaginal secretion, baby t-shirt of the victim, shorts of the victim and vest of the victim.

25. So far as the contention of the learned counsel for the appellant that there is delay in examination of the sample by the FSL is concerned, it is seen that as per the FSL report, the samples were forwarded to the FSL vide letter dated 21.10.2015. Although, the report is dated 01.02.2018 however, the report nowhere states that the samples were putrefied or were not fit for examination. The FSL report was proved on the record by Dr. Sarabjit Singh. He deposed that the samples were duly received in sealed condition alongwith sample seal and the same was marked for examination. Further, during examination, no question was asked to the witness that the samples were not fit for examination. On

the other hand, it was stated by the witness that there is zero percent scope of any mistake in DNA fingerprint examination.

26. The judgments cited by the learned counsel for the appellant do not support this contention that injuries necessarily have to accompany once the hymen is ruptured.

27. A Division Bench of this Court (of which I was a member) in Jitender Sharma v State (NCT of Delhi) reported as **2019 SCC OnLine Del 8266**, held as follows:

“25. The position of law on the question, whether absence of injuries found on the person of the prosecutrix, in a case of rape, would result in a finding of acquittal, is well settled. Dealing with this issue in a case of a child rape, a Coordinate Bench of this Court in Lokesh Mishra v. State of NCT of Delhi, in Criminal Appeal No. 768 of 2010, decided on 12.03.2014, relying on earlier decisions of the Apex Court, while upholding the conviction under section 376 IPC, made the following observations:

38....In the case of Ranjit Hazarika v. State of Assam, reported in (1998) 8 SCC 635, the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, the Apex Court took a view that the medical opinion cannot throw overboard an otherwise cogent and trustworthy evidence of the prosecutrix.

39. The apex court in B.C. Deva v. State of Karnataka, reported at (2007) 12 SCC 122, inspite of the fact that no injuries were found on the person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Apex Court upheld the conviction of the accused. The Court observed that:

“18. The plea that no marks of injuries were found either on the person of the accused or

the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted.”

Conclusion

28. In view of the above discussion, this Court is of the opinion that the child victim is a competent witness and her testimony is, both credible and reliable and is duly corroborated by the scientific evidence in the form of MLC and the FSL report available on the record.

29. I find no ground to interfere with the judgment passed by the trial court. The appeal is accordingly dismissed alongwith the pending application.

30. A certified copy of this order be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

JULY 17, 2020

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