

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 06.01.2020

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CRL.A. 282/2016 and CRL.M.(BAIL) 1047/2019

RAIS @ LALA

..... Appellant

versus

THE STATE (NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant: Ms Prachi Nirwan, Advocate for Mr Anwesh Madhukar, Advocate (DHCLSC).
For the Respondent: Ms Meenakshi Chauhan, APP for State with W/SI Somna, PS Kanjhawala.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present petition, impugning a judgment dated 28.01.2016 (hereafter the 'impugned judgment') and order on sentence dated 30.01.2016 passed by the ASJ, North-West District, Rohini District Court, New Delhi, whereby the appellant was convicted for the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter the 'POCSO Act') and was awarded ten years of rigorous imprisonment and a fine of ₹10,000/-. In default of the fine, he would have to undergo simple imprisonment for a further period of six months.

2. It is the prosecution's case the appellant had committed penetrative sexual assault on the victim who was, at the material time, less than eight years old. The appellant, who is a vendor of balloons, had enticed the child victim by giving her ₹20/- and one balloon and thereafter, lured her into bushes and had sexually assaulted her. The victim had raised an alarm. One Shri Rajesh (who had deposed as PW-8) was passing by. He had rescued the victim. The appellant had tried to run away, but was apprehended.

3. The appellant contends that the Trial Court has failed to appreciate that the evidence brought on record is insufficient to convict the appellant. The appellant contends that the testimony of PW8 – who according to the prosecution had allegedly caught hold of the appellant while committing the offence – did not establish the case of the prosecution. The appellant contends that PW8 could neither recount the date of the alleged incident and nor could he identify the appellant. Further, the appellant contends that PW-7's testimony is hearsay based on what he heard from PW-8 and thus, could not have been relied upon. The appellant also contends that the testimony of PW-11 is hearsay as well, because PW-11 recounted whatever he had heard from public persons and thus, cannot be relied upon.

4. Further, the appellant submits that the MLC of the victim records that there were no injuries to the victim's private parts, which is highly improbable if she had been the subject to forced sexual intercourse. And, the abrasions on the vulva could have been caused by scratching also, a fact stated by PW-10 in her testimony. The prosecution has failed

to prove that the alleged clothing items recovered (frock and knickers) belonged to the victim, since the said items were not identified by the victim. Thus, the appellant contends that the DNA report to connect the said articles of clothing to the appellant is inconclusive.

5. The site plan, as prepared by PW-18, is also contested by the appellant. He contends that the same was not prepared by her at the instance of any public person. The appellant also states that there are material inconsistencies in the testimony of the victim (who deposed as PW-9) and submits that she is a tutored witness and her story is not supported by medical evidence.

6. In order to prove its case, the prosecution examined eighteen witnesses and the defence did not lead any evidence.

Evidence

7. Sh. Shripal Singh, Principal, MC Primary Girls School, Qutubgarh, Delhi was examined as PW-1, and he deposed as to the age of 'N' (name withheld to avoid ignominy). He deposed that that as per the admission form and the affidavit issued by 'N's mother, her date of birth was 22.05.2006. He produced other documents to supplement the same including the original pasting file containing the original admission form and affidavit and original admission register. PW-1 was not cross-examined by the defense.

8. WHC Saroj, PS Sultan Puri, Delhi was examined as PW-3. She deposed that on 17.11.2013, she was working as a duty officer at PS

Kanjhawala. At about 10:00 am, an information was received that a person had been apprehended doing a wrong act with a small girl opposite Qutubgarh Telephone Exchange. She recorded the said information vide DD No. 11-A and informed the SHO of the said PS. Thereafter, inquiry of the same was entrusted to WSI Somna. On the same day, at about 02:30 pm, Ct. Munshi Lal produced a *rukka* before her on which she made her endorsement and thereafter, FIR No. 377/13 under Section 376 of the IPC and Section 6 of the POCSO Act was registered.

9. Ct. Naveen Kumar, PS Kanjhawala, deposed as PW-4. He deposed that on the date of the alleged offence he, on the instructions of WSI Somna, took two sealed *pullandas* and one sample seal from MHC (M) Rajbir and deposited the same with FSL, Rohini. He deposed that the case property and sample seal remained in his custody and were not tampered with. He denied that he had tampered with the *pullandas* at the instructions of the IO during the period they remained in his custody.

10. Sh. Vir Singh, 'N's father, deposed as PW-7. He deposed that he resides with his family consisting of his wife, two sons and one daughter in a house which is near to the house of one Rakesh uncle. He did not remember the date and month of the incident, but stated that the event occurred on a Sunday at about 09:30 am. Prior to the same, he had gone to the market to sell vegetables. He stated that he is illiterate. He deposed that a boy told him that a balloon seller had taken his daughter (N) with him and upon hearing 'N's cries, the villagers apprehended the said balloon seller. Thereafter, they took 'N' to the PS. PW-7 deposed

that he did not know what 'N' told the police, because she was taken to a separate room for inquiry. The name of the balloon seller was told to PW-7 as Rais and he deposed that he could identify Rais (PW-7 correctly identified the accused in Court). On being cross-examined by the Ld. Addl. PP (since PW-7 had resiled from his earlier statement), PW-7 deposed that it was correct that the incident took place on 17.11.2013 near the bushes near the telephone exchange of Village Qutubgarh. He deposed that he was called to the spot and when he reached there, he saw police officials and Rakesh uncle, who were present with 'N' and the accused. He deposed that it was correct that the police had told him that the accused had committed a wrong act with his daughter by giving her ₹20/- and a balloon. 'N' produced the balloon and ₹20/- currency note in his presence, which the police took into their possession. He deposed that he did not know the contents of the seizure memo, which he had signed, since he is illiterate. He deposed that it was correct that 'N's statement was recorded in the presence of an NGO. He could not recollect the facts which had been put to him in Court because he is illiterate. In his cross examination by the defence, he stated that he had not witnessed anything about the incident and he had stated to the police whatever was told to him by Rakesh uncle.

11. Sh. Rakesh deposed as PW-8. PW-8 stated that he works as a labourer and even though he could not recollect the date of the alleged incident, however, it was the eleventh month of the last year i.e. 2013. At about 09:00/10:00 am, when he was passing through the bushes near the telephone exchange, he saw that one person selling balloons, had

made a small girl sit with him. He did not see anything more and on doubt, he apprehended the said person and called public persons from the village who started to beat the said person. PW-8 stated that this person was not present in Court, after looking around in the entire courtroom. He stated that he did not know what proceedings were conducted by the police. On being cross-examined by the Ld. Addl. PP for the State (since PW-8 was resiling from his earlier statement), PW-8 deposed that when he was passing through the bushes at about 09:00 am, the accused was committing a wrong act with the daughter of Vir Singh and thereafter, PW-8 apprehended the accused. PW-8 had stated to the police that 'N' had produced a currency note of ₹20/- and one balloon before the police. PW-8 deposed that the fact that the accused was arrested in his presence is correct and he had signed his arrest papers. PW-8 could not identify the accused in Court, even upon being specifically pointed out to by the Addl. PP. He denied the suggestion that he was deliberately not identifying the accused because he had been won over by the family of the accused. He deposed that he did not know if the accused was a resident of Village Qutubgarh and he had seen him for the first time in the village.

12. 'N' deposed as PW-9. After being satisfied that she was capable of understanding questions and answering them reasonably, her testimony was recorded in question answer form under oath. She deposed that on Sunday, when her parents had gone to the field, a balloon seller had come and he also had a flute which he was playing. She heard the sound of the flute and came out. Thereafter, he offered

her a balloon and took her into a lane. 'N's brother had also come with her, who was given some money by the said balloon seller and was told to get 'Shikhar Gutka' for him. Thereafter, the balloon seller gave ₹20/- and one balloon to 'N' and proceeded into the bushes with her, where he made her sit on her lap. Thereafter, he made her lie down on the ground and engaged in a sexual act with her. PW-9 deposed that upon her raising an alarm, Rakesh uncle came to save her. Thereafter, she stated that the police arrived and PW-9 told the police what had happened. PW-9 deposed that she was taken for medical examination. PW-9 correctly identified the accused in Court. In her cross examination, she deposed that she had told the police that the accused was playing a flute. She denied that she had told the police about the fact that the accused had told her brother to get him 'Shikhar Gutka'. PW-9 deposed that there was no one present on the way when the accused had taken her. Further, she deposed that when the crowd collected at the spot, she only knew Rakesh uncle. PW-9 stated that it is correct that the accused had ran away before Rakesh uncle arrived at the spot. She deposed that one Raja had apprehended the accused. However, she deposed that when Rakesh uncle was coming to save her, the accused was fleeing from the spot. Rakesh uncle told Raja to apprehend the accused.

13. Dr. Rashmi Verma, SR Gynae Sanjay Gandhi Hospital, Delhi deposed as PW-10. She deposed that she had been deputed by M.S. SGM Hospital in case of Dr. Asha Nagpal who was, at the material time, the SR Gynae at the said hospital. Dr. Nagpal had left the hospital

without any forwarding address. PW-10 deposed that as per 'N's MLC, no external injuries were found. There were, however, abrasions on her vulva but the hymen was intact. In her cross-examination, she deposed that the abrasions on 'N's vulva could also be caused by scratching. She denied that there would be wide spread damage to her labia majora, labia minora, fourchette and hymen on committing penetrative assault. She deposed that such damage can occur only if there is complete penetrative assault.

14. Sh. Ashish Gupta deposed as PW-11. He deposed that he did not remember the date of the incident, but it could be 17.11.2013. He deposed that he was going back to his house after dropping his father at his office. He heard the noise "*pakro pakro*". The public was trying to apprehend a balloon seller. One or two persons had apprehended him. PW-11 deposed that he came to know that the person raising the noise of "*pakro pakro*" was one Rakesh. PW-11 did not know the name of the balloon seller and the minor girl with whom the accused had committed the wrong act. He deposed that the minor girl was standing beside Rakesh and was weeping. His mobile phone was used to call the police at 100 number. PW-11 correctly identified the accused in Court. In his cross-examination, he confirmed the fact that whatever he had told the police, had been heard by him from other public persons. Further, he deposed that the fact that the public had caught hold of the accused was correct and not Rakesh.

15. L/Ct. Geeta, PS Kanjhawala, deposed as PW-14. She deposed that she along with W/SI Somna went to the site of the incident where

she found one person (Rakesh) who had apprehended another person (Rais @ Lala). Rakesh handed over the custody of the accused to the IO and stated that he had apprehended the accused while the accused was doing a wrong act with 'N'. 'N' produced a yellow, white and blue coloured balloon and ₹20/- before the IO. Further, one air pump meant for filling air in balloons was also taken into possession from the accused, apart from balloons and one grey coloured bag. These articles were kept in a cloth *pullanda* and were sealed with the seal of SR. Seizure memos were signed by Rakesh and Veer Singh, who she deposed are public witnesses. Thereafter, the accused was taken to SGM Hospital by the IO, one constable and Rakesh. There, his custody was handed over to SI Sudhir Rathi, who got him medically examined. The medical examination of 'N' was also conducted and an MLC was received by the IO. She deposed that in the meanwhile, NGO person, Nazma Khan was called by the IO, and she also reached the hospital to counsel the victim child. On the basis of 'N's statement, the IO prepared the *rukka* and handed it over to Ct. Munshi Lal, who returned to the PS to register a FIR. Thereafter, the IO prepared a site plan of the spot at the instance of the victim child. At this stage, PW-14 correctly identified the accused in open court. At this stage, MHC (M) produced a sealed bag of grey colour. There was an air pump and balloons of different colours present in the said bag. MHC(M) also produced another small sealed *pullanda* which contained one balloon of blue, white and yellow print and one currency note of ₹20/- kept in a small plastic container, which PW-14 correctly identified. In her cross-examination, she deposed that when she first reached the spot, no public persons except

Rakesh, the victim child and the accused were present. The IO did not make any inquiry from persons in the neighborhood. She deposed that it is correct that the number on the currency note of ₹20/- was not mentioned by the IO in the seizure memo. She denied the suggestion that all the writing work was done by the IO while sitting in the PS and thereafter PW-14 appended her signatures on them. She denied that items such as the air pump, balloons and the currency note were planted on the accused.

16. WSI Somna, PS Kanjhawala, deposed as PW-18. She deposed that she received DD No. 11A regarding misbehavior by a person with a small girl near the Telephone Exchange, Kutubgarh. She, along with L/Ct. Geeta and Ct. Munshi Lal reached the spot near the bushes near the Telephone Exchange, where she met one person who produced another person and a small girl, namely 'N'. She deposed Rakesh produced Rais @ Lala (the accused). PW-18 correctly identified the accused in open court. Thereafter, she deposed that she took the accused to SGM Hospital in the custody of Ct. Munshi Lal and Rakesh. She informed an NGO to send their member to the hospital. Thereafter, SI Sudhir Rathi met her at the hospital, where she handed over the custody of the accused to him to get his medical examination done. She took into her possession one air filling pump for balloons, one ₹20/- currency note and one balloon of yellow and white print. In her cross examination, she deposed that she did not place any document on record that would show that the investigation was marked to SI Sudhir Rathi, since SI Sudhir Rathi was present at the hospital itself. She denied that

the accused was not apprehended by any person when she reached the spot. She affirmed that she did not record the number of the currency note of ₹20/- in the memo. She denied that the said currency note had been planted. She affirmed that post the accused's disclosure statement, no article was recovered from him. She denied having tutored 'N'.

Reasons and Conclusion

17. At the outset, it is relevant to note that there is no material inconsistency in the testimony of the victim and her statement recorded under Section 164 of the Cr.P.C. Her description of the incident is unambiguous and consistent. This Court finds no reason to doubt her testimony.

18. In her statement recorded under Section 164 of the Cr.P.C., she had clearly stated that the accused had taken her behind the bushes and made her sit on his lap. He had thereafter made her lie down and had removed her clothes. He had removed his clothes as well. He thereafter had done a wrong act (*Gandi Harkat*) and had inserted his penis in her vagina "*Or Gandi Harkat Karne Laga. Fir Usna Meri Susu Me Apni Susu Dal Di*". Her testimony in court is wholly consistent with her description of the offence in her statement under Section 164 of the Cr.P.C. The relevant extract of her testimony in question and answer form, is set out below:-

“Q. Phir kya hua?

Ans. Uske bad usne mujhe dharti par leta diya aur usne mera pant khola aur apna bhi pant khola.

Q. Phir kya hua?

Ans. Phir usne apne susu ko mere susu me daal diya.

Q. Uske baad kya hua beta?

Ans. Mein jor se chilayi toh mujhe bachane Rakesh uncle aaya.”

19. There is an additional fact which is deposed by her with regard to the victim's brother being sent away by the accused to buy *Shikhar Gutka*. This fact was not stated by her in her statement under Section 164 of the Cr.P.C. However, in the opinion of this Court, this additional fact does not dilute the reliability of her testimony. It is necessary to bear in mind that the victim was less than eight years old at the material time. Her failure to narrate this fact at the time of recording her statement under Section 164 of the Cr.P.C. does not, in any manner, indicate that her testimony in regard to the offending act, is incorrect.

20. It was contended on behalf of the appellant that the accused was not apprehended by Sh Rakesh (referred to as Rakesh Uncle by the victim) and therefore, her statement recorded under Section 164 of the Cr.P.C. to the effect that she was saved by Rakesh Uncle raises doubt as to her testimony. This contention is also unmerited. She had testified that she had raised an alarm and Rakesh Uncle had come to save her “*Mein jor se chilayi toh mujhe bachane Rakesh uncle aaya*”. In her cross-examination, she had clarified that the accused had run away before Rakesh uncle had arrived. He was apprehended by one Raja. She stated that Rakesh Uncle had come to save her and when he (Rakesh

Uncle) had come to save her, the accused was running away. She was saved by Rakesh Uncle and he had asked Raja to apprehend the accused. The relevant extract of her testimony is as under:-

“Q. Kya yeh baat sahi hai ki jab waha par Rakesh uncle aaye uss se pehle gubbarewala bhag gaya tha?

Ans. Yeh sahi hai ki gubbarewala Rakesh uncle ke aane se pehle bhag gaya tha.

Court Ques. Beta yeh batao ki gubbarewale ko kisne pakda tha?

Ans. Gubbarewale ko Raja ne pakada tha.

Court Ques. Raja kaun hai?

Ans. Raja gali me rehta hai.

Court Ques. Raja ko kisne gubbarewale ke baree me bataya?

Ans. Jab Rakesh uncle mujhe bachne aa rahe the, tab gubbarewala waha se bhag raha tha. Rakesh uncle ne mujhe bachaya aur Raja uncle ko bola ki use pakd le.

Q. Kya yeh baat sahi hai ki Raja uncle ne gubbarewale ko pakad kar police ko de diya tha?

Ans. Ha yeh baat sahi hai.”

21. The aforesaid testimony clearly indicates that the victim had raised an alarm; Rakesh had come to save her; he had found the accused running away; he was then apprehended by Raja. He was handed over

to the police. It is also clear from the testimony that a crowd had collected at that time.

22. Rakesh was examined as PW 8. He deposed that when he was passing through the bushes, he saw that a person, who was selling balloons, had made a small girl sit with him but he did not see anything more than that. He had apprehended the said person (the accused) and had called public persons from the village who had then beaten the accused. In his cross-examination, he had confirmed that he had informed the police that when he was passing near the bushes at 9.00 a.m. he had seen the accused committing a wrong act with the victim.

23. In view of the above, his statement (in his examination in chief) that he had only seen that the accused had “*made a small girl sit with him*” and he did not see anything more cannot be accepted since in his cross-examination, he had confirmed his statement made to the police that when he was passing near the bushes, he had seen that the accused was committing a wrong act.

24. It is also relevant to note that the learned Magistrate also put questions to the victim to confirm the statement made by her. She had questioned her as to what she meant by “*Susu wali jagah*”. She had also questioned the victim as to what had happened? In response to the said questions, the victim had reiterated her statement. She had clearly stated that the accused had removed her clothes as well as his clothes and had started doing the wrongful act on her. She had described the penetrative

assault as: “*Usne Apni Susu Meri Susu Me Dali, Bus yahi hua tha*”. There is no ambiguity in her testimony.

25. The learned counsel had referred to the MLC in support of his contention that accused had not committed any penetrative assault. He stated that in the MLC it was recorded that the balloon seller had “tried to rape her”. He submitted that thus the allegation was only regarding attempt to commit the offence of rape and not any penetrative assault. He pointed out that the MLC indicated that the hymen was intact and this was inconsistent with the allegation of penetrative assault. This Court finds little merit in the aforesaid contention. Dr Rashmi Verma (who deposed as PW 10) had explained that it is not necessary that there would be a widespread damage to the victim’s labia majora, labia minora, fourchette and hymen, if there is a penetrative assault. She had clarified that such damage can occur only if there is a complete penetrative assault. Therefore, the factum that the victim’s hymen was intact is not inconsistent with her allegation of penetrative assault.

26. Section 3 (a) of the POCSO Act defines penetrative assault which is relevant and reads as under:-

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

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

- (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) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

27. It is apparent from the plain language of Clause (a) of Section 3 of POCSO that penetration “*to any extent*” would constitute penetrative sexual assault. Thus, although the medical evidence obtaining in this case does not indicate that there was a complete penetrative assault, the same does not absolve the accused from committing a penetrative assault as described by the victim.

28. Forensic evidence also supports the case of the prosecution. Ms Seema Nain, Senior Scientific Officer (Biology) deposed as PW 17. She had testified as to her report – the DNA report (Ex. PW 17/A) – and had confirmed that the DNA profiling had indicated that the DNA of the accused was found in cotton wool swabs of the victim and clothes of the victim (frock and knicker).

29. In view of the unambiguous testimony of the victim and the other corroborating evidence obtaining in this case, the Trial Court had convicted the accused of the offence under Section 6 of POCSO Act

and sentenced him to rigorous imprisonment for a period of ten years along with a fine of ₹10,000/-. The Trial Court had also considered the mitigating circumstances and had awarded the appellant the minimum sentence.

30. This Court concurs with the Trial Court that the prosecution has established that the appellant had committed the offence for which he was charged, beyond reasonable doubt.

31. In view of the above, the appeal is dismissed. The pending application is also disposed of.

JANUARY 6, 2020
RK/PKV/MK

VIBHU BAKHRU, J

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