

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 29.06.2020

+ **CRL.A.554/2016 & CRL.M.(BAIL) 2278/2019, CRL.M.A. 2310/2020 & CRL.M.A. 7475/2020**

RAKESH

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr M. L. Yadav.

For the Respondent: Ms Kusum Dhalla, APP for State.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 22nd March, 2016, whereby the appellant was convicted for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO). The appellant also impugns an order dated 23rd March, 2016, whereby the appellant was sentenced to rigorous imprisonment for a period of ten years with a fine of ₹5,000/-. It was further directed that in default of payment of such fine, the appellant would undergo simple imprisonment for a further period of fifteen days.

2. The nominal roll indicates that the appellant has already served almost six years and nine months of his prison sentence.

3. The appellant was prosecuted pursuant to registration of an FIR bearing no. 750/2014 under Section 376(2) of the Indian Penal Code, 1860 (IPC). The said FIR was registered on 11th June, 2014 at the instance of the mother of the victim – a girl aged about nine years. The victim's mother had stated that her husband had noticed that she was walking awkwardly (*paro ko thoda kholkar chal rahi thi*). On his inquiring the reasons for walking in that manner, the victim told him that the accused (appellant herein), who lived in the neighborhood had for the past four days paying her ₹10/- daily and calling her to his house. She stated that, thereafter, the accused would take her to the bathroom where he would make her lie down after removing her *pajama* and insert his finger in a private part from where she urinates. She stated that this would result in her feeling pain and she would start crying. The accused had threatened her not to narrate the incidents to anyone. The victim's mother stated that on hearing the above, the victim's father went to the house of the appellant (accused) and they both quarreled. Thereafter, the victim's father called 100 and reported the incident.

4. The victim was medically examined on 11th June, 2014 and the MLC indicates that the external genitalia of the victim was found reddened and inflamed. The labia was found inflamed and there were red marks/abrasions on the outer perineal area. However, there were no lacerations and the hymen was found intact.

5. On 12th June 2014, the statements of the victim and her mother were recorded under Section 164 of the Cr.PC.

6. In order to establish its case, the prosecution examined the victim as PW-1. In her examination-in-chief, she stated that the accused had taken her to the bathroom of his house. He had then taken off her clothes as well as his. He laid with her and thereafter, inserted his finger in her urinary part. The prosecution also examined the mother of the victim, who deposed as PW-2. However, she did not support the case of the prosecution and denied giving any statement to the police. Since she had resiled from her earlier statement, the additional PP had sought and was granted permission to cross-examine her. In her cross-examination, she confirmed that her statement (Ex.PW-2/A) bore her signatures. She also admitted that her statement recorded under Section 164 of the Cr.PC (Ex.PW-2/B) was signed by her.

7. The victim's father was examined as PW-3. He also did not support the case of the prosecution. He denied that the victim had disclosed to him anything about any sexual assault on her. He stated that the victim had gone to the shop in the neighborhood to buy a packet of Surf and the son of the accused and the victim had quarreled. He was cross-examined on behalf of the prosecution and he denied the suggestions made on behalf of the prosecution. He stated that the victim does not stick to the facts narrated by her but keeps giving different versions. According to him, she was not subjected to any sexual assault.

8. Notwithstanding that the parents of the victim had turned hostile, the Trial Court convicted the appellant on the basis of the statements of the victim. The Trial Court reasoned that a child could not be expected to give minute details of an incident. And, although there were variations in the statements and the testimony of the victim, the same did not go to the root of the matter. The Trial Court held that the victim was consistent in her description of the sexual assault and therefore, her testimony was reliable. Further, the Trial Court proceeded on the assumption that the medical evidence supported the case of the prosecution and redness and inflammation on the external genitalia and abrasions on the outer perineal area, were indicative of a sexual assault on the victim.

9. Mr Yadav, learned counsel appearing for the appellant contended that there were material variations in the statements made by the victim and her testimony before the Trial Court and the same raised significant doubts as to the prosecution's case. He submitted that the mother of the victim (who deposed as PW-2) had also accepted that they were advised to implicate the appellant in a false case. He contended that the appellant had been falsely implicated after there was a quarrel between him and the father of the victim. He also stated that the Trial Court had erred in proceeding on the basis that the medical evidence supported the prosecution.

10. Ms Dhalla, learned APP submitted that there was no flaw in the approach of the Trial Court and the minor variations in the statement of the victim did not render her testimony unreliable. She stated that it

was evident that the parents of the victim had been won over and therefore, had not supported the case of the prosecution. She contended that the testimony of the parents of the victim before the Trial Court could not be relied upon and their statements made earlier were required to be taken into account. And, those statements established that the appellant is guilty of the offence for which he is convicted.

11. I have heard the learned counsel for the parties.

12. At about 9:53 PM on 10th June 2014, the police received a telephone call reporting the incident. The caller identified himself as the victim's father. He reported that his daughter (aged nine years) was subjected to a wrong act by his neighbour (Rakesh), a few days ago. The information was recorded in DD entry no.102B(Ex.PW-7/A). It is important to note that according to his report, the offence was committed few days prior to the call.

13. SI Parvesh, who was on emergency duty at the relevant time, proceeded to the residence of the victim at about 10:00 PM. He was examined as PW-5. He testified that when he reached the spot at about 10:00 PM, a PCR van was found parked at the spot. The complainant (victim's father) along with his wife, daughter and the accused were taken to Harish Chander Hospital in the PCR van. He further stated that he along with Ct. Shankar also went to the hospital and the accused was medically examined. He stated that about 11:30 PM, SI Anita (who testified as PW-13) also reached the hospital and

he handed over the victim to her. Since a gynecologist was not available at the hospital, the victim was taken to BSA Hospital, Rohini and she was medically examined at the said hospital. He testified that the accused was arrested in his presence and his personal search was conducted by the Investigating Officer (IO). In his cross-examination, he stated that when he entered the house no one was present there and he cannot tell how many rooms were constructed. He did not prepare a site plan and also did not record the statement of any of the neighbours.

14. SI Anita (PW-13) testified that she took the victim and her parents to BSA Hospital and the victim's medical examination was conducted under her supervision. She further stated that she recorded the statement of the mother of the victim (Ex.PW-2/A) and prepared a *rukka* (Ex.PW-13/A). Thereafter, she sent Ct. Shankar for registration of the case. Ct. Shankar testified as PW-4 and confirmed that SI Anita had handed over a *rukka* to him for getting the FIR registered. He had done so and, thereafter, had proceeded to the spot. He also testified that the accused was arrested in his presence. Although PW-5 (SI Parvesh) testified that SI Anita had recorded the statement of the Complainant (father of the victim), it appears that the same was not proved.

15. The FIR was registered on the basis of the statement of the mother of the victim (who testified as PW-2). On the basis of her statement, the *rukka* (Ex.PW-13/A) was prepared and the FIR was lodged. It is important to note that in her statement, which was

recorded on 11th June, 2014, she stated that her husband was at home that day – that is, 10th June, 2014 as the said statement was recorded in the early hours of 11th June, 2014 – and had not gone to work. She stated that her husband had noticed that his daughter was walking by spreading her feet (*pauroko choda khol kar chal rahi thi*). She stated that her husband inquired from her the reasons for walking in the awkward manner and her daughter (victim) informed him that their neighbour (Rakesh uncle) had, since the past four days, been paying her a sum of ₹10/- daily and calling her to his house. She stated that thereafter, he would take her to the bathroom inside the room and would make her lie down. He would remove her *pajami* and then would insert a finger from where she urinates. The victim's mother stated that the victim reported that this was very painful and she would cry in pain. The victim reportedly informed her father that Rakesh had threatened her not to report the same to her mother. The victim's mother stated that the victim had narrated the above to her father in her presence. She stated that, thereafter, her husband went to the Rakesh's house they had a quarrel. Thereafter, he telephoned 100 and informed the police.

16. It is, at once, clear that there is an inconsistency in the information as provided by the victim's father telephonically and the statement made by the victim's mother. Whereas, the victim's father had reported that the offence (wrong act) had been done with his daughter a few days prior to his call, the victim's mother had stated that the victim had informed her father that she was being assaulted

for the past four days. As stated above, the statement made by the victim's mother formed the basis of the FIR.

17. The victim's statement under Section 164 of the CrPC was recorded on 12th June, 2014. She stated that on last Sunday (that would be 7th June, 2014) her mother had sent her to buy "Surf" from the shop. On the way, she met Rakesh (accused) and he took her to the bathroom. She stated that he removed her clothes and inserted his finger from where she urinates. She further stated that he threatened her that if she reported the incident to her parents, he would strangle and kill her (*gala dabakar maar dunga*). She stated that, thereafter, she narrated the incident to her father as she was experiencing pain and burning sensation in her private part from where she urinates.

18. The statement of the victim's mother was also recorded at the same time. The victim's mother stated that she had noticed that her daughter was finding it difficult to urinate for the past several days (*kayi din*). She also stated that she would also weep in pain on several occasions (*kayi baar toh roti bhi thi*) from there. She stated that when she removed her clothes and examined her private part, she found that there were some marks and white liquid was also oozing (*safed paani bhi nikal raha tha*). She stated that she inquired the reasons for the same but the victim did not tell her anything. She stated that two days ago (that would be 9th June, 2014, as her statement was recorded on 12th June), her husband became aware of the same on the victim informing him that on last Sunday she was sent to buy Surf from the shop and Rakesh, who lived behind the temple, had lured her to the

bathroom by offering her some money (*paise ka lalach dekar bathroom ke andar bula liya*). She stated that the victim narrated that Rakesh had removed all her clothes and had inserted his finger in the part from where she urinates. He also threatened her that if she had narrated the incident to anyone, he would kill her.

19. Although the statement of the victim's mother was recorded the very next day, the same is not consistent with her statement made a day earlier and on the basis of which the FIR was registered. It is important to note that in her statement recorded under Section 164 of the CrPC, she now stated that the offence was committed last Sunday (that would be 7th June, 2014). It was no longer her assertion that the victim had reported that the accused had been repeatedly assaulting her for the past four days as alleged earlier. On the contrary, her statement now reflected that the offence was allegedly committed once (on the last Sunday – the said date would be 7th June, 2014 as 12th June, 2014 was a Friday).

20. The victim was examined as PW-1. She stated that some days ago her mother had given her ₹10/- to buy surf and she had gone to the shop to buy the said product. The son of the shopkeeper (Vishal) had snatched money from her hand and thereafter, somebody informed the same to her parents and a quarrel took place at the shop. She stated some public persons had called the police and the matter was reported to the police. She, however, stated that nothing wrong happened with her at the spot. However, she also informed the court that the accused had taken her to the bathroom of his house and had taken off her

clothes as well as his. He laid down with her and had inserted his finger in her urinary part.

21. It is, at once, apparent that the statement made by the victim is neither consistent with her earlier statement nor the statement of her mother. It is relevant to note that she talks about a quarrel that had occurred when she had gone to buy Surf. If her testimony is read in conjunction with her statement recorded under Section 164 of the CrPC, it would mean that the said quarrel had taken place on the Sunday prior to reporting the matter to the police (that is on 7th June, 2014). But she also stated that nothing had happened with her at the spot.

22. The victim was cross-examined on behalf of the accused. She stood by her statement that the accused had committed the offence and denied the suggestion to the contrary. She also stood by her statement that Vishal (who is the son of the accused) had snatched a currency note of ₹10/- from her. She also stated that a quarrel had taken place between her and the son of the accused (Vishal). She reiterated that her parents had also arrived at the spot and a quarrel had taken place between them and the accused in relation to the said incident. In her cross-examination, she stated that incident of sexual assault did not happen at that time but happened on the same evening while she was on her way to a temple. She stated that she did not raise any alarm as the accused had gagged her mouth. She further stated that the accused resided at a distance of one house from her house and she used to go there often to play with his son.

23. The examination-in-chief of PW-1 is bereft of any particulars as to when she was sexually assaulted. She merely informed the Trial Court that the accused had taken her to the bathroom of his house; he had taken off his clothes as well as her (he had lied down with her); and had inserted his finger in her urinary part. In her statement under Section 164 of the CrPC, she stated that the incident had occurred when her mother had sent her to buy Surf. It is material to note that in her examination before the Trial Court, it was no longer her allegation that the incident had happened when her mother had sent her to buy surf on 7th June, 2014. However, in her cross-examination, she stated that the incident had occurred on the same date in the evening when she was going to the temple. She also stated that she did not raise an alarm, as the accused had gagged her mouth. It is material to note that no such allegation had been made by the victim in her statement recorded under Section 164 of the CrPC or by her mother in her initial statement or in her statement under Section 164 of the CrPC.

24. The victim is consistent in her allegation that the accused had taken her to the bathroom of his house and had inserted his finger in her urinary part. But apart from this, it is hard to find any consistency in her statement her recorded under Section 164 of the Cr.PC and her statement made before the court. There is material inconsistency in a statement as to when the incident had taken place. Whereas in her statement under Section 164 of the CrPC, she narrated that the incident had taken place when she had gone to purchase Surf; in her examination before the Trial Court, she did not indicate as to when she

was sexually assaulted. However, in her cross-examination, she stated that it was in the evening of the same day when she had gone to the temple.

25. The victim's statement under section 164 Cr.PC and her examination before court are inconsistent with the allegations made in the FIR as well. The prosecution's case that the victim had been repeatedly assaulted, as is alleged in the FIR, is clearly unsustainable. The said allegation was made by the victim's mother in her initial statement but the same was not repeated in her statement recorded the next day under Section 164 of the Cr.PC.

26. The prosecution's case that the victim had revealed that she had been sexually assaulted and had narrated the incident to her father on him asking her the reason for walking in an awkward manner, is not supported by any of the witnesses. Neither the victim's mother (who deposed as PW-2) nor the victim's father (who deposed as PW-3) have supported the said allegation. More importantly, the victim has also not stated anything before the court to support the same. Her statement recorded under Section 164 of the CrPC also does not support the said case.

27. As noticed above, the statements made by the victim's mother are also inconsistent. Whereas the victim's mother had initially alleged that her daughter had narrated to her father that she had been assaulted repeatedly for the past four days, she did not maintain the said

allegation in her statement recorded under Section 164 of the Cr.PC, the very next day.

28. The victim's mother also did not make any allegation that the accused had forcibly gagged the victim and had taken her to his house. On the contrary, she alleged that he had lured her daughter by offering her money.

29. The parents of the victim (PW2 and PW3) testified before the Trial Court to the effect that no offence had been committed with their daughter.

30. The Trial Court had discarded their testimony as they had turned hostile and were no longer supporting the prosecution's case. However, the Trial Court overlooked the fact that even the initial statement made by the victim's mother and the initial report made by the victim's father (recorded in DD entry – Ex PW7/A) were inconsistent with the case set up by the prosecution. The Trial Court proceeded solely on the basis that (a) the victim had made the allegation; and (b) the medical evidence supported the case of the prosecution and therefore, all inconsistencies in various statements were not material.

31. This Court is unable to concur with this approach. This Court is also of the view that the Trial Court had erred in proceeding on the basis that the medical evidence supported the case of the prosecution. The medical evidence on record does not establish that the victim had been sexually assaulted. The MLC of the victim indicates that a local

examination of the victim was conducted. The local examination indicated that (a) the external genitalia was reddened and inflamed; labia was inflamed; (b) there were red marks/abrasions on the outer perineal area; and (c) she had sodden skin. However, there were no lacerations and the hymen was intact.

32. There is no evidence to suggest or establish that redness of the genital area, inflammation or red marks in the perineal area are indicative of a sexual assault. There is no medical opinion on record which suggests the same. The MLC had indicated that there were abrasions on the outer perineal area and sodden skin. Sodden skin indicates that the skin is saturated with water. It is, usually, an indication of an infection. At this stage, it is relevant to mention that the victim's mother in her statement under Section 164 of the CrPC had stated that she had noticed that her daughter was having problems urinating for several days (*kayi din*). Her problem was so acute that sometimes she would cry in pain. The prosecution did not lead any evidence to establish that the victim's condition was or could have been caused by a sexual assault as alleged: that is insertion of a finger in the vagina. The perineal region means the area between the anus and the genitals. It is a diamond shaped region between the thighs and in females includes the vagina and anus. It is difficult to accept abrasions on the outer perineal area are an obvious indication of a penetrative sexual assault of the nature as alleged.

33. Thus, the conclusion that the medical condition of the victim established that she had been sexually assaulted, is without any material.

34. The learned counsel appearing for the appellant had submitted that the fact that the victim's hymen was found intact clearly indicated that no such offence as alleged was committed. This is not correct because insertion of any object or body part even to limited extent would constitute a penetrative sexual assault under Section 3 of the POCSO Act. It is not necessary that such an act results in tearing of the hymen. Whilst it is incorrect to suggest that the medical evidence proves that the victim was not sexually assaulted; it is also incorrect to hold that the medical evidence establishes any such assault.

35. Although the victim has made an allegation of a sexual assault and the same requires to be given due weightage; however, in the facts of this case, this Court finds it is difficult to sustain the appellant's conviction solely on the statement made by PW-1.

36. In ***Pancchi v State of U.P.: AIR 1998 SC 2726***, the Supreme Court observed as under:

“....The law is that evidence if a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell them and this a child witness is easy prey to tutoring.”

37. In ***Dattu Ramrao Sakhare vs State of Maharashtra: (1997) 5 SCC 341***, the Supreme Court held as under:

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored.”

38. The sole testimony of a rape victim is sufficient to convict the accused provided such testimony is of sterling quality. It would be unsafe to convict the accused on the sole testimony of a witness whose statements are inconsistent in material particulars. A sterling witness is one of high quality and one of the qualitative tests is that of consistency, right from time the witness makes his/her initial statement till the conclusion of the testimony before the court. [see: ***Rai Sandeep @ Deepu vs. State of NCT of Delhi: 2012 (8) SCC 21***].

39. As noticed about the quality of the victim's evidence is not of a nature that can be implicitly relied upon without any other corroborative evidence. It is not possible for this Court to hold that the prosecution has established its case beyond reasonable doubt.

40. In view of the above, the appeal is allowed and the appellant is acquitted. He shall be released forthwith, in the event he is not required in any other case.

41. All pending applications are also disposed of.

JUNE 29, 2020
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VIBHU BAKHRU, J

