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

+ CRL.A.970/2018

ALLAUDEEN

.... Appellant

Through: Mr. S.S. Ahluwalia, Advocate with
Mr. Mohit Bangwal, Advocate.

versus

STATE

.... Respondent

Through: Ms. Aashaa Tiwari, APP for the State.

Reserved On: 07th February, 2020

Date of Decision: 26th February, 2020

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CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:

1. Present appeal has been filed by appellant-convict challenging the judgment dated 5th May, 2018 and the order on sentence dated 8th May, 2018 passed by Additional Sessions Judge (North-West) – 01, Special Court, POCSO, Rohini District Courts, Delhi in Sessions Case No. 53123/2016 arising out of FIR No. 185/2016 registered with Police Station Ashok Vihar, whereby he had been convicted under Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO) and Section 506 of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced to life imprisonment with a fine of Rs. 10,000/- for the offence

punishable under Section 6 POCSO and two years rigorous imprisonment with fine of Rs. 1,000/- for the offence punishable under Section 506 IPC.

CASE OF THE PROSECUTION

2. The case of prosecution, as noted by the Trial Court, is reproduced hereinbelow:-

“1. The facts of the case as borne out from the record are that on 29.03.2016, after entrustment of DD no.26-A, SI Rama Saroha and Ct. Sonika reached at the informed place i.e. CSA Colony, where ASI Raj Kumar, Ct. Satpal, both the child victims P and A, mother of child victim P and father of the child victim A were found present and father of child victim A produced the accused before her. SI Rama Saroha got both the child victims counseled through NGO counselor, got them medically examined at BJRM Hospital and also got accused medically examined. Thereafter, she made inquiry from the complainant (mother of ‘P’) and recorded her statement, wherein she stated that on that day, at about 7.00 pm, her neighbour V.S. caught the accused red-handed while removing the underwear of his daughter i.e. child victim A and she also went there and on inquiry, child victim A told her that 8/10 days prior, accused took her to his house, got his children out of the jhuggi, removed her underwear as well as his clothes and lie upon her and touched his penis to her vagina, then ejaculated and when she raised alarm, accused left her and threatened that in case, she disclosed about the acts of accused to anyone, he will kill her by cutting her neck. Child victim A also disclosed that accused had also committed wrong act with the child victim P. Thereafter she made inquiry from her daughter / child victim P, who also told that accused took her to his house a day before yesterday and asked her to remove her underwear, for which, she refused and then, accused slapped her, pushed her, removed her underwear forcibly and also removed his pant and lie upon her and touched his penis to her vagina and then ejaculated and thereafter, he threatened her that in case, she disclosed about the acts of accused to anyone,

he will kill her by cutting her neck and because of the fear of the accused, child victim A and P did not disclose about his acts to anyone. She requested for legal action against the accused. On the basis of statement of the complainant as well as MLC, present case FIR was registered. Site plan of the place of incident was prepared. Accused was arrested and his personal search was conducted. The potency test of the accused got conducted at RML Hospital. Statement of both the child victims U/s 164 CrPC were got recorded. Documents regarding the date of birth of child victims were collected and thereafter, on completion of investigation, charge sheet was prepared and filed before this court.

2. After filing of the charge sheet in the matter, the copy thereof, was supplied to the accused. Arguments on the point of charge were heard and on 11.07.2016, charges u/s 5(m) of POCSO Act 2012 (hereinafter referred to as the "Act"), punishable u/s 6 of Act and u/s 506 IPC was framed against the accused, to which he pleaded not guilty and claimed trial."

FINDING OF THE TRIAL COURT

3. The conclusion of the Trial Court is reproduced hereinbelow:-

"25. If the law laid down in the aforesaid judgments is applied to the facts of the present case then it would be evident that the child victims are consistent in their all the statements. There is no dispute that conviction can be based on the sole testimony of the reliable witnesses. Both the victims have specifically narrated their incidents to the ld. M.M that accused sexually assaulted them. Victim A has stated to the ld. M.M that accused took her to his jhuggi and removed her panty and then lie upon her. In the meantime, her father came and rescued her. She also stated that about 10 days before also, accused took her to his jhuggi and inserted his susu in her susu and thereafter, her underwear got wet. Victim P has also stated that on a particular day, when she was coming from toilet, accused forcibly took her to his jhuggi and was touching

his toilet wali jagah to her toilet wali jagah and her underwear got wet. He also threatened to cut her throat, if she disclosed about his acts to any one. Both the victims are of very tender age of 7 and 8 years and certainly can be influenced by the threats given by the accused. It was only when the father of victim A caught the accused red-handed, both the victims narrated the incident to their parents and then to the police.

26. *The defence taken by the accused in the cross-examination that he being a Muslim was isolated and there was a conspiracy to throw him out of the area is not plausible. Father of the victim A in the cross-examination has specifically stated that majority of his neighbours are Muslims and the other muslims are not like the accused. This clearly shows that accused was not the sole Muslim living in that area and there was no conspiracy to remove him from the locality.*

27. *I do not find any contradictions and improvement in the testimonies of both the victims, duly corroborated by the father of the victim A, who caught the accused red-handed on 29.03.2016. It cannot be ignored that there is a presumption against the accused u/s 29 of the act that he has committed this act and once the prosecution has established the guilt, it was for the accused to rebut that presumption, which he has failed to. Accused therefore, is convicted for committing offence punishable u/s 6 of the Act r/w u/s 5(m) of the Act for committed aggravated penetrative sexual assault upon two victim children.*

28. *Coming to the offence u/s 506 IPC, victim P has all along stated that after sexually assaulting her, the accused threatened to kill her, if she will disclose this fact to any person. There is no cross-examination on this aspect and as such, prosecution has proved that accused threatened victim P and because of that threats, she did not disclose about the sexual assault on her to any person including her parents. Prosecution as such, proved the commission of offence by the accused u/s 506 IPC beyond reasonable doubt and the accused is convicted for offence punishable u/s 506 IPC as well."*

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT

4. Mr. S.S. Ahluwalia, learned counsel for the appellant-convict contended that the statements of the two minor prosecutrices 'A' and 'P' were inconsistent and unreliable.

5. He stated that the prosecutrix 'A' in her statement recorded under Section 164 Cr.P.C. had stated that no penetration had occurred on the day the complaint was lodged with the police, yet when she had deposed before the Court she had stated that on the day the complaint was lodged with the police the appellant-convict had committed the act of penetrative sexual assault. He pointed out that prosecutrix 'A' in her deposition had also stated that the appellant-convict had not committed sexual assault upon her prior to the date of the complaint. He emphasised that she had rather deposed when the appellant-convict had earlier tried to commit sexual assault upon her, she had beaten him up.

6. He also stated that though prosecutrix 'P' had stated in her statement recorded under Section 164 Cr.P.C. that she had told her mother about the sexual assault by the appellant-convict, yet in her testimony she had deposed that she had informed prosecutrix 'A' and it was she who had informed her mother about the alleged incident of sexual assault.

7. Learned counsel for the appellant-convict contended that since there were no external injuries on either prosecutrix 'A' or prosecutrix 'P' and their internal medical examination had not been conducted, the prosecution had failed to prove its case against the appellant-convict. In support of his contention, he relied upon the judgment of the Supreme Court in ***Prahlad vs. State of Rajasthan, 2018 (4) Crimes 372*** and judgment of the Himachal

Pradesh High Court in *Nikka Ram vs. State of H.P., 2019 CriLJ 1834*. In view of the aforesaid, he prayed that the impugned judgment and order on sentence be set aside.

ARGUMENTS ON BEHALF OF THE STATE

8. *Per contra*, Ms. Aashaa Tiwari, learned APP for the State stated that the prosecutrix 'A' (PW-7) and prosecutrix 'P' (PW-8) had remained consistent and had corroborated each other's testimonies. She emphasised that they had supported the case of the prosecution and there were no material contradictions in their testimonies.

9. Learned APP for State pointed out that prosecutrix 'A' had swapped the dates of incident of penetration and sexual assault in her testimony and the same had occurred because her testimony had been recorded about eight months later.

10. She relied upon the statement of prosecutrices 'A' and 'P' recorded under Section 164 Cr.P.C. as well as their depositions. The English translation of their statements recorded under Section 164 Cr. P.C and their depositions are reproduced hereinbelow:-

A) Statement of Prosecutrix 'A' recorded under Section 164 Cr. P.C.

"Statement of victim A aged about 8 years, R/o (victim's address), Delhi U/s 164 Cr.P.C.

Oath is exempted as child is below 12 years.

"All of us were playing. At about 6 O'Clock, Uncle Alauddin called me. He took me to his Jhuggi and removed my underwear and laid upon me. He removed his clothes and laid upon me and did not do anything. I started crying. My father came over there. My father gave him much beatings. Ten days

ago, he was tempting me by way of giving me toffee. He forcibly took me to his Jhuggi. Thereafter, he inserted his private part into my private part and my underwear became wet. Therafter I came. Yesterday, the Police arrived. There was an exchange of beatings. I told that the said man harassed me much. Then the police took him along with them. He had told that he would behead me.”

*Sd/- (illegible)
(in English)
(MM/NW)
30.03.2016*

R O & AC

RTI of ‘A’”

B) Deposition of Prosecutrix ‘A’ (PW-7)

“Q. Beta batao kya hua tha?

Ans. Ek din main sham ko 6 baje gali mai khel rahi thi ‘P’ ke sath to Allaudeen ne mera hath pakad liya aur mujhe apni jhuggi ma le gaya.

Q. Beta Allaudeen uncle kon hain?

Ans. Wo meri gali mai rehte hain.

Q. Beta Allaudeen uncle ne jhuggi mai kya kiya?

Ans. Unhone apne kapda uttar diya aur mera kapda bhi uttar diya aur apna susu mere susu mai daal diya.. Main zor se chilai to mere papa aa gaye. Unhone Allaudeen ko mara, fir police ko bula liya police ne Allaudeen ko bahut mara.

Q. Allaudeen uncle ne aur kya kiya tha?

Ans. Wo mujhe chocolate de kar lalchaa raha tha. Ek din Alaudeen uncle meri deh per laut raha tha to maine unhe maar kar bhaga diya.

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Accused Allaudeen is present in court today (correctly identified by the witness through the design of wooden partition.

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.....Ye kehna sahi hai ki Allaudeen uncle ne meri peshab karne wali jagah main apni peshab karne wali cheez daali thi jis din police wahan aai thi. Ye hi baat maine Judge aunty ko bhi bata di thi.”

C) Statement of Prosecutrix ‘P’ recorded under Section 164 Cr. P.C.

“I was sleeping in the house. I felt a call of nature. I was returning after answering the call of nature. Uncle forcibly took me along with him. He took me a day before yesterday. It was day time. I do not know the name of Uncle. He forcibly removed my underwear after taking me to the house. He removed all of his clothes and then laid upon me. He was touching his private part with my private part and my underwear became wet. Then nothing happened. Then I returned to my house. I told my mother about it a day before yesterday. He had told that in case I tell about that, he would behead me.”

D) Deposition of Prosecutrix ‘P’ (PW-8)

“Q. Beta Allaudeen uncle kon hain?

Ans. Wo mere ghar ke pass hi rehte hai.

Q. Beta kya hua?

Ans. Ek din main dopahar mai main apne ghar mai so rahi thi. Sote sote mujhe zor se toilet laga aur mai toilet karne bahar gai to Allaudeen uncle ne mujhe zabardasti pakad kar apni jhuggi mai le gai.

Q. Beta fir kya hua?

Ans. Usne apne kapda utara aur meri chaddi khol di aur mere upper let gaya aur apna toilet mere toilet se sata raha tha. Mujhe thoda thoda dard hua tha.

Q. Beta aur kya hua?

Ans. Usne mujhe bola tha ki agar tu ye baat kisi ko batayegi to tujhe jaan se maar dunga. Fir maine ye baat apni saheli 'A' ko batai aur usne ye baat meri mummy ko batai.

Q. Beta fir kya hua?

Ans. Fir 'A' ke papa ne phone karke police ko bula liya. 'A' ke papa ne us uncle ke bahut maara tha aur policewala us uncle ko bitha kar gadi mai le gaye the."

11. In view of the aforesaid, the learned APP contended that the prosecution had successfully proved its case against the appellant-convict and prayed that his conviction be confirmed.

COURT'S REASONING

THE TESTIMONIES OF BOTH THE PROSECUTRIXES INSPIRE CONFIDENCE AND THE POSSIBILITY OF THEM BEING TUTORED IS RULED OUT. THEIR INITIAL STATEMENTS AND DEPOSITIONS WITH RESPECT TO THE SEXUAL ASSAULT ARE CORROBORATED BY THEIR MLCs AND THE DEPOSITION OF THEIR PARENTS.

12. It is settled law that the deposition of a child witness may require corroboration, but in case his/her deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his/her evidence. Further, the evidence of a child witness must be evaluated more carefully with greater circumspection because he/she is susceptible to tutoring. An inference as to whether the child has been

13. In the present case, the testimonies of both the prosecutrices inspire confidence and the possibility of them being tutored is ruled out. Their initial statements and depositions with respect to the sexual assault are corroborated by their MLCs and the deposition of their parents. The relevant portions of the MLC of the two prosecutrices and the deposition of their parents are reproduced hereinbelow:-

“BABU JAGJIVAN RAM MEMORIAL HOSPITAL, DELHI-110033
MLC REGISTER

Examining Medical Officer”

B) Testimony of father of Prosecutrix 'A' (PW-9)

"On 29.03.2016 at about 7 or 7:30 p.m. I was returning back home from my work and when I reached outside the jhuggi of accused Allaudeen, I saw that accused had caught hold my daughter by her hand. I also saw that the underwear of my daughter was lying removed. On seeing me my daughter started weeping and I got annoyed and I strictly asked to accused as to what he was doing with my daughter. On hearing my voice my wife had also come in the jhuggi of accused and other persons from the neighbourhood had also gathered. Public persons also gathered at the spot. I called the police at 100 number. Police officials reached at the spot and made preliminary inquiry from my daughter in the presence of my wife. My daughter A had told me that 8-10 days prior to that day accused had sexually assaulted her (Usko beizzat karne ki koshish kiya tha).

Q. What do you mean by beizzat kiya?

Ans. My daughter had told that the accused had touched her private part with his private part.

(emphasis supplied)

C) MLC of Prosecutrix 'P' (Ex. PW-5/A)

No. 3620	Name <u>P.</u> Age _____ Occupation _____ Residence _____ Date of examination <u>29/03/2016</u>	Father's /Husband Name _____ Sex <u>Female</u> Religion _____ Name of relative of friend <u>Ct.Kuldeep 2174/NW</u>
Date and hour of arrival <u>23/03/16 11.25 pm</u> No. and date of police docket <u>28-PP</u> No. and name of Constable <u>W/32 Rama Saroha</u> Police Station <u>Ashok Vihar</u>		PARTICULARS OF INJURIES OR SYMPTOMS, IN CASE OF POISONING B/B Police for M/E A/H/O <u>Sexual assault</u>

{ <i>In Admitted</i> <i>Date of admission</i> ____ <i>Date of Discharge</i> ____	xxx xxx xxx <i>B/B Police for MLC.</i> <i>A/H/O- <u>attempt of sexual assault on</u></i> <i><u>27/3/2016 by man</u></i> xxx xxx xxx
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Examining Medical Officer”

D) Testimony of mother of Prosecutrix ‘P’ (PW-10)

“....I made inquiry from my daughter, who had told me that accused Allaudeen had removed her clothes and his clothes as well and touched her private part from his private parts and made her clothes wet. ‘A’ had also told me about the same thing which was committed by accused upon her 8-10 days prior to 29.03.2016. Both the children kept quiet and did not disclose this incident to anyone as the accused had threatened them not to disclose about the incident otherwise he would cut their heads (mundi kaat dunga).....”

(emphasis supplied)

14. Further, both the prosecutrices had identified appellant-convict in Court.

15. This Court is also of the view that the prosecutrix ‘P’ has remained consistent about the incident of sexual assault and the only contradiction in her testimony is as to how her mother came to know about the incident. In the opinion of this Court, the said contradiction is not material and does not affect the case of the prosecution. The Supreme Court has repeatedly held that minor contradictions cannot be a ground for discrediting the entire evidence. In *Mritunjoy Biswas Vs. Pranab Alias Kuti Biswas and Another, (2013) 12 SCC 796*, the Supreme Court has held as under:-

“28. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission....”

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31. The High Court, as we find, has read the evidence not as a whole but in utter fragmentation and appreciated the same in total out of context. It is to be kept in mind that while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.”

(emphasis supplied)

SINCE THE DATES OF THE INCIDENT OF SEXUAL ASSAULT AND PENETRATIVE SEXUAL ASSAULT MENTIONED BY PROSECUTRIX 'A' IN HER DEPOSITION AND HER STATEMENT RECORDED UNDER SECTION 164 ARE CONTRADICTORY AND THAT PARENTS OF BOTH THE PROSECUTRIXES HAD DECLINED THE INTERNAL MEDICAL EXAMINATION OF THE PROSECUTRIXES, THIS COURT IS OF THE VIEW THAT THE APPELLANT-CONVICT IS ENTITLED TO BENEFIT OF DOUBT WITH RESPECT TO PENETRATIVE SEXUAL ASSAULT.

16. However there is merit in the argument of the learned counsel for the appellant-convict that the dates of the incident of sexual assault and the incident of penetrative sexual assault mentioned by prosecutrix 'A' in her deposition and her statement recorded under Section 164 are contradictory. Though the explanation offered by Ms. Aashaa Tiwari, learned APP, of swapping of dates of incident of sexual assault and the incident of penetrative sexual assault is due to tender age of the prosecutrix 'A' and the time lag between the date of incidents / filing of FIR and recording of evidence is plausible, yet keeping in view the fact that parents of both the prosecutrices had declined the internal medical examination of the prosecutrices and the Investigating Officer (PW-13) had in her cross examination impliedly admitted that the hymen of the prosecutrices were intact, this Court is of the view that the appellant-convict is entitled to benefit of doubt with respect to penetrative sexual assault.

IN VIEW OF THE Demeanour OF THE PROSECUTRIX 'P' AS RECORDED BY THE TRIAL COURT, THIS COURT IS OF THE OPINION THAT THE APPELLANT-CONVICT HAD THREATENED THE PROSECUTRIX AFTER SEXUALLY ASSAULTING HER AND WHICH IS WHY SHE WAS TERRIFIED IN COURT AFTER SEEING HIM. ACCORDINGLY, IT IS PROVED THAT APPELLANT-CONVICT

COMMITTED SEXUAL ASSAULT AS DEFINED UNDER SECTION 7 OF POC SO ACT UPON PROSECUTRIX 'A' AS WELL AS PROSECUTRIX 'P'

17. It is also pertinent to mention that while recording the deposition of Prosecutrix 'P' (PW-8), the Trial Court had noted that after identifying the appellant-convict, the minor prosecutrix 'P' had started crying due to fear. The observations of the Trial Court are reproduced hereinbelow:-

"Accused Allaudeen is present in the court today (correctly identified by the witness through the design of wooden partition.)

Court observation: After identifying the accused the child victim has turned white and she has put her head down. She has been consoled by the Ld. Support persons. At this stage, she has started weeping. A recess of 10 minutes is ordered and the accused has been sent to Ahlmad's room.

AFTER 10 MINUTES

XXX XXX XXX by Sh. Shubham Asri, Ld. Amicus Curiae for the accused.

Court Observation : The witness appears to be little stable now. I have again asked certain questions to her and she has given rational answers thereto, however she kept looking backward towards the wooden partition out of fear.

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Court Observation : at this stage the witness has exhibited the expressions of fear and she has started trembling. She has been permitted to have a walk around for some time so that she gets normal."

(emphasis supplied)

18. In view of the aforesaid demeanour of the prosecutrix 'P' (PW-8), while deposing before the Trial Court, this Court is of the opinion that the appellant-convict had threatened the prosecutrix after sexually assaulting her and which is why she was terrified in Court after seeing him.

19. Consequently, this Court finds that testimonies of prosecutrix ‘A’ as well as prosecutrix ‘P’, with respect to the incident of sexual assaults and threats, have a ring of truth, are clear, cogent, consistent, credible, trustworthy and have been corroborated by other evidence and material on record. Accordingly, it is proved that appellant-convict committed sexual assault as defined under Section 7 of POCSO Act upon prosecutrix ‘A’ as well as prosecutrix ‘P’. Section 7 of POCSO Act reads as under:-

“7. Whoever, with sexual intent touches the vagina, penis, anus, or breast of the child or makes the child touch the vagina, penis, anus, or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.”

(emphasis supplied)

CONCLUSION

20. In view of the aforesaid findings, present appeal is partly allowed inasmuch as the conviction and sentence of appellant-convict under Section 6 of POCSO Act is set aside. However, the appellant-convict is convicted under Section 8 of POCSO Act.

21. Since the appellant-convict has repeatedly committed sexual assault upon two minor prosecutrices, aged about seven and eight years, this Court deems it fit to impose the maximum punishment prescribed under Section 8 of the POCSO Act. Consequently, the appellant-convict is sentenced to imprisonment for five years with a fine of Rs. 10,000/-.

22. The conviction and order on sentence of the appellant-convict under Section 506 IPC is confirmed and he shall be entitled to the benefit under Section 428 Cr.P.C. The impugned judgment of the Trial Court and order on sentence are modified accordingly.

23. Trial Court Record be sent back. Copy of judgment be sent to the appellant-convict through the concerned Jail Superintendent.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

FEBRUARY 26, 2020

sb/rn/js

