

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 06.01.2020

+ **CRL.A. 670/2017 & CRL.M.(BAIL) 1446/2018**

AKHTAR AHMAD

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Richa Dhawan, Standing Counsel
DHCLSC with Mr Anuj Chaturvedi,
Advocate.

For the Respondent : Ms Kusum Dhalla, APP for State.
Ms Shyel Trehan, Mr Rohan Poddar and
Mr Aman Shukla, Advocates for
complainant/prosecutrix.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal, impugning the judgment dated 25.04.2017 passed by the Learned ASJ-01 (NW), Rohini District Courts, New Delhi, whereby the appellant was convicted under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) for committing aggravated sexual assault on a child of ten years of age. The appellant also challenges the order dated 01.05.2017, whereby the appellant was sentenced for a period of five years of rigorous imprisonment, along with a fine of

₹10,000/- and in default of the said fine, further simple imprisonment for a period of three months, for committing the offence under Section 10 of the POCSO Act.

2. On 11.11.2014, at about 3:10 pm, information was received at the PS IP Estate through PCR with regard to the recovery of an abandoned girl child, aged about 7 years, from a bus and was recorded as DD No. 20-A. The same was entrusted to enquiry to SI Mohit Malik, who along with Ct Narender went to the said spot and found the aforesaid girl (hereafter 'the Child'). Thereafter, WSI Vishambhari also reached the spot and called a counsellor who recorded the Child's statement. The Child stated that after the death of her mother, her father had abandoned her and her other siblings. She was brought to Delhi by her aunt (*bua*, sister of her father). After some time, her aunt (*bua*) had left her at the place of another woman, who used to make her do the work of filling of lime (*chuna bharna*). She disclosed that when she was staying with her aunt (*bua*), her uncle (*fufa*, husband of *bua*) used to touch her private parts. The son of her aunt, the woman with whom her *bua* had left her, had taken her to a bus and had left there.

3. Thereafter, the child was taken to LNJP Hospital, where her medical examination was conducted. Her hymen appeared to be intact but it was found to be patulous (slightly wide). On the aforesaid basis, the FIR was recorded. The child victim's statement was also recorded under Section 164 of the CrPC. Thereafter, investigation was conducted and criminal proceedings were set in motion against the appellant.

4. Charges under Section 5 (m), 5(l) and 5(p) of the POCSO Act, punishable with Section 6 of the POSCO Act, were framed against the appellant, to which he not pleaded guilty. To prove its case, the prosecution examined eleven witnesses.

Evidence

5. Before proceeding further, it is important to examine the depositions of the witnesses.

6. Ms Puja, was examined as PW1 and she proved the school records of the Child. As per the admission form and affidavit submitted by one Smt. Roshan Khatoon (aunt of the child), the date of birth of the Child was mentioned as 02.01.2005. Learned MM, Tis Hazari Courts, who had recorded the statement under Section 164 of the CrPC was examined as PW3 and she proved the statement of the victim, which was recorded before her (Ex. PW3/B).

7. Dr. Shakun, Assistant Professor, Maulana Azad Medical College and Lok Nayak College, was examined as PW4. She deposed that on 11.11.2014, she was present in Gynaecology Department of Lok Nayak Hospital. On that day, at about 9:30 pm, the Child was brought by the counsellor of Delhi Women Commission. Initially, she disclosed no history of sexual assault. On further inquiry, the Child informed them that her aunt'(*bua*'s) husband (her *fufa*), used to insert the tip of his index finger in her vagina. There was no history of bleeding. On examination, the urethra, fourchette and hymen did not show any fresh injury or scar mark. Hymen appeared intact but patulous (lax) (opened

slightly wide). The MLC (Ex. PW4/A) was proved by PW4. On cross examination, PW4 stated that the patulous (lax) could take place for a number of reasons, such as the insertion of a foreign object and sexual assault could not be ruled out.

8. HC Rajeev, had checked the previous criminal antecedents of the appellant and was examined as PW5. He deposed that there was no previous involvement of the appellant in any criminal case. Dr. Amit Anand, CMO, Lok Nayan Hospital, was examined as PW6 and he stated that on 11.11.2014, he was present in the casualty of Lok Nayak Hospital, when the Child was brought to him. He initially examined the patient and then referred her to the Gynaecology Department for further examination. The MLC as prepared by him was proved and exhibited as Ex. PW6/B.

9. Dr. Mohit Chauhan, who was examined as PW7, had prepared the MLC report of the appellant (Ex. PW7/A) and had opined that there was nothing to suggest that the appellant was not capable of performing sexual intercourse.

10. SI Vishambhari, examined as PW8, deposed that on 11.11.2014, on receiving DD No. 20-A, she along with Ct. Shakuntala, had reached the spot, that is, Ambedkar Terminal, where she met SI Mohit Malik and Ct Narender and the Child. She called a counsellor from DCW, who counselled the Child, and thereafter, she had recorded the child's statement (Ex. PW8/A). The statement was handed over to Ct. Narender for the registration of the FIR. The counsellor also counselled the Child

separately and recorded her statement. Thereafter, the Child was taken to LNJP Hospital, where her medical examination was conducted. On 12.11.2014, the Child was produced before CWC and she was counselled and sent to SOS, Udyan Gol Market, in Delhi. On 13.11.2014, the statement of the Child was recorded under Section 164 of the CrPC. Thereafter, PW8 was transferred from the PS and she handed over the case file to MCHR.

11. SI Mohit Malik, was examined as PW9 and he deposed that on 11.11.2014, DD No. 20-A was received regarding an abandoned girl, aged about seven years, found near the terminal of Ambedkar Stadium. On receipt of the DD, he along with Ct Narender, reached near Bus No. DL-1PC-3076, of Route No. 949, wherein the Child was found. PW9 informed the said facts to the SHO, who then sent WSI Vishambhari at the said spot for further inquiry. Thereafter, he left the said spot. On 02.06.2015, on further investigation being entrusted to him, he came to know that Ms. Uzma Parveen was appointed for counselling of the child victim and the child had told her about the involvement of her uncle, who resided at Mubarakpur Dabas. On 04.06.2015, on receipt of secret information, the appellant was arrested. The appellant also made a disclosure statement (Ex. PW 9/C). On searching the house of appellant, documents relating to the identity of the appellant and the Child were found and were seized vide seizure memo (Ex. PW-9/D). The appellant was medically examined and PW9 verified the age of the Child from her school. After recording the statement of the witnesses and preparing the charge sheet, he filed the same on 03.09.2014, after obtaining the

appropriate order from DCP Central.

12. Sandeep Kataria, the bus conductor who had discovered the Child, was examined as PW10 and he deposed that on 11.11.2014, he was on duty at bus Route No. 949, which used to ply from Tikri Border to Ambedkar Stadium. During the afternoon time, when they reached Ambedkar Terminal, all passengers got down except a small girl aged about 5-7 years. On inquiring from her, she told him that her *fufa* used to beat her up and due to this reason, she had left her home. She further stated that she had boarded the bus from Nangloi. Thereafter, PW10 called the police at 100 number and handed over the custody of the girl child to police officials.

13. Ms Usma Praveen, the CWC counsellor, was examined as PW11. She deposed that it is her duty to counsel victim children. As per the directions of CWC, she was appointed as a support person for counselling the Child in February 2015. Since then, she had been counselling her in Udyan Shelter Home, Gole Market, Delhi. During counselling, the Child disclosed that sexual assault had been committed on her by her *fufa*, Akhtar Ahmad. Thereafter, the child was shifted to Katyayni, Home of Destitute girls, near Jhandewalan Metro Station Delhi. She stated that on the basis of her efforts by which she had obtained the address of the appellant, the police were able to arrest the appellant.

14. The appellant, in his statement under Section 313 of the Cr.P.C., stated that he had been falsely implicated in the case by the Child at the

instance of the police.

Discussion and Conclusion

15. The learned counsel appearing for the appellant submits that there are material inconsistencies in the statement of the Child as made to the police in the presence of the counsellor; her statement under Section 164 of the Cr.P.C.; and her deposition before the Court.

16. As per Ex. PW8/A, statement of the Child recorded on 11.11.2014 by the police in the presence of a counsellor, the Child had stated that her mother died a few years back and her father used to drive a car in the village. She had two sisters and three brothers and they used to reside in a nearby village. Recently, her *bua* brought her to Delhi and made her stay with an aunty, who used to make her fill lime chalk (*chuna bharna*). She stated that in the village, her *fufa* used to often remove her *pyjamas* and used to keep his fingers on her “*susu wali jagah*”. She stated that aunty’s (that is, where she used to work) son had made her sit on the bus and thereafter, she fell asleep.

17. As per Ex. PW 3/B, the statement under Section 164 of the CrPC was recorded after the Child was asked general questions to determine her mental frame. After determining that she was fairly articulate, the Learned MM proceeded to record her statement. The Child stated that she lived with her *bua* and *fufa* and her *fufa*’s name was Akhtar. He had committed a wrong act (*galat kaam*) with her and had put her hand from where she urinates (*peshaab karne wali jagah*). She also pointed towards her vaginal area. When asked whether it used to hurt when he

used to commit wrong acts on her, she answered in the affirmative and also stated that such acts had been committed by him many times. When asked if she had informed her aunt (*bua*) about her *fufa*'s actions, she stated in the affirmative and said that her aunt (*bua*) had screamed on her *fufa*. He denied doing anything. Thereafter, her *bua* used to beat her up while stating that her *fufa* would not lie. The Child stated that since, her *fufa* used to do wrong things with her, her *bua* had left her with another woman (aunty). The said aunty had left her on a bus.

18. In her deposition before the Court as PW2, the Child stated that after the death of her mother, all her sisters had come to the stay with her *bua*. She stated that she has two paternal aunts (*buas*), one in the village and one in the city. She stated that her siblings live with her *bua* in the village, whereas she lives with her *bua* in the city. Her *bua* and *fufa*'s children live somewhere else. Her relatives used to go to work and she used to be at home alone. Her *fufa* used to come back by 2.00 PM to eat lunch and her *bua* used to return by 7.PM. One day when her *fufa* came to eat lunch, she asked him for five rupees. He told her that he would give the same to her after she served lunch to him. When she went to keep the utensils in the other room, he (*fufaji*) grabbed her and took her clothes off. She alleged that he touched her vaginal area ("*bee ch wali jagah*") with his finger. Thereafter, he took off his clothes and asked her to touch his private parts. She deposed that while he was touching her private parts, she experienced extreme pain.

19. She stated that her *fufaji* had done such acts with her several times. One time, her *bua* had seen the same and had a massive fight

with her husband (*fufa*). Her *bua* had said that her *fufaji* would not lie because he denied having done any such act. Thereafter, her *bua* sent her to the village. After coming back, her *fufaji* continued to commit the above described acts. Thereafter, her *bua* asked her if she would like to stay with Asma *didi*. She agreed to the same and started living with “Asma *didi*” and used to look after her children. One day, when she came to visit her *bua*, her *bua* gave her ten rupees to buy some pulses (*daal*). She used this opportunity to run away and went and sat in a bus. Thereafter, the ‘ticket waale uncle’ (the conductor of the said bus) asked her where she wants to go and she stated that she didn’t know. After that, the said uncle called the police. She stated that she didn’t tell everything to the police since she was feeling scared. She stated that the police had also taken her to the hospital. When she was asked if she had given her statement before the Court previously, she answered in the affirmative. Her statement under Section 164 of the Cr.P.C. was read to her and she admitted to the correctness of her statement.

20. Thereafter, she voluntarily stated that she had lied in her Statement under Section 164 of the CrPC, that the aunty had left her on the bus because she was scared that the police might send her back to her *bua* or the auntyji.

21. When asked about the actions of the police, she stated that the police had tried to search for her house. They were unable to do, as she did not know the location. One day, the police, along with her, reached her house. However, she came back since she did not want to live there. She was taken to Gole Market, where she stayed for a few days.

Thereafter, a 'mam' told her to go to Katyayani Balika Ashram so that she could live and study there. She was asked if she could identify the accused. She answered in the affirmative and identified the appellant as the accused.

22. The Child was cross-examined. In her cross-examination, she confirmed that she has to sometimes live with her *Bua* from the village and sometimes with her *Bua* from the city. She also confirmed that she would not do her homework assigned by her school and her teacher used to scold her on account of the same. She also confirmed that her teacher used to complain about the same to her paternal aunt (*Bua*), who stayed in the village. She also stated that because of that her paternal aunt from the village had sent her to live with her paternal aunt in the city. She was admitted to a school in Delhi. She also confirmed that her school teachers in the city had the same issues as her teachers from her school in the village. She also confirmed that her *Fufa* and her *Bua* used to tell her to do school work properly. She also accepted that she would leave her home without telling her *Bua* and *Fufa* and she did not like being scolded by them. On her further cross-examination, she reiterated that her *Fufa* used to come at 02:00 in the afternoon for his lunch and at that time, she would be alone.

23. Undeniably, there are several inconsistencies in the statement of the Child recorded by the Police; the statement recorded under Section 164 of the Cr.P.C.; and her testimony. In her initial statement (Ex.PW8/A), she had stated that the son of her aunty (referring to the person whom she would work with) had left her at the bus station. In

her statement under Section 164 of the Cr.P.C. (Ex.PW3/B), she stated that her aunty had left her sitting in the bus. However, she volunteered that her statement made before the Judge, to the effect that her aunty had left her in the bus, was false. She was also questioned as to why she had made the wrong statement and she responded by stating that she was afraid that the police would send her back to her *Bua* or to the house of Asma *didi*. In addition to the inconsistency with regard to who had left her in the bus, there is also inconsistency with regard to the work she was required to perform. In her initial statement (Ex.PW8/A), she stated that her *Bua* had left her with an Aunty and she would do the work of filling of lime chalk (*chuna bharne ka kaam*) at her house. In her statement recorded under Section 164 of the Cr.P.C. (Ex.PW3/B), she stated that her *Bua* had left her with one aunty who used to make her work. She did not describe the work done by her. In her testimony before the Court, she stated that her *Bua* had left her with Asma *Didi*, where she used to look after her children.

24. However, this Court is of the view that the said inconsistencies are not material. It is clear that the Child's paternal aunt (*Bua*) had left her with another person (who is described as Aunty or Asma *Didi*). It is also clear that the Child was required to do some work at the said house either filling lime or looking after the children. More importantly, the Child is consistent in her statement regarding the sexual assault. She had maintained that her *Fufa* had used to touch her private parts. In this view, this Court finds no room for doubt that the appellant had sexually assaulted the Child.

25. The medical evidence obtaining in this case is also supportive of the fact that the Child may have suffered sexual assault, as described by her. Although her hymen appeared to be intact but was patulous (lax), slightly wide. PW4 Dr. Shakun, Asstt. Professor, Maulana Azad Medical College and Lok Nayak Hospital, New Delhi had explained in her cross-examination that *“The patulous (lax) can take place for a number of reasons in a child, such as insertion of foreign object.”*

26. Thus, sexual assault on the Child could not be excluded on the basis of medical evidence. On the contrary, the medical evidence was corroborated with reference to sexual assault as described by the Child.

27. The learned counsel appearing for the appellant had earnestly contended that the Child’s cross-examination did indicate that her *Bua* and the appellant used to scold her on account of her not doing the work, as assigned by her school teachers and the Child resented the same. This indicated that the Child had run away from home and also provided the motive for her to implicate the appellant. She also assailed the reasoning of the Trial Court, which was founded on the drawing made by the Child. She submitted that the Trial Court had proceeded on an erroneous premise that the drawing made by the Child, while she was waiting for her testimony to be recorded, indicated commission of sexual assault upon her house by undressing her. She submitted that the sketch made by the Child could not lead to any such inference.

28. There is much merit in the appellant’s contention that the inference drawn by the Trial Court on the basis of the sketch drawn by

the Child is unwarranted. The Child had drawn a house, a girl carrying balloons and a girl dress. This did not, in any manner, indicate that the Child had an intermingled relation, or any inference of commission of a sexual assault could be drawn by the said sketch. The reasoning of the Trial Court in this regard is, plainly, in the realm of conjectures and surmises. However, the testimony of the Child is quite clear and there is no doubt that the appellant had sexually assaulted the Child. The contention that the Child had implicated the appellant because he used to scold her, is unpersuasive. The Child has clearly described the sexual assault committed on her and this Court is unable to accept that the Child of such tender years could have conceived of a devious plan for making such bile allegations to implicate a close relative only because he would scold her and compel her to do her school work.

29. In view of the above, this Court finds no reason to set aside the appellant's conviction or the sentence awarded to him. The appeal is, accordingly, dismissed.

30. The pending application is disposed of.

JANUARY 6, 2020
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VIBHU BAKHRU, J