

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

% Reserved on: 7th August, 2019
Decided on: 9th January, 2020

+ **CRL.A. 1178/2017**

NARESH

..... Appellant

Represented by: Mr. S.S. Ahluwalia and Mr.
Mohit, Advocates

versus

STATE

..... Respondent

Represented by: Mr. Amit Gupta, APP for the
State with ASI Sunil Kumar,
PS Hauz Qazi.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, Naresh challenges the impugned judgment dated 9th November 2017 convicting him for the offence punishable under Sections 8 of POCSO Act in FIR No. 150/2013 registered at PS Hauz Qazi and the order on sentence dated 15th November 2017 directing him to undergo rigorous imprisonment for a period of forty months and to pay a fine of ₹10,000/- and in default whereof to undergo simple imprisonment for a period of six months.

2. Learned counsel for the appellant contends that there are contradictions in the statements of victim recorded under Section 161 Cr.P.C., Section 164 Cr.P.C and the deposition before the court. There is nothing in MLC to suggest insertion of penis. It is the case of the appellant that he has been falsely implicated in the case due to dispute in the family. Even as per the testimony of the grandfather of the victim there were no seizures made from the house of the appellant belying the prosecution case.

3. Learned APP for the State on the other hand contends that the

statements of the victim's family bring out the case under Section 7 of POCSO Act as touching the private parts of the child victim would amount to an offence defined under Section 7 of POCSO Act and punishable under Section 8 POCSO Act.

4. Process of law was set into motion on 26th September 2017 at about 02:35 P.M. when a telephonic information was received that “Chote Bache ke sath galat kaam hua hai”. Aforesaid information was recorded vide DD No. 15 PP (Ex.PW13/A) and assigned to WSI Suman. She reached at the spot where ASI Tooki Singh and Ct. Shiv Lal were already present. The victim, his mother and grandparents were also present there. She recorded the statement of the mother of the victim wherein she stated that on 26th September 2013 at around 1:15 P.M. when her son (the victim herein) returned home from school she sent him to first floor to change clothes. He started playing with his brother and did not come back. After waiting for him, when he did not come back she went upstairs and asked her other son as to where the victim was on which he stated that Naresh (appellant herein) had called the victim to fly kite and accordingly he went there. After twenty minutes the victim came back home in terrified condition. When she asked him as to what happened he stated that *“Naresh Bhai mujhe apni chaat par patang dor ke bahane se bulaya va kamre mein lejakar mujhe letaya , fir meri nikkar utari, meri potty vali jagha par apna susu lagaya fir mujhe dard hone laga , khoon nikalne laga, mere pairo mein khoon lag gaya. Naresh ne mere pairo pe paani dalkar dhulvaya.”*. When she removed his shorts, she found some blood stains on it. She informed the said incident to her father-in-law who after talking to the victim made a call to 100 number. Aforesaid statement was recorded vide Ex. PW-1/A and the victim was taken to LNJP

hospital for medical examination along with his mother and grandparents. After the medical examination, the doctor handed over four sealed parcels containing inner and outer clothes of the victim which were seized vide seizure memo Ex. PW-5/A.

5. On the basis of the aforesaid statement, FIR No. 150/2013 (Ex.PW-4/A) was lodged at PS Hauz Qazi for the offences punishable under Section 377 IPC and Section 4 of POCSO Act.

6. The Investigating Officer along with Ct. Ramesh, victim, his mother and his grandparents reached at the place of the incident where she prepared the site plan at the instance of the mother of the victim vide Ex. PW-13/C. Thereafter, the appellant was arrested on identification by the mother of the victim vide arrest memo Ex.PW-1/B, his personal search was conducted vide memo Ex.PW-5/B and his disclosure statement was recorded vide Ex.PW-13/D. The appellant led them to the place of incident where a pointing out memo was prepared at his instance vide memo Ex.PW-13/E. The custody of the accused was given to Ct. Shiv Lal. She recorded the statement of victim and his brother vide Ex. PW-13/F and Ex. PW-13/G respectively. The appellant was sent to LNJP hospital for his medical examination through Ct. Shiv Lal and Ct. Vinay. Ct. Shiv Lal and Ct. Vinay handed over the blood sample of the appellant in sealed condition with one sample seal which were seized vide seizure memo Ex. PW-5/C. All the exhibits were deposited in the malkhana.

7. On 27th September 2013, the potency test of the appellant was conducted at MAMC hospital vide MLC Ex. PW-12/A. The appellant was produced before the concerned court and was remanded to judicial custody. On 1st October 2013 the statement of victim was recorded under Section 164

Cr.P.C. On 4th October 2013 the above stated exhibits were sent to FSL through Ct. Tejpal.

8. On 19th October 2013, a notice was served under Section 91 Cr.P.C. upon the Principal of the school of the appellant Ex. PW-13/J. The principal provided the attested copy of the transfer certificate of the appellant Ex. PW-13/L and the same was seized vide seizure memo Ex. PW-13/K. The mother of the victim provided photocopy of the Birth Certificate of the victim Ex. PW-1/D. The concerned Sub-Registrar, City Zone, NDMC verified and provided the original copy of the same vide Ex. PW-13/M. On 24th October 2013, counselling of the victim was done at CWC, Mayur Vihar.

9. On completion of investigation, charge sheet was filed. Charge was framed for the offences punishable under Section 377 IPC and Section 6 of POCSO Act vide order dated 10th December 2013.

10. PW-1, mother of the victim deposed in sync with her complaint made to the police. In her cross-examination she stated that she did not see the victim coming down from the second floor to ground floor via first floor. She stated that she did not know as to when the victim went to the ground floor. She stated that when she was calling her other son and the victim for tuition, the other son was flying kite at fourth floor and he informed her that the victim was not with him. She stated that after returning from the school it was the routine of the victim to come late from the second floor. She did not go to the second floor to see the victim after he did not respond to her calls. She also stated that she did not see the victim going to the house of the appellant and that from her other son she got to know that the victim was called by the appellant to fly kite. She did not go to the house of the appellant to call the victim rather she only made a loud voice to call the

victim. The appellant did not come to her house to call the victim. The appellant called the victim from his roof. Police did not seize thread of the kite and kite in her presence. She did not see any injury on the anus of the victim. She stated that when the victim came back from the house of the appellant, he was wearing underwear and sando vest. She took off the said underwear. Police did not seize sando vest. She stated that she did not go to the hospital. She did not find any sign of semen on the anus of the victim.

11. PW-2, grandfather of the victim stated that when he inquired about the said incident from the appellant, he tendered apology for the same. Thereafter he made a call to 100 number. In his cross-examination he stated that he saw blood spots on the underwear of the victim and also noticed that his legs were washed. The victim was not wearing any shorts, he was wearing only underwear and vest. There were no blood stains on the vest. He further stated that there was no sign of injury on any body part of the victim nor did he notice any injury mark on external portion of the anus. There was a gap of 6-7 feet between their house and the house of the appellant and that one cannot go to the roof of the appellant from their roof. Police did not seize any danda, kite, manja or charkha in his presence.

12. The victim was examined as PW-3 in court. After ascertaining that he was capable of understanding the questions put to him and was capable of giving rational answers thereof the victim was examined, who stated that his kite was entangled at the roof of his Baba, when he asked the appellant to help him to release the kite he asked him to come and release the kite. Then he came downstairs and went to the roof of the appellant but the kite could not be released. He asked the appellant to help him but his hands were not reaching the kite so he asked him to get a danda from his room. The

appellant with the help of the danda got released the kite and thereafter asked him to keep danda back in his room and when he was going back to keep danda in the room, the appellant came there and took danda from him and kept the same. Thereafter, he made him stand at the top of the washing machine and touched his penis at his anus after removing his underwear. He added that blood did not ooze out from his anus. The blood came from the penis of the appellant. The blood appeared on his legs and his anus. The appellant washed his legs. He further stated that the appellant threatened to beat him if he disclosed the said incident to anyone. When his mother was preparing him for the tuition, she noticed blood stains on his underwear and asked him about the same. He told the said incident to his mother and that the blood was of the appellant. His mother told the said incident to his grandfather and thereafter they went to the house of the appellant where his mother gave three-four slaps to the appellant. In his cross-examination he stated that after seeing the *kati patang*, other children ran to catch the said kite from stairs of the appellant and at that time appellant was taking bath. He denied the suggestion that he had fallen on the thigh of the appellant.

13. Brother of the victim was examined as PW-6 in the court. After ascertaining that he was capable of understanding the questions put to him and was capable of giving rational answers thereof, he was examined. PW-6 stated that in September 2014 he was flying kite on his roof along with his brother when the kite was entangled on the roof of their neighbour. The appellant who was on the roof of his house advised the victim to come and detangle the kite himself. The victim went to the roof of the appellant.

14. Dr. Pummy Choudhary, Senior Medical Officer, Lok Nayak Hospital, stated that on 26th September 2013, Dr. Akhilesh Sehgal, Junior Resident,

examined the victim and prepared his MLC vide Ex.PW-7/A. The victim was brought with alleged history of sexual assault. On examination, no external injury was noted. The blood samples and the blood-stained garments of the victim were sealed and handed over to the police. The victim was referred to Pediatric surgery for detailed examination.

15. Dr. Akhilesh Sehgal (PW-10), Junior Resident, Lok Nayak Hospital stated that on 26th September 2013 he examined the victim and prepared his MLC vide Ex.PW-7/A. He also collected the blood stained under garments of the victim, sealed them and handed over to the IO. He also collected blood samples of the victim in plain and EDTA vial and sealed the same and handed over to the police. The victim was referred to Pediatric surgery for further examination, evaluation and expert opinion and treatment.

16. Dr. Rajender Singh (PW-11), CMO, LNJP hospital, Delhi, stated that he medically examined the appellant vide MLC Ex. PW-11/A. The blood sample of the appellant was also taken, sealed and handed over to the police for DNA Examination. In his cross-examination he stated that he did not notice any abscess on the right thigh of the patient.

17. Dr. Manjunath (PW-12), Junior Resident, LNJP Hospital stated that on 27th September 2013 he medically examined the appellant vide MLC Ex. PW-12/A. On examination, no external injury was found on the appellant. He opined that there was nothing to suggest that the appellant was incapable of performing sexual intercourse. In his cross-examination he stated that there was no injury on the genitals of the appellant. There was no boil on the accused. The boil after treatment does not leave any scar and it heals within two weeks.

18. The appellant in his statement recorded under Section 313 Cr.P.C.

stated that he has been falsely implicated in the present case and that he had not done any wrong act with anyone. He stated that he was taking bath and had a boil on his leg, the victim got disbalanced while coming down from the stairs and the blood started coming out from the boil and got onto the shorts of the victim.

19. The DNA finger printing forensic report exhibited as Ex.PW-13/P reveals that the blood on the underwear of the victim tallied with the sample of the victim, though the DNA profiling from the underwear of the victim and the anal swab did not account for the alleles of the appellant. Though as per the medical of the victim there was no external injury however, it is evident that when the private part of the victim was touched by the appellant blood oozed out which was found on the underwear of the victim. The presence of the blood of the victim on the underwear duly corroborates his version that he was subjected to sexual assault. Though learned counsel for the appellant has strenuously argued that there are material contradictions and improvements in the testimony of the witnesses however, as noted above the statements of the witnesses are consistent. Brother of the victim has clearly deposed that while they were flying kite on the roof, the kite got entangled on the roof of the neighbor and the appellant, who was on the roof of the house advised the victim to come to him to the roof of his house and detangle the kite himself resulting in the victim going to the roof of the appellant however, when he returned back he informed his mother about the incident. Further the victim also stated that his legs were washed by the appellant. Though the plea of false implication has been taken however, the explanation rendered by the appellant in his statement under Section 313 Cr.P.C. is not plausible wherein he stated that he had a boil on his leg and as

the victim dis-balanced himself he fell and the blood oozed out from his boils and stuck on the shorts of the victim. As noted above the DNA report clearly shows that the blood on the underwear of the victim was that of the victim and not of the appellant. Moreover, on medical examination got conducted of the appellant no injury or boil was found on the leg of the appellant.

20. Considering the facts as noted above, this Court finds no error in the impugned judgment of conviction and order on sentence. Appeal is dismissed.

21. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellant.

22. TCR be returned.

(MUKTA GUPTA)
JUDGE

JANUARY 09, 2020
‘sk/vn’

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