

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 07.01.2021

+ **CRL. A. 969/2017**

VIJAY

.....Appellant

Versus

STATE (G.N.C.T. OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Kanhaiya Singhal, Advocate.

For the Respondent : Mr Ravi Nayak, 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 07.05.2015, whereby the appellant was convicted of an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereafter the 'POCSO Act'). The appellant also impugns an order dated 16.05.2015, whereby he was sentenced to serve ten years of rigorous imprisonment along with a fine of ₹10,000/- for the offence for which he was convicted. It was

further directed that in default of payment of fine, he would undergo simple imprisonment for a further period of eight months.

2. The appellant was charged of barging in the *jhuggi* of the victim at about 03.00 a.m. It was alleged that he had removed the panty/underwear of the prosecutrix (a minor aged about nine years at the material time). He had allegedly touched her vagina and had also inserted his finger inside her anus.

3. The father of the prosecutrix made a call to the police at about 06.10 a.m. on 23.09.2013, after apprehending the appellant. The said call was received at PS South Campus and was entered as DD No.6A (Ex.PW5/A). It was reported that a quarrel had ensued as a result of eve teasing (*ladki chedne ke karan jhagda*). The said DD entry was handed over to SI Chandan Singh. At the material time, he was posted at PS South Campus. He was examined as PW5. He stated that he along with W/Ct. Sushila went to the scene of the incident (Shri Ram JJ, South Moti Bagh) and met the prosecutrix (aged nine years) and her parents . He testified that he had apprehended the accused as he was informed that he had assaulted the prosecutrix. He further stated that SI Saroj was called to the spot and she recorded the statement of the victim (prosecutrix) and got the FIR in question registered (FIR 166/2013 under Sections 376/377 of IPC and Sections 6, 7 and 8 of POSCO Act).

4. The statement of the prosecutrix was recorded by SI Saroj on 23.09.2013. In her statement (Ex.PW1/A), she stated that she studies

in fourth standard in an NDMC school and resides with her parents in a *jhuggi*. She stated that because of the summer months, the door of the *jhuggi* remains opened. She alleged that at about 03:00 a.m. one boy whose name was Vijay and who lived in the same cluster of *jhuggies* had entered her *jhuggi* while all its inhabitants were asleep. She stated that she was acquainted with the accused. She alleged that he removed her underwear and started feeling her vagina (*peshab karne wali jagah par hath ferne laga*) and he forcibly inserted the finger from where she defecates. She stated that she raised an alarm and her parents woke up. They attempted to apprehend him but he fled from the spot. She stated that her parents searched for him and found him at about 06:00 a.m. on the terrace of the *silai* center. They caught hold of him and called the police. She stated that the police officials came and he was handed over to them.

5. Her statement under Section 164 of the Cr.PC was recorded on the same date (that is, on 23.09.2013). Her statement recorded under Section 164 Cr.PC is almost similar to her statement recorded under Section 161 Cr.PC earlier on that date. However, there is a minor inconsistency in the time of the incident. Whereas she had stated in her statement that the accused had entered her *jhuggi* at about 03:00 a.m., in her statement recorded under Section 164 of the Cr.PC (Ex.PW1/C), she stated that he had entered the *jhuggi* at around 03:30 a.m. In addition, she also stated that for the past three or four days, the accused had been following her all the way to her school and she had not understood why he was doing so.

6. The prosecutrix was examined medically. However, there were no injury marks and her mother refused to get her internal examination conducted.

7. The prosecutrix was examined as PW1. In her examination, she stated that on the night of the incident, the accused had opened her *salwar* and had inserted his finger from where she urinates and where she defecates. She had stated that she felt pain and she had called out to her parents and her parents had woken up. She once again confirmed that the accused had fled from the spot and was apprehended at about 06:00 a.m. from the silai center.

8. The prosecutrix was cross-examined. In her cross-examination, she was pointedly asked whether it was possible that some other person might have entered the *jhuggi* and not the accused Vijay. She denied the suggestion and reiterated that it was the accused Vijay who had entered her *jhuggi* and had committed the offence. She was asked whether any of her *chachi* resides in the same area and she responded in the affirmative. She was then asked whether the accused had any quarrel with her *chachi* and she replied in the negative.

9. The father of the prosecutrix was examined as PW2. He testified that on 23.09.2013, he was present in his *jhuggi* along with his family members and at about 3/3:30 a.m. he heard a scream from his daughter and on hearing the same, he and his wife woke up. On inquiries, her daughter (prosecutrix) had told him that the accused who was standing there had committed a wrong act with her. He testified

that he attempted to apprehend the accused but he managed to flee. He stated that at about 06:00 a.m., he was found present at *silai* center (sewing center) which was located in front of his *jhuggi*. He stated that thereafter, he called the police and handed over his custody to them. In his cross-examination, he confirmed that one Smt. Chaman resides in his neighbourhood but he did not know that whether the behavior of Smt. Chaman was cordial with the family of the accused.

10. There is no dispute that the prosecutrix was a minor at the material time. The Principal of her school was examined as PW3 and she had produced the admission register of the school and a photocopy of the relevant entry was taken on record (Ex.PW3/A). According to the school records, her date of birth is 11.08.2004. Therefore, on the date of the incident, the prosecutrix was just over nine years of age.

11. The appellant did not lead any evidence. In his statement recorded under Section 313 of the Cr.PC, he stated that he had been falsely implicated as his family did not have good relations with one Smt. Chaman Devi. He alleged that she had persuaded the family of the prosecutrix to falsely implicate him in this case.

12. Mr Kanhaiya Singhal, learned counsel appearing for the appellant contended that the appellant had been falsely implicated in this case. He drew the attention of this Court to the MLC (Ex.PW1/B) of the prosecutrix where it was recorded that the offence was committed by a person, whose name was not known. He submitted that whereas before the concerned doctor, the prosecutrix had stated

that she did not know the name of the accused. However, in her statement recorded under Section 161 of the Cr.PC, she had specifically named the appellant. She had also stated that she already knew him. He submitted that the prosecutrix had further improved upon the allegations in her statement recorded under Section 164 of the Cr.PC. In that statement she had further alleged that the accused had been following her to her school for the last three to four days prior to the date of the incident.

13. This Court has examined the evidence obtaining in this case. The testimony of the prosecutrix cannot be considered as unreliable. This Court finds no material inconsistency between her testimony and her statements recorded earlier. The fact that she alleged that the appellant had been following her for three to four days prior to the date of the incident, in her statement recorded under Section 164 of the Cr.PC, does not in any manner raise any doubts as to the allegations made by her. Her testimony is also consistent with the testimony of her father (PW2). It is material to note that in her examination before the Court, she had stated that the accused had inserted his finger in her vagina as well as in her anus. However in her initial statement as well as in her statement recorded under Section 164 of the Cr.PC, she had not made any allegations of the accused inserting his finger in her vagina. She had stated that he had touched her vagina and felt it. However, this too is of little relevance in the given circumstances. It is relevant to note that the prosecutrix was asleep when the accused had removed her underwear/opened her

salwar. She had woken up with the accused committing the said acts. Her allegations are, essentially, that he had felt her vagina and had inserted his finger in her anus.

14. Considering the manner in which the offence was committed, the inconsistency regarding whether he had inserted his finger in the vagina or had felt it, would not be of much relevance. In any event this Court is of the view that the said inconsistency does not in any manner raise any doubts as to the allegations made by the prosecutrix.

15. The contention that he had been falsely implicated because the name of the accused was not mentioned to the concerned doctor who had examined the prosecutrix, is also unpersuasive. It is material to note that the prosecutrix was taken for the medical examination by the concerned police official and her mother. There is no reason to believe that her mother knew the name of the appellant and it appears that the mother had narrated the incident to the doctor.

16. As far as the prosecutrix is concerned, she had named the appellant as the person who had committed the offence in her first statement that was recorded in the morning of the date of the incident. She had also named him in her statement recorded under Section 164 of the Cr.PC, as well as in her examination before the Trial Court. In view of the above, there is no doubt that the prosecutrix was aware of the identity of the appellant and had identified him.

17. In view of the evidence obtaining in this case, this Court concurs with the view of the Trial Court that the appellant is guilty of the offence for which he is charged.

18. The appeal is unmerited and is, accordingly, dismissed.

JANUARY 07, 2021
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VIBHU BAKHRU, J

