



* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on : 30th August, 2022
Pronounced on: 27th September, 2022

CRL.A. 154/2020

AZAD KHAN

..... Appellant

Through: Ms.Saahila Lamba (DHCLSC)
and Mr. Tarun Khanna,
Advocates.

versus

STATE

.... Respondent

Through: Ms. Shubhi Gupta, APP for the
State

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

J U D G M E N T

ANISH DAYAL, J.

1. The present appeal assails the judgment dated 26th September, 2019 passed by the learned Trial Court convicting the appellant for the offence punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act) read with Section 5 (m) of POCSO Act and order on sentence dated 27th September, 2019 awarding sentence of life imprisonment for offence punishable under Section 6 of the POCSO Act with fine of Rs.10,000/- (simple imprisonment of six months in default of payment of fine).

Incident :

2. As per the case of the prosecution, DD No.18A dated 7th May, 2013 at 01:44 p.m. was recorded on PCR call reporting rape of a 7-8 years old minor girl near Jal Board, L-Road, Fire Station, Keshav



Puram. Upon receipt of the complaint, PW-6 Constable Dinesh and PW-13 Inspector Kamlesh, the initial Investigating Officer went to the spot at the *jhuggi* cluster. PW-13 met the complainant PW-8, Ram Narayan, the paternal uncle of the victim, who stated that on that day at about 1:00 P.M. when he returned home, he found the minor victim 'N' was weeping in the *jhuggi* and the crowd gathered there. On enquiry, the victim 'N' told that one neighbour Azad, the appellant had called her in *jhuggi* and removed her *pyjama* and clothes and after laying her on the floor, inserted his private parts in her private parts and when she started crying, he ran away. One girl 'R' who was playing with the victim, also stated the same. PW-13 called the PCR who took the victim for medical examination and on his statement, *Rukka* was prepared and handed over to Ct. Sudhir for registration of the FIR and accordingly, FIR No. 135/2013 was registered under Section 376 IPC and Section 6 of POCSO Act.

3. The appellant was arrested and medically examined as well. Exhibits of the victim and blood sample of the appellant were seized by the doctor and sent to the Forensic Science Laboratory (FSL). Charge-sheet was filed against the appellant and charges of commission of offence punishable under Section 6 read with Section 5 (m) POCSO Act or in the alternative Section 376 (2) (1) IPC were framed on 24th August, 2017 against the appellant to which he pleaded not guilty and claimed trial. The prosecution examined 15 witnesses and the statement of the appellant was recorded u/s 313 Cr.P.C. who examined two witnesses in defence.

Evidence:

4. The evidence as gleaned from the record, relevant for the assessment of this appeal, is *inter alia* as under:



(i) PW-8, Ram Narayan, ^{NEUTRAL CITATION NO: 2022/DHC/003938} ~~father~~ of the victim (husband of paternal aunt of the victim) was the complainant who had called the PCR having come to know that his niece, the minor victim 'N' had been sexually assaulted by the appellant. PW-8 stated that though he did not remember the date and month specifically and that the incident had occurred about one and a half years ago, the victim 'N' and child 'L' were daughters of his brother-in-law (*sala*) who were staying with him as their mother Smt. Kesh Kali had gone to her native village to look after her maternal grandmother (*nani*). On the day of the incident, he had left home for his work and child 'L' aged about 15 years was working as a *beldar*, had also left home for work. At about 01:00 P.M. he returned back to his *jhuggi* and saw that the neighbours had gathered and victim 'N' aged about 7 years was crying bitterly and child 'L' was also with her. Upon asking her the reason, the victim 'N' mentioned that some time back the appellant, who was residing in their neighbourhood, came in her *jhuggi* and removed her *pyjama* and also removed his own clothes and did wrongful act with her. As per PW-8, the appellant had put his male organ in the vagina of the victim 'N' and when the victim started crying, he left her in that condition and fled away. In his cross examination, he said that there were other *jhuggis* adjoining his *jhuggi* and shops as well and the police had taken into possession a blanket from his house where the incident had occurred. The appellant was arrested by the police from his *jhuggi* and was taken to the police station. He denied any suggestion to the effect that he had borrowed some money from the appellant and there was a quarrel between them. A perusal of the *rukka* Ex. PW-8/A also confirms that the testimony given by PW-8 is



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consistent with what has been stated in *Pukka* and there was no material improvement.

(ii) PW-9, the victim 'N' testified that she was the daughter of Smt. Kesh Kali and Sh. Balram and she was not school-going. She had an older sister and a younger brother. She stated that she was going with her friend 'R' to get some water and the appellant was following them (whom she identified in court). The appellant then held her hand and took her to the room while her friend 'R' was sent by the appellant to her own home. Upon going to the room, the appellant had committed the wrongful act and then give her a biscuit and Rs.20/-. In her testimony, she stated that her *bua* and *fufa* had both gone for work and at that time there was nobody at home.

(iii) PW-10, Sh. Gaya Prasad, who was the cousin of both victim 'N' and child 'L', was residing in the *jhuggi* cluster and was working as a *beldar*. He stated that on 7th May, 2013, his cousin child 'L' aged about 14 years had also gone for work and that the victim 'N' was alone at home with her friend 'R'. He stated that when he came back at about 01:00 P.M. he found that neighbours were present in the *jhuggi* and the victim was weeping and on enquiring from her, she told that the appellant had committed sexual assault upon her.

(iv) PW-11, Smt. Kesh Kali, the mother of the victim deposed that she has two daughters and one son and a few days prior to the incident she had gone to her native village to see her ailing father-in-law and had left both the daughters in the custody of her brother-in-law (*nandoi*) since they were residing in the same *jhuggi* cluster.

(v) PW-13 stated that after the registration of the FIR which was done at 4:45 PM, she alongwith Ct. Sudhir and PW-8, Ram Narayan



had gone to the *jhuggi* of the appellant who was found sleeping there. NEUTRAL CITATION NO: 2022/DHC/003938

Thereupon, on the identification of PW-8, she apprehended the appellant vide arrest memo Ex. PW13/C. Pursuant to that, the appellant was sent for medical examination to B.G.R.M Hospital, and his MLC report was prepared as Ex. PW5/A.

(vi) PW-15, Ms. Seema Nain, Assistant Director (Biology) Forensic Science Laboratory (FSL), Rohini, Delhi deposed that she had received a sealed parcel at the FSL which is marked for DNA examination and accordingly after examination, she had prepared a detailed DNA report which is exhibited as Ex. PW-15/A. On a perusal of Ex. PW-15/A, it is evident that post DNA profiling performed on the *pyjama* of the prosecutrix and the blood sample of the accused, PW-15 concluded that the DNA profile from the blood sample of the appellant is matching with the male DNA profile generated from the *pyjama* of the prosecutrix.

(vii) Dr. Mohit Tiwari, PW-5 proved the MLC which was exhibited as Ex. PW-5/A was prepared by Dr. Manas Dubey who had left the hospital and the signatures of Dr. Manas Dubey had been identified by Dr. Mohit Tiwari. PW-5 had also testified the signatures of Dr. Nandeeep on the MLC of the patient (child victim 'N') Ex. PW-5/B who had referred the child to the gynecologist Dr. Smita Pathak.

(viii) The doctor from BJRM Hospital deposed that Dr. Smita Pathak who had examined the victim had left the hospital services but PW-7 had seen MLC No.59122 of victim and she identified the handwriting of Dr. Smita Pathak on the MLC which was exhibited as Ex. PW-5/B.

(ix) The appellant in his statement recorded under Section 313 Cr.P.C only stated that he was falsely implicated in the case at the



instance of PW-8, Ram Narayan and his son PW-10, Gaya Prasad, as they owed money to him.

(x) DW-1, Smt. Munisha deposed that the appellant was her real brother and was unmarried and she used to stay two or three lanes away from his house. She further stated that the appellant used to sell articles on his cart in the morning and would come back in the evening as his material was sold. There was nothing in her testimony to exculpate the appellant.

(xi) DW-2, Smt. Bijendri deposed that the appellant was living near her *jhuggi* of the appellant who used to ply his cart near Lawrence Road. She did depose that PW-8 had a dispute with the appellant who used to demand money from PW-8 which he refused to give. In her cross-examination, she stated that no money transaction between the appellant and PW-8 had taken place in her presence and she had only heard it. Both the testimonies of DW-1 and DW-2 would be classified as 'hearsay'. They stated nothing specifically in their testimony which would exculpate the appellant of the crime.

Analysis

5. On a detailed assessment of evidence on record and appreciation of the submissions by the counsels for the parties, this Court of the considered view that the prosecution has been able to prove its case beyond reasonable doubt and the appellant has been rightly held guilty for the offences for which he has been convicted, for *inter alia* on the following reasons:

(i) The testimony of the prosecutrix, the victim 'N' is consistent and clear all through her examination in chief and her cross examination. There are a catena of judgments which upheld that even



the sole evidence of the prosecutrix in a case of sexual assault, particularly of a minor, can be the sole basis for conviction of an accused provided various other foundational facts are consistent. Reliance in this regard is placed on ***Ganesan V. State*** (2020) 10 SCC 573, where the Hon'ble Supreme Court relied on various earlier precedents in Para 10 of the judgement in support of the settled proposition of law which the Hon'ble Supreme Court stated as following: *"As per the settled proposition of law, even there can be a conviction based on the sole testimony of the victim, however, she must be found to be reliable and trustworthy."*

(ii) The testimony of the complainant PW-8, the maternal uncle, under whose care the victim 'N' was, had also been consistent in his deposition. His testimony has been further corroborated by PW-10, his son Gaya Prasad regarding them reaching the *jhuggi* cluster and getting to know of the assault by the weeping victim 'N'. There is nothing to suggest that PW-8's testimony was tainted in any manner including his absence at his house at the time of the incident.

(iii) Most importantly, in cases of such sexual assault, the medical evidence clinches the issue as regards the case of the prosecution and in this matter as well, the opinion of the DNA examination is categorical and clear that the appellant's DNA profile had been found on the *pyjama* of the prosecutrix. The *pyjama* of the prosecutrix had been secured and seized by PW-13 and exhibited as Ex. PW-13/A.

(iv) A perusal of the MLC indicates that the minor victim was brought to the hospital by WSI Veena, PW-14 and noted the facts that she was contacted by the *fufu* of the child victim and was complaining of her sexual assault by the neighbour namely Azad at 1:00 P.M. on



7th May, 2013. The MLC reported that the hymen of the victim was ruptured and inflamed and the doctor noted that it was a recent sexual assault. The MLC of the appellant, who had been examined, noted that there was nothing in his examination to suggest that he could not perform a sexual act.

(v) The learned Trial Court has stated the age of the prosecutrix was never in dispute since the appellant at no stage challenged the same. At the time of her deposition (which was in March, 2015), the learned Trial Court's observation was that the victim was 9 years of age. Accordingly, the learned Trial Court held that since no suggestion was given to the mother or the complainant regarding the age of the victim and that the ossification test though not proved but reflected that the age of the victim was estimated between 8 to 10 years as on 28th June, 2013, there was no reason to doubt the fact that the victim was indeed a minor at the time of the incidence.

(vi) As regards the learned Trial Court's estimation of the age of the victim as being under 12 years at the time of the incident, as contained in para 7 of the impugned judgement, this Court finds that except for the observation of the learned Trial Court there is no other substantive proof provided by the prosecution regarding the age of the victim. Since the victim was not school going, as is evident from the testimony of the victim herself, it could not have been possible to get any evidence of school admission records. Further, the ossification test which estimated the age of the victim between 8 to 10 years, was not proved before the Court through relevant prosecution witnesses. Since the ossification test was conducted on the victim, it ought to have been proved by the prosecution in its evidence. Two possible methods of



establishing age i.e. school register and ossification test not being available to the learned Trial Court, it relied merely on the testimonies before the court regarding the possible age of the victim.

(vii) The following testimonies regarding the age of the victim would be relevant for this Court to examine:

(a) PW-8, Ram Narayan, the *fufa* of the victim and the complainant states that the victim 'N' was aged about 7 years. PW-8 was not cross-examined on the aspect of age of the victim on his deposition in this regard.

(b) PW-13, Inspector Kamlesh stated that DD No.18A was regarding rape on a minor girl. She further stated that she tried to get age proof of the victim child 'N' but no age proof could be brought by the complainant mother as child victim 'N' never went to school. She further deposed on the basis of statement of child 'L' (sibling of the victim 'N') that another case FIR No.136/2013 had been registered regarding same appellant and in that case, both the victim 'N' and child 'L' were subjected to bone age determination test as per which both of them were minor at the time of the incident. PW-13 was not cross-examined by the learned counsel for the appellant on this aspect.

(c) PW-10, Gaya Prasad, cousin of both the victim 'N' and child 'L', had deposed that child 'L' was aged 14 years at the time of the incident and that she had gone to work as *beldar*. The child 'L' had also stated that 2-3 days prior to the date of incident (07th May, 2013) the appellant had committed "*chhed chhad*" with her and tried to remove her clothes.

(d) This aspect is also corroborated by the testimony of PW-11, the mother of both the victim 'N' and child 'L'. She had stated that she



had two daughters and one son and the whereabouts of her husband were not known to her for the last 8-9 years. She further stated that after coming to know the incident about sexual assault upon her younger daughter (N) and “*chhed chhad*” with her elder daughter (L) by the appellant, she immediately rushed back from her native village.

(viii) It is evident from examination of these testimonies that victim ‘N’ was about 7-8 years of age at the time of incident while the elder sibling child ‘L’ was aged about 14 years. The evidence therefore clearly points to the victim ‘N’ being a minor at the time of incident.

(ix) However, even if the victim ‘N’ was a minor, the age of the victim cannot be determinatively established as below 12 years. Section 5 (m) and therefore Section 6 of the POCSO Act cannot be invoked against the appellant. Having regard to the fact that foundational facts of the offence have been clearly established, this Court is of the considered view that the appellant be convicted instead for the offence under Section 3 punishable under Section 4(1) of POCSO Act. The minimum sentence prescribed under Section 4(1) (Section 4 pre-amendment) of POCSO Act was earlier 7 years, which was later amended by Act 25 of 2019 to be 10 years at the minimum. Since this incident took place in 2013, the provision prior to the amendment shall apply, therefore, the sentence which can be awarded under Section 4(1) (Section 4 pre-amendment) of POCSO Act can range from a minimum of 7 years but which may extend to imprisonment for life in addition to a fine.

(x) This Court, therefore, is of the view that the appellant instead be convicted under Section 3 of the PCOSO Act and is sentenced to imprisonment for life under Section 4 of the PCOSO Act. Fine of



Rs.10,000/- and simple imprisonment for a period of 6 months in default of payment of fine, as awarded by the Trial Court, would continue to be the same and part of the sentence alongwith this revised sentence awarded by this Court.

Conclusion:

6. In light of the above analysis, this Court is of the considered view that the case of the prosecution is duly supported by evidence which proves beyond reasonable doubt that the alleged crime had been committed by the appellant. However, due to reasons mentioned in para 5 (ix) and (x) of the analysis above, conviction of the appellant cannot be sustained under Section 5 (m) of POCSO Act but instead will be under Section 4 (1) (as stood prior to the amendment in 2019) read with Section 3 of POCSO Act. The sentence would be for life imprisonment, along with fine of Rs.10,000/- (simple imprisonment of six months in default of payment of fine). The appeal is accordingly dismissed.

7. Copy of the same be uploaded on the website of this Court.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 27, 2022/sm