

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 3rd June, 2016

+ CRL.A.1175/2015

DHARMENDER Appellant
Through Mr Azhar Qayum and Mr A.A Dutt, Advs.
versus

STATE

..... Respondent
Through Mr Mukesh Kumar, Additional Public
Prosecutor for the State

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 10.09.2015 and order on sentence dated 15.09.2015 arising out of Sessions Case No.110/13 arising out of FIR No.444/12 under Ss. 377/506 IPC and 6 of POCSO Act Police Station Alipur, Delhi whereby learned Additional Sessions Judge, North Rohini, New Delhi convicted the appellant for offences punishable under S. 6 of POCSO Act and under Ss. 377/506 IPC and sentenced to undergo rigorous imprisonment for a period of ten years alongwith fine of Rs5,000/-; in default to undergo simple imprisonment for a period of one month for offence punishable under S. 6 of POCSO Act and rigorous imprisonment for a period of one year with fine of Rs.1,000/-; in default to undergo simple imprisonment for a period of one month for offence punishable under S. 506 IPC. No separate sentence was awarded for offence punishable under S.377 IPC. The sentences were ordered to run concurrently and benefit of S. 428 Cr.PC was accorded to the convict. Further, as provided under S. 33(a) of POCSO Act, a sum of Rs.1 lac was granted as compensation to the victim.

2. The prosecution case, succinctly stated, is as under:

3. FIR in question was registered on the complaint of the victim N, a boy aged about 10 years alleging that on 18.12.2012 at about 4 PM, when he was playing on the roof of his house, the accused Dharmender came there and took him in his room. When the victim asked for water, the accused made him to drink soda. Accused closed the door of the room and switched off the light. Accused threatened the victim that if victim would raise alarm, he would be killed. Then, the accused removed pant of the victim forcibly and made the victim lie down on the bed. Accused inserted his penis in the anus of victim forcibly. Victim cried with pain. When accused got up to apply mustard oil, the victim escaped from the room. In the evening, when the mother of accused came, he narrated the whole incident to her. His mother told the incident to the neighbors and called at 100 number. Statement of victim was recorded and he was medically examined. He prayed for legal action against the accused.

4. Accused was arrested and was charge-sheeted in the present case for the offence punishable u/s 377/506 IPC and u/s 6 POCSO (Protection of Children from Sexual Offences) Act, 2012. Charge for the said offences was framed against the accused to which he pleaded not guilty and claimed trial.

5. In order to substantiate its case prosecution examined 11 witnesses. The case of accused/appellant in his statement under S. 313 Cr.PC was one of denial simplicitor. According to him, he had a quarrel with the mother of the victim prior to this incident and she threatened him to take revenge from him. According to him, no such incident took place. However, he did not prefer to lead any evidence in defence.

6. After scrutinizing the testimony of the witnesses coupled with the medical evidence, learned Trial Court convicted the appellant and sentenced him as mentioned hereinbefore.

7. Feeling aggrieved, the present appeal has been preferred by the appellant.

8. Out of 11 witnesses examined by the prosecution, the material witnesses are PW1 – Laxmi Devi; PW2 - Nitesh/victim, PW3 Dr. Ashutosh Gupta, PW5 – Jagbir Singh Rana, Principal, MCD primary school, PW10 – Mrs Babli Devi.

9. Since the appellant was charged for the offence punishable under S. 6 of POCSO Act, it was incumbent upon the prosecution to prove that the victim was a child less than 12 years on the date of incident. In order to substantiate this fact, besides the oral testimony of Smt. Laxmi Devi (PW1) that the victim was aged about 10 years, prosecution examined PW5 – Jagbir Singh Rana, Principal, MCD primary school who proved the date of birth of the victim as 05.03.2003 by producing his school record Ex.PW5/A. Nothing material could be elicited in his cross examination and the defence has not challenged the age of the victim in any manner nor has anything been proved on record to dispute the age of the victim. Under the circumstances it was rightly held that the age of the victim was about 10 years on the date of commission of offence.

10. As regards the incident, the most material witness is the victim himself. It is pertinent to note that the FIR itself was recorded on the basis of statement of the victim wherein in his initial complaint Ex.PW2/A, he narrated the incident stating inter alia that on 17.12.2012, his father had gone to village Hasanpur, Bihar while his mother had gone on her duty. At about 4 PM, he was playing on the roof of his house. Accused Dharmender (appellant herein) came there and took him in his room. When he asked him to let him go to drink water, accused made him to drink soda. He asked him to lie on bed. He closed the door of the room and switched off the light. He threatened him with dire consequences in case he raises alarm. He got frightened. Thereafter, accused removed his pant forcibly and made him lie down on the bed and inserted his penis in his anus. He cried with pain. Accused got up to apply mustard oil. Meanwhile he managed to escape from the room. In the evening, he (victim) narrated the whole incident to his mother. His mother told the incident to the neighbors and then informed the police. The victim was thereafter produced before Shri Manish Khurana, Metropolitan Magistrate for the purpose of recording his statement under S. 164 Cr.PC. Same incident was narrated by him in his statement Ex.PW2/B. Substantially similar is his deposition before the Court. Except for some minor variations in these statements, nothing substantial could be elicited in the cross examination of the witnesses. Moreover,

minor variations are bound to occur in the testimony of any witness and it is to be kept in mind that the victim was only aged about 10 years. Minor variation does not pertain to the substratum of the case so as to affect the credibility and veracity of this witness.

11. Furthermore, after the mother of victim returned back from her work in the evening, the victim narrated the incident to her who also informed the same to the neighbours and thereafter police was called. As such without any substantial delay, the police machinery swung into action. Furthermore, PW10 – Smt Babli, who is the neighbour of the victim has also deposed that she saw the victim running out crying from the room of the appellant and the victim was carrying his pant in his hand. Her testimony could not be shaken in cross examination.

12. Over and above, the ocular testimony of the victim, duly corroborated by the aforesaid circumstances, the same is substantially corroborated by the medical evidence. The victim was medically examined by PW3 Dr. Ashutosh Gupta and his MLC Ex.PW3/A was prepared. As per the MLC the victim was brought to the hospital with history of sodomy. On examination tear was present at 6 and 12 O'clock position at anal margin of the victim. The anal tear clearly indicates that the victim was sodomized.

13. According to accused, he was falsely implicated in this case as prior to the incident he had a quarrel with the mother of victim who had threatened the accused to take revenge from him. However, this plea is not substantiated. Moreover, no such suggestion was given to the mother of the victim. Furthermore, the plea taken by the accused is very vague as it has not been explained as to what was the quarrel between him and the mother of the victim for which reason she would take such a drastic step of getting the accused arrested in such a serious case. Moreover, absolutely no explanation is forthcoming as to how the medical evidence also substantiated the ocular testimony of the victim.

14. The entire evidence was meticulously scrutinized by the learned Trial Court while convicting the appellant. Same does not suffer from any infirmity which calls for interference.

15. As regards, the quantum of sentence, the minimum sentence prescribed for offence under S.6 of the POCSO Act is ten years and fine which has been imposed upon the appellant. The Court does not have any discretion to award a lesser sentence than the minimum prescribed under this section. Even otherwise, the antecedents of the appellant does not warrant any leniency in the matter as learned Additional Public Prosecutor for the State has placed on record the criminal antecedents of the appellant which reflects that the appellant is involved in following cases of District Bullandshahar (U.P):

- i. FIR No.240/95 under S. 13 Gunda Act
- ii. FIR No.153A/97 under Ss. 147/148/307/504 IPC
- iii. FIR No.178/97 under Ss. 377/511/323/506 IPC
- iv. FIR No.335/02 under Ss. 328/379/411 IPC
- v. FIR No.102/03 under S. 4/25 Arms Act
- vi. FIR No.66/04 under S. 3/4 Gunda Act

16. As per the nominal roll, the conduct of the appellant is also unsatisfactory as he has been punished several times on account of his misconduct.

17. In the result, the appeal is dismissed being devoid of any merits.

Copy of the judgment alongwith trial court record be sent back immediately.

(SUNITA GUPTA)
JUDGE

JUNE 03, 2016/*rd*