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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: 30.08.2017

Judgment Pronounced on: 21.09.2017

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CRL.A 1061/2016

HANS RAJ @ BHOLA

..... Appellant

Through: Mr. Ajay Verma, Advocate

versus

STATE

..... Respondent

Through: Ms. Aashaa Tiwari, APP for State
with SI Ramesh Kumar, PS Sultan
Puri

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J.

1. This Criminal Appeal has been filed against the impugned judgment dated 06.10.2015 in Sessions Case No.28/14 arising out of FIR no. 834/13 registered under Sections 376(2)(i)/511 of the Indian Penal Code, 1860 (in short 'IPC') whereby the Trial Court convicted the appellant under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO Act'). By order dated 8.10.2015, the Trial Court sentenced him to undergo rigorous imprisonment for five years and imposed a fine of Rs.5,000/-.
2. On 05.12.2013, after receipt of DD No.57-B, PW-13 W/SI Rakhi along with L/Ct. Kamlesh went to House No.S-168, Dhabe Wali Gali,

C-3 Block, Sultan Puri, Delhi where SI Vikas Sahu and Ct. Raj Kumar met her. SI Vikas Sahu introduced the complainant Smt. Sushma to PW-13 SI Rakhi. The complainant informed PW-13 SI Rakhi that his neighbour Bhola (appellant) had attempted to molest her daughter “K” (child victim) and her neighbour’s daughter “I” (second child victim), both aged about five years on 05.12.2013. In the meanwhile, Nazma Khan, who was an official from an NGO, had also arrived at the spot and counselled the complainant. The complainant got her statement recorded in which she stated that on the same day at about 9 PM she was getting *mehendi* inscribed on her hand in the lane in front of her house when suddenly her child victim “K” came running to her and informed her that the appellant had kissed her and child victim “I” and that the appellant was removing underpant of child victim “I”. The complainant stated that on hearing this she along with child victim “K” rushed to the park where she saw that the appellant had removed child victim “I”’s underpant down to her knees and was urinating in her presence. On seeing this, the complainant called the mother of child victim “I” through child victim “K” to the park where they apprehended the appellant and brought him to the lane in front of their house and called the police. The complainant further stated that the appellant started apologizing and she along with mother of child victim “I” thrashed the appellant several times after which the appellant managed to escape. The police arrived at the scene of crime after all this had happened.

3. On the basis of this statement made by the mother of child victim “K”, FIR no.834/13 was registered. Both child victims were medically

examined at the Sanjay Gandhi Memorial Hospital and a site plan was prepared, the appellant was arrested on the next day of the incident and his disclosure statement was recorded. Statements of both the child victims were recorded under Section 164 of the Code of Criminal Procedure, 1973 (in short 'the Code').

4. The prosecution examined 13 witnesses in order to bring home the guilt of the appellant.
5. The Trial Court convicted the appellant relying primarily on the testimony of both the child victims. The Trial Court found the testimony of both the child victims to be reliable and corroborating each other and that of the testimony of their respective mothers i.e. PW-4 Sushma (mother of child victim "K") and PW-9 Preeti (mother of child victim "T") who are also eye witnesses in the present case.
6. Learned counsel for the appellant had argued that the judgment of the Trial Court is based on conjectures and surmises and therefore needs to be set aside.
7. He argued that the appellant had been falsely implicated in the present case which is clear from the call made by PW-12 Karamvir Singh to PW-1 Ct. Usha Rani informing that a boy aged about 18 years had been apprehended whereas the appellant was about 40 years of age.
8. He further argued that the appellant was not arrested at the spot but was arrested on the next day of the alleged incident. He urged that no parent would allow her daughter to play in the streets at 9 PM during the winter when it gets very dark around 9 PM.
9. He had further urged that the testimony of the child victims were not reliable as both the victims had been tutored by their family members

and Police officials. He relied upon the judgment of this Court in **Samey Singh v State 1998 (1) JCC (Delhi) 217** to add weight to this contention.

10. He had contended that without prejudice to the aforesaid arguments, the appellant deserves leniency as he had no previous criminal antecedents and has been in jail since the date of arrest and therefore his punishment should be converted to the period prescribed under Section 8 of the POCSO Act.
11. Per contra, Learned APP for the State had argued that the judgment of the Trial Court was based on sound appreciation of evidence and law and therefore does not warrant interference.
12. Learned APP had contended that the testimony of the child witnesses were completely reliable and corroborated by the testimony of other witnesses. He argued that the testimony of the child victims proved the guilt of the appellant beyond all reasonable doubt.
13. I have heard the learned counsel for the appellant and learned APP for the State.
14. The appellant has challenged the impugned judgment on three grounds:-
 - i. The testimony of both the child victims cannot be relied upon as they have been tutored by their family members and Police personnel.
 - ii. The appellant was falsely implicated in this case as PW-1 Ct. Usha Rani, who had received the phone call from the father of child victim "I" (PW-12), had testified in her examination-in-chief that PW-12 had informed her over

the phone that a male aged about 18 years had been caught as he was found molesting his daughter whereas the appellant at the time of the incident was aged about 40 years.

- iii. Without prejudice to the above stated grounds, the appellant should be punished under Section 8 of the POCSO Act for the offence of Sexual Assault and not under Section 10 for Aggravated Sexual Assault as he had no previous criminal antecedent.

- 15. Coming to the first issue which is whether the testimony of child witnesses are reliable at all? This question was answered by the Hon'ble Supreme Court in the case of **Panchhi v. State of U.P., (1998) 7 SCC 177** where it was held as under:

“11. Shri R.K. Jain, learned Senior Counsel, contended that it is very risky to place reliance on the evidence of PW 1, he being a child witness. According to the learned counsel, the evidence of a child witness is generally unworthy of credence. **But we do not subscribe to the view that the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring.**

12. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide *Prakash v. State of M.P.* [(1992) 4 SCC 225 : 1992 SCC (Cri) 853] ; *Baby Kandayanathil v. State of*

Kerala [1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] ; Raja Ram Yadav v. State of Bihar [(1996) 9 SCC 287 : 1996 SCC (Cri) 1004 : AIR 1996 SC 1613] and Dattu Ramrao Sakhare v. State of Maharashtra [(1997) 5 SCC 341 : 1997 SCC (Cri) 685]).”

16. The Hon’ble Supreme Court again reiterated its views in **Panchhi’s case (supra)** in **State of Rajasthan v. Om Prakash, (2002) 5 SCC 745** where it was held as under:

“17. The evidence of a child witness is required to be evaluated carefully as the child may be swayed by what others may tell him or her as the child is an easy prey to tutoring. Wisdom requires that the evidence of a child witness must find adequate corroboration before it is relied on (State of U.P. v. Ashok Dixit [(2000) 3 SCC 70 : 2000 SCC (Cri) 579 : JT (2000) 2 SC 107]). We have already held that in the present case we have carefully examined the evidence of the child and the other evidence. We find the reasons given by the High Court for rejecting the said evidence wholly unconvincing. It is unfortunate that what to talk of considering, the High Court has not even noticed the testimony of the prosecutrix in the judgment under appeal.”

17. Therefore the testimony of a child victim is required to be scrutinized carefully and corroborated before being accepted. In the present case, child victim “K” testified as PW-3. The statement of the other child victim “I” was recorded as PW-8.
18. Child victim “K” in her examination-in-chief testified that on the fateful day she was playing with child victim “I” outside her house when the appellant took both of them to the nearby park and started kissing them both on their cheeks. She further deposed that the appellant then took off child victim “I”s underpants after which she

(child victim “K”) ran away from the park and informed her mother (PW-4) about the incident. She then correctly identified the appellant. In her cross-examination, she stated that it was night time and she was playing with child victim “T” when the appellant took them to the nearby park.

19. Child victim “T” who appeared as PW-8 stated in her examination-in-chief that while she was playing with child victim “K” in the lane in front of child victim “K”’s house, the appellant came there and took both of them away to the park. She stated that the appellant then took off her and child victim “K”’s underpants and kissed them. She further stated that the appellant then urinated in front of them. She further stated that afterwards child victim “K” told her mother about the incident after which her mother came to the park and slapped the appellant twice and called the police. Child victim “T” then correctly identified the appellant. In her cross-examination she stated that it was night time and she knew the appellant as he was residing nearby her house, near the toffee shop.
20. The other two eye witnesses in the present case were mother of child victim “K” who deposed as PW-4 and mother of child victim “T” who deposed as PW-9.
21. PW-4 deposed that on 05.12.2013 at about 9 PM she was getting *henna* applied to her hands on the occasion of marriage of her brother-in-law (*Dewar*) while both the child victims were playing in the lane in front of her house. After some time, her daughter i.e. child victim “K” came running to her and informed her that the appellant had taken her and child victim “T” to the park and had kissed her on the cheek

and removed child victim “T”s underpants. She called the mother of child victim “I” and they went to the said park and saw the appellant urinating while holding child victim “T”s hand. She deposed that PW-9 then slapped the appellant twice or thrice and called the police. Thereafter the appellant started to apologize and then fled away. She stated that the police came at the spot and made enquiries from her and other people who had gathered there. Nothing material which could affect the prosecution’s case came from her cross-examination.

22. PW-9 who is the mother of child victim “I” deposed in her examination-in-chief that on the fateful day at about 9:30 PM, she was cooking at home when child victim “K” who was also residing in their neighbourhood came to her and informed her that the appellant was kissing her daughter i.e. child victim “T” in the park. She further deposed that on reaching the park, she saw her daughter’s underpants removed till her knees. She deposed that she slapped the appellant and brought him into the ‘gali’ with the help of PW-4 and called the police. She deposed in her cross-examination that the appellant was apprehended within 30 minutes after police arrived at the spot.
23. After going through the testimony of both the child victims i.e. PW-3 and PW-8 and the testimony of other eye witnesses (PW-4 and PW-9), it is found that they corroborate each other. Both the child victims corroborate each other’s testimony and the testimony of their mothers i.e. PW-4 and PW-9. It is established that the appellant took both the child victims aged 5 and 4 years from the ‘gali’ to the nearby park where he kissed child victim “K” on her right cheek and removed child victim “T” underpants and urinated in front of them.

24. The appellant in his statement under Section 313 of the Code had stated that he had been falsely implicated in the case and the real culprit was an 18 year old boy who had fled away from the spot. He emphasised on the testimony of PW-1 Ct. Usha Rani to strengthen his point. PW-1 Usha Rani in her examination-in-chief had stated that in the initial call made to her by PW-12 (father of child victim I) it was stated that an 18 year old boy had been apprehended as he was molesting his daughter.
25. It is important to note here that PW-1 had not seen the appellant at this moment as this was the first call made to the Police reporting the incident. Further, in light of the testimony of both the child victims and PW-4 and PW-9 who had all seen the appellant and caught him red handed at the scene of crime, the identity of the appellant stands proved beyond reasonable doubt. Further, no questions were put to PW-12 in his cross-examination as to why he made the assumption that the appellant was aged around 18 years. It was possible that the identity of the appellant was not completely established at the time when the first call to the Police was made, but subsequent events and depositions show that the identity of the appellant is proved beyond all doubts.
26. In the cross-examination of both the victims, the appellant had not disputed his identity. He did not challenge his involvement in the crime in the cross-examination of both the child victims i.e. PW-3 and PW-8. The Hon'ble Supreme Court in **Sarwan Singh v. State of Punjab, (2003) 1 SCC 240** held that whenever an accused had failed to cross-examine any witness on any part of his testimony, the same

must be believed to be true unless proved otherwise. Relevant paragraph of this judgment is reproduced below:

“9. Incidentally, in the early nineties, terrorist activities were on a peak in the border districts of Punjab and it has practically been an axiomatic truth in the area in question that no one would in fact come out of the residential houses after dusk unless performed at 3 o'clock in the morning. **There exists no other evidence nor even there being any suggestion of existence of any other factor for such performed outing at 3 a.m. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted. A decision of the Calcutta High Court lends support to the observation as above.** [See in this context *A.E.G. Carapietv. A.Y. Derderian* [AIR 1961 Cal 359] (opinion of P.B. Mukherjee, J., as he then was).]”

27. The appellant apart from making this assertion of mistaken identity and false implication in the present case has not brought forward any evidence or witness to prove the same. There is no history of enmity or misunderstanding between the appellant and the victim's family and therefore the argument that he was falsely implicated only appears illusory.
28. Learned counsel for the appellant had prayed that the appellant should be convicted under Section 8 of the POCSO Act rather than Section 10 because the appellant is a first time offender and has remained in jail since his arrest on 05.12.2013.
29. Section 7 and 8 of the POCSO Act deal with Sexual Assault, they read as under :

“Sexual Assault and punishment therefor.

7. Sexual assault:

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

8. Punishment for sexual assault:

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.”

30. Section 9 and 10 of the POCSO Act which deal with Aggravated Sexual Assault and its punishment, relevant portion of Section 9 and Section 10 read as under:

“Aggravated sexual assault and punishment therefor.

9. Aggravated sexual assault:

.....

(m) whoever commits **sexual assault on a child below twelve years; or**

.....

is said to commit **aggravated sexual assault.**

10. Punishment for aggravated sexual assault:

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”

31. A plain reading of Sections 7 and 9 brings out the difference between ‘sexual assault’ and ‘aggravated sexual assault’. It becomes clear after reading Section 9(m) that anyone who commits ‘sexual assault’ on a

‘child below the age of 12 years’ is to be ‘punished under Section 10’ for “aggravated sexual assault”. Admittedly, both the child victims “K” and “I” are 5 and 4 years of age respectively. Therefore, other factors which the learned counsel for the appellant submitted are of no consequence as no criminal antecedents or exemplary behaviour while in custody can entitle an appellant to punishment under a section which defines a different crime than the one committed by the appellant.

32. Therefore in light of the facts and circumstances of the case, I find no infirmity at all with the judgment of the Trial Court sentencing the appellant to rigorous imprisonment for a period of 5 years along with fine of Rs.5000/-for the offence under Section 10 of the POCSO Act and the same is upheld.
33. Appeal is dismissed.

(VINOD GOEL)
JUDGE

SEPTEMBER 21, 2017

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