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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A. 15/2018**

SHANKAR @ DEVI SINGH

..... Appellant

Through: Mr. Ankur Sood and Ms.
Romila Mandal, Advocates

versus

STATE

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP
for State

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA

JUDGMENT
16.05.2018

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Dr. S. Muralidhar, J.:

1. This is an appeal directed against the judgment dated 26th September 2017 passed by the learned Additional Sessions Judge-1/Special Judge (POCSO), Shahdara District, Karkardooma Courts, Delhi in Sessions Case No.10/16 arising out of FIR No.541/2014 registered at PS Anand Vihar convicting the Appellant for the offence punishable under Section 376 (2) (f) (i) IPC and Section 6 POCSO Act.

2. The Appellant was charged with raping his step-daughter aged 11 years (PW-1) at about 10:30 am on 29th August 2014 and at about 1 pm 7-8 days prior at two separate locations in village Karkardooma, Delhi and thereby committing an offence punishable under Section 376 (2) (f) (i) and (n) of IPC. He was also charged with having committed aggravated penetrative

sexual assault on a minor victim aged 11 years, thereby committing an offence punishable under Section 6 POCSO Act.

Background facts and investigation

3. The case of the prosecution was essentially based on the version of events narrated by PW-1. PW-1 disclosed that her mother works as domestic help and would go for work at 8 am and return at 2 pm. On 29th August 2014, PW-1 was playing with her friends, X and Y, between 9:30-10:00 am when her step-father, the Appellant herein, came there. He beat her and asked her to send her friends away. While X went away, according to PW-1, her other friend, Y, remained and was secretly watching her. She then stated as under:

“My father took his “Susu” in my “Susu”. Before this my father had bolted the door of the room. He removed his clothes and also removed my clothes. I tried to raise my voice but he put his hand on my mouth. Thereafter, my father left the place. My mother came back at 02:00 pm. Before leaving my father had threatened me that if I tell the incident to anyone, he would kill me. My friend Y who had secretly seen us, told my mother about the incident.”

4. After her mother returned, PW-1 disclosed to her mother what had happened and then her mother (PW-6) took her to the PS where the statement of PW-1 was recorded and she was also sent for medical examination.

5. The MLC of PW-1 shows that she was brought to Dr. Hedgewar Arogya Sansthan, Karkardooma at around 10:45 pm on 29th August 2014. It is noted in the MLC that PW-1 was brought there by SI Shweta Sharma (PW-8) with “history of improper touching over private parts (vagina) by step-father on

29.08.2014 at 10:30 A.M.” It is further noted, “according to patient, when she was alone in the house, her father sexually molested her, touching her breasts and vagina/vulva with his same hands. She also gives history of same sexual molestation episode 2 days back. He had threatened her that he would beat her if she revealed it to anyone. She told her friends & mother who brought her here.”

6. The investigation was handled first by Sub-Inspector (SI) Shweta Sharma (PW-8). On 30th August 2014, PW-8 recorded the statement of the victim’s mother (PW-6). The victim was counselled at PS Anand Vihar by a social worker. Thereafter, on the basis of the statement of the mother (PW-6) and the medical examination of the victim (PW-1), the *rukka* was prepared and handed over for registration of FIR. Accompanied by PW-6 and PW-1, PW-8 went to the spot and prepared a site plan and recorded the supplementary statements of the mother (PW-6) and the victim (PW-1).

7. In the evening of 30th August 2014, PW-8 accompanied by Constable Omkar went to the house of the victim. Both PWs- 1 and 6 joined them in the investigation and started searching for the accused. They reached the Community Centre, Shiv Tikki Wala where they found the Appellant standing. He was pointed out by both PWs- 1 and 6 and he was apprehended and interrogated. He is supposed to have given a disclosure statement. The Appellant was also taken to the Dr. Hedgewar Arogya Sansthan, Karkardooma in the custody of Constable Sunil Mann (PW-3). The Appellant underwent medical examination. Three sealed *pulandas* were handed over by the doctor, which were then seized.

8. On 1st September 2014, an application was filed for recording the statement of the victim under Section 164 Cr PC (Ex.A1). In this statement, the victim stuck to the version of events she had earlier narrated to the police. According to PW-8, she made inquiries from X, Y and Z but they “were too young to make the statement” and therefore, their statements were not recorded.

9. The exhibits collected during the medical examinations of PW-1 and the Appellant were sent to the Forensic Science Laboratory (‘FSL’) on 17th September 2014 through Constable Sandeep Kumar (PW-7).

10. After completion of the investigation, a charge sheet was filed and by the order dated 10th February 2015, charges were framed against the Appellant as indicated hereinbefore.

Trial Court judgment

11. Eight witnesses were examined on behalf of the prosecution. In his statement under Section 313 Cr PC, the Appellant denied all the incriminating circumstances. He claimed that he was falsely implicated. According to him, PW-6 did not wish to live with him at Aligarh, his native place, and on that issue, there was some quarrel between them. He alleges that PW-6 has used her daughter (PW-1) to make a false case against him. No witnesses were examined for the defence.

12. In the impugned judgment, the trial Court came to the conclusion that the evidence of PW-1 was truthful and consistent on the material aspects and

therefore could form the basis of the conviction of the Appellant. The medical evidence and the forensic evidence also supported the version of the victim. The MLC confirmed that the hymen was found torn, the semen stains found on the underwear of the child victim were confirmed to be that of the Appellant through the DNA finger printing report. Consequently, the Appellant was held guilty of the offences for which he was charged and sentenced in the manner indicated hereinbefore.

Analysis and reasons

13. The Court has heard the submissions of Mr. Ankoor Sood, learned counsel for the Appellant and Mr. Kewal Singh Ahuja, learned APP for the State.

14. In the first place, Mr. Sood submitted that there was no clarity in the case of the prosecution as to whether there was a single incident of rape or two incidents of rape committed by the Appellant on the victim. Attention is drawn to the MLC where *inter alia* it was noted that the victim “also gives history of same sexual molestation episode 2 days back.” However, this was inconsistent with the version of PW-6 in the Court where she claimed that her daughter had disclosed to PW-8 that “7-8 days prior to the incident (i.e. on 29th August 2014) when we were residing in the house of Ganga Ram behind Gali No.2, at that time also accused came in the noon time when my victim daughter playing with her younger sister Z (aged about 1 ½ year) at our house and at that time accused had also removed her clothes and inserted his penis into the vagina of my victim daughter and at that time my victim daughter has no disclosed the said incident to me.” Even in the order of

framing of charge, there is a brief reference made to an earlier incident that occurred 7-8 days prior to 29th August 2014.

15. However, it is only for that offence that he has been found guilty by the trial Court. Consequently, the Court does not find anything significant turning on the fact that reference is made to an earlier instance of rape being committed by the Appellant whereas the victim herself has not mentioned the same in her deposition in Court.

16. Mr. Sood then submitted that with the victim having named her friend, Y as an eyewitness to the incident, it was incumbent on the prosecution to have examined the said witness. Reliance is placed on the decision in ***TK Ramesh Kumar v. State 2015 (3) SCALE 248*** where, in the context of the Prevention of Corruption Act, 1988, the Court observed that the failure to examine a material witness was fatal to the case of the prosecution. However, in the present case, the Court finds that although the testimony of the victim's friend might have lent further corroboration to the testimony of the victim, her non-examination does not weaken the case of the prosecution.

17. Mr. Sood relied on the decision in ***Rai Sandeep v. State (2012) 8 SCC 21*** to emphasize that the testimony of PW-1 had to be of 'sterling character' and should have been fully corroborated on all material particulars without which it would be unsafe to place reliance on such testimony. He also relied on the decision ***K. Venkateshwarlu v. State of A.P. (2012) 8 SCC 73*** wherein the Supreme Court required the evidence of a child witness to be subject to 'close scrutiny' particularly since a child witness could be a

pliable witness and could be tutored easily either by ‘threat, coercion or inducement.’

18. At this stage, the Court considers it appropriate to recapitulate the legal position with regards to the testimony of a victim of rape. The Supreme Court in *State of Punjab v. Gurmit Singh AIR 1996 SC 1393* explained:

“We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

19. Again, in *Om Prakash v. State of U.P. AIR 2006 SC 2214*, it was observed:

“A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it

is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short 'Evidence Act') similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case.”

20. Further, in light of the contention of the learned counsel for the Appellant that the testimony of a child witness must be subjected to close scrutiny, it would be appropriate to revisit the legal position as laid down by the Supreme Court. In *Dattu Ramrao Sakhare v. State of Maharashtra* (1997) 5 SCC 341 it was held as follows:

“A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a

reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

21. In *Nivrutti Pandurang Kokate v. The State of Maharashtra (2008) 12 SCC 565*, the Supreme Court highlighted the importance of the trial Judge having to be satisfied that the child understands the obligation of having to speak the truth and is not under any influence to make a statement. The Court explained:

“The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

22. The Court would like to first observe that in the present case, the learned trial Judge did administer questions to PW-1 in order to satisfy himself that she understood the obligation of having to speak the truth. The victim was able to clearly describe what happened to her not just once before the police but again before the learned MM and then for the third time before the trial Court. On the core of her testimony, i.e. the rape committed on her by the Appellant, the Court is unable to find any material inconsistency in her

versions which would discredit her testimony. There are, of course, minor discrepancies as pointed out by learned counsel for the Appellant where it is not clear whether PW-6 was first told about the incident by the friend of PW-1 or by PW-1 herself. There is also some discrepancy in PW-6 bringing the victim straightaway to the police station. However, these differences really do not affect the core of the testimony of the victim.

23. Mr. Sood referred to the medical examination to emphasize that the absence of injury being noticed on the victim who was just 11 years old gave reasonable doubt about her testimony in the manner in which she has described the incident. In the present case, the MLC does record that the hymen was torn. Additionally, the report of the FSL confirms that the semen stain on the underwear of the victim matched the blood group of the Appellant using the DNA finger printing technique. This is perhaps a clinching corroboration of the version of the victim. This part of the evidence has not been able to be shaken by the Appellant at all.

24. A reference is also made by Mr. Sood to *Modi's Medical Jurisprudence and Toxicology* (24th Edition) wherein one of the requirements spelt out is for there to be a medical opinion on whether the accused is capable of performing the sexual act. In the present case, the MLC noted that the Appellant was not able to give a semen sample at the time of his examination. However, this by no means implies that the Appellant was incapable of performing a sexual act. With the FSL clearly indicating that the semen stain on the underwear of the victim matched the blood group of the Appellant and her hymen being torn, there was strong corroboration of

her version of the penetrative sexual assault by the Appellant on her.

Conclusion

25. For all of the aforementioned reasons, the Court is of the view that the trial Court rightly held the Appellant guilty of the offences under clauses (f) and (i) of Section 376 (2) IPC and Section 6 of POCSO. The order on sentence also does not call for interference particularly since the offence has been committed by someone who is a close relative of the victim. The Court, therefore, finds no reason to interfere with the impugned judgment and order on sentence passed by the trial Court.

26. The appeal is dismissed. The trial court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 16, 2018

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