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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A. 595/2018 and CRL.M.B. 887/2018**

GOPI NISHA MALLAH Appellant

Through: Mr. Pawan Sharma, Advocate

versus

THE STATE Respondent

Through: Mr. K.S. Ahuja, APP for State.

CORAM: JUSTICE S. MURALIDHAR
JUSTICE V. KAMESWAR RAO

ORDER
04.09.2018

Dr. S. Muralidhar, J.:

1. The present appeal is directed against the judgment dated 24th April, 2018 passed by the learned Additional Sessions Judge-05 (Central), Tis Hazari Courts, Delhi in SC No.28195/2016 arising out of FIR No.15/2014 registered at PS Bara Hindu Rao, Delhi, convicting the Appellant for the offences punishable under Sections 376(2) (i) and (m), 363, and 325 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act').

2. This appeal is also directed against the order on sentence of the same date whereby the Appellant was sentenced as under:

- (a) For the offence punishable under Section 325 IPC, to undergo Rigorous Imprisonment (RI) for a period of 7 years in addition to

payment of fine of Rs.3000/-, and in default of payment of fine, to undergo Simple Imprisonment (SI) for 2 years.

- (b) For the offence punishable under Section 363 IPC, to undergo RI for a period of 7 years in addition to payment of fine of Rs.3000/-, and in default of payment of fine to undergo SI for 2 years.
- (c) For the offence punishable under Section 376 (2) (i) and (m) IPC, to undergo RI for life in addition to payment of fine of Rs.2500/-, and in default of payment of fine, to undergo SI for 3 years.
- (d) For the offence punishable under Section 6 POCSO Act, to undergo RI for life in addition to payment of fine of Rs.2500/-, and in default of payment of fine, to undergo SI for 03 years.
- (e) All sentences were directed to run concurrently.

3. It must be noted that by an order dated 16th April, 2018, the victim was granted interim compensation of Rs.1 lakh by the District Legal Services Authority ('DLSA'). The trial Court in addition thereto recommended payment of adequate compensation to the victim under the Victim Compensation Scheme in terms of Section 357A Cr PC and referred the matter to the Secretary, DLSA, Central District for necessary action.

Charge

4. The charge against the Appellant is that on 2nd February, 2014 between 6.30 to 7 pm, he kidnapped the victim (PW-4), aged about 8 years, while she was playing with her younger sisters and thereby committed an offence punishable under Section 363 IPC; secondly, between 6.30 pm to 9 pm on

2nd February 2014 at the Bonta Park, Kamla Nehru Ridge, he committed rape upon the victim by inserting his finger into her anus and his penis into her vagina and also caused grievous bodily injury while committing rape upon her and thereby committed an offence punishable under clauses (i) and (m) of Section 376(2) IPC; thirdly, he caused her grievous injury thereby committing an offence punishable under Section 326 IPC and fourthly he committed aggravated penetrative sexual assault by inserting his finger into the anus of victim aged about 8 years and his penis into her vagina and thereby committed an offence punishable under Section 6 POCSO Act.

The incident

5. At the time of the incident, the victim was aged around 8 years and was playing in the *gali* with her younger sisters i.e. PW-3 aged 7 years and another younger sister who was just about 4 years old. In the narration of PW-4, the Appellant came there after sunset and offered to give them something to eat. While her two sisters ran home, PW-4 got left behind. The Appellant lifted her in his lap and from there took her to a park. PW-4 stated “after reaching in the park, the accused had taken out his *shushu* (penis) from his pant and thereafter inserted in my *shushu* (vagina). He had also inserted his finger in my *potty* (anus). Before that he had put down my *pajama* and underwear.”

6. On the day of the incident, the father of the victim, PW-2, received a call from his wife (PW-1) at around 7.30 pm who told him that the victim had gone missing and asked him to return home. After rushing home PW-2, PW-

1 and the brother of PW-2 i.e. PW-9 searched for the victim but did not find any clue till about 9 pm. At around 9 pm, when PW-2 accompanied by PW-1 were proceeding towards PS Bara Hindu Rao to lodge an FIR through the *zameer wali gali*, they reached near the Barat Ghar and noticed a person coming towards them along with the victim girl (PW-4). As the person came closer, PW-2 could make him out to be the Appellant, whom he knew from before as he was the brother-in-law of one Dharmender, from whom PW-2 had taken a godown on rent. When PW-2 enquired from the Appellant about his daughter, he tried to escape but PW-2 managed to apprehend him. PW-2 then called PW-9 to the Barat Ghar. In the meanwhile, PW-1 took PW-4 back with her since the condition of PW-4 was bad. After handing over the Appellant to PW-9, PW-2 and PW-1 took PW-4 to the Bara Hindu Rao (BHR) Hospital.

Medical examination

7. Dr. Amisha Sharma examined PW-4 at the BHR Hospital. The handwriting of Dr. Amisha Sharma on the MLC (Ex.PW19/A) was identified by Dr. Bhawna (PW-19). The MLC noted the history of the case as narrated by PW-1 and PW-2 and as told to them by PW-4. The injuries were noted as grievous in the MLC and PW-4 was referred to the Labour Room for the safe kit examination.

8. The further examination of PW-4 was undertaken by Dr. Ratika whose handwriting was identified by Dr. Deepanjali Gupta (PW-17). Dr. Ratika noted that the victim was fearful and there was a vaginal tear of three

centimeters. The victim, with the permission of PW-1, was then sent to the GA for repairing vaginal tear. The report of this procedure was Ex.PW17/D. It appears that the victim was finally discharged on 11th February, 2014.

9. As far the Appellant is concerned, his medical examination was undertaken at BHR Hospital by Dr. Kritya Dubey (PW-6). On local examination, it was found that he had “small bruises present on upper back on the right side and middle back on the right side.” His blood sample was taken and sealed. His MLC was marked as Ex.PW6/A.

Investigation

10. Sub-Inspector (SI) Tirath Devi (PW-12) was the initial Investigating Officer (IO), who received a call from the Duty Officer of PS Bara Hindu Rao on the intervening night of 2nd/3rd February, 2014. PW-12 reached the BHR Hospital, where she met the parents of the victim and collected the MLC of the victim who was at that time at the ICU. The statement of PW-1 was recorded (Ex.PW1/A) and on that basis an FIR was registered.

11. Meanwhile, the Appellant had been brought to the PS and was formally arrested. His disclosure statement was recorded. The statement of PW-3, the younger sister of PW-4 was also recorded. The statements of both PW-1 and PW-3 were also recorded under Section 164 Cr PC before the learned Metropolitan Magistrate (MM). After the discharge of the victim from the hospital on 11th February, 2014, her statement was recorded through videography at her house. The victim was also produced before the MM for recording her statement under Section 164 Cr PC.

Forensic evidence

12. The sealed exhibits were sent to the Forensic Science Laboratory (FSL), Rohini, Delhi. SI Sanjeev Kumar (PW-20) was posted at PS Bara Hindu Rao on 25th February 2014, when the remaining investigation was assigned to him. The birth record of PW-4 was obtained from the school. In terms of the school record produced by the Principal (PW-5) of the school attended by the victim, her date of birth was 31st January, 2005.

13. The testing of the samples sent to the FSL was undertaken by PW-16, who was the Senior Scientific Officer (Biology). Of the several exhibits Ex.1b was the *pyjama* of the victim on which human semen was detected. Blood was also detected on it. In her report, it is stated that no blood or semen was detected on remaining exhibits and that “the DNA profiling STR analysis performed on the exhibit ‘1b’ (*pyjama* of victim) & ‘5’ (blood gauze of accused) provided is sufficient to conclude that the DNA Fingerprinting profile on the source of exhibit ‘5’ (Blood gauze of accused) is similar with the DNA Fingerprinting on the source of exhibit ‘1b’ (*pyjama* of victim).”

14. After the filing of the charge-sheet, the charges against the Appellant were framed as mentioned hereinbefore by the trial Court by an order dated 22nd May, 2014.

CCTV footage

15. It must be mentioned at this stage that while the matter was pending in the trial Court, by an order dated 21st February, 2014 of the trial Court, an

inquiry regarding the CCTV footage in the area was conducted. This was on the application of Smt. Neelam (sister of the Appellant). A report was submitted to the trial Court by PW-20 on 1st March, 2014 where *inter-alia* it is pointed out that the plea for CCTV footage was filed on 18th February, 2016 after the lapse of 16 days period from the date of registration of the case. The DVR storage capacity in most of the CCTVs installed was not more than 15 days and there was a strong possibility that the Appellant was well aware of this fact and therefore, did not make such demand earlier. It is concluded that no concrete conclusion could be drawn on the basis of CCTV footage when the memories/DVR recording capacity of these CCTVs “was automatically erased/elapsed.”

Trial

16. On behalf of the prosecution, 21 witnesses were examined. When the incriminating circumstances were put to the Appellant under Section 313 Cr PC, while denying most of them, he surprisingly did not dispute that the victim was with him at the time when she was recovered by her parents. In response to question No.19, he replied:

“I am innocent and I have falsely implicated in the present case. I had not done anything wrong with the victim. I was only taking the victim as the victim requested me to drop her to her house at Azad Market as she lost the way of her house.”

17. In his defence, the Appellant examined one Lal Chand (DW-1) who claimed that the Appellant had come to his house on 2nd February, 2014 at around 10 am and that they had had tea and started playing carrom.

According to DW-1, the Appellant remained at the house till 8.30 pm and thereafter left stating that he is going to his sister's house.

Judgment of the trial Court

18. The trial Court on an analysis of the evidence came to the following conclusions:

- (i) It stood established that PW-4 was about 9 years of age on the date of incident.
- (ii) The victim had clearly identified the Appellant and described the aggravated sexual assault committed by him on her. Her statement in Court was consistent with the statement given by her under Section 164 Cr PC.
- (iii) PW-1 corroborated PW-4 on what had transpired when she and PW-2 found the victim whilst they were on their way to the PS. PW-1 also deposed that she and PW-2 saw the Appellant coming with the victim at around 9 pm near the *Barat Ghar* on 2nd February, 2014 at which point PW-4 rushed to her mother weeping and the Appellant was apprehended by PW-2 at the spot.
- (iv) The medical evidence proved that victim had suffered grievous injuries to her private parts requiring surgery and blood transfusion. She remained in the hospital receiving treatment till 11th February, 2014.
- (v) The scientific evidence in the form of the FSL report proved the presence of DNA of the Appellant on the *pyjama* of the victim (Ex.1b). There was no merit in the defence argument that the FSL

report had been manipulated or that the blood sample of the Appellant had been obtained later on and planted.

- (vi) Although, it could not be said whether the omission to collect the CCTV footage by the prosecution was deliberate, it could not be ignored that by the time the Court ordered its collection, the footage/DVR memory of the relevant time period had been deleted.
- (vii) Further, although DW-1 deposed that the Appellant remained at his house on 2nd February, 2014 up till 8.30 pm, in the statement under Section 313 Cr PC, even the Appellant did not dispute his being found with victim. He did not mention anything about visiting the house of DW-1 and remaining there till 8.30 pm.

19. The trial Court, however, found that since it was not the case of the prosecution that grievous injuries were caused to the victim by any instrument or weapon, the Appellant ought to be given the benefit of doubt as far as the offence punishable under Section 326 IPC is concerned. However, he was convicted for the offence punishable under Section 325 IPC and sentenced as noticed hereinbefore for that offence as well as the offences punishable under Sections 363 and 376(2) (i) and (m) IPC and Section 6 POCSO Act.

Reasons and conclusions

20. Learned counsel for the Appellant has taken the Court through the entire record and tried to persuade the Court regarding unreliability of the testimony of PW-4. The Court has, on a careful perusal of the said

testimony, been unable to find any inconsistency in the statement of the victim as to what actually took place on the evening of 2nd February, 2014. She was able to correctly identify the Appellant as the person who took her away to the park and then committed forcible penetrated sexual assault upon her.

21. A poignant moment in the trial Court during the deposition of the victim was captured by the learned trial Court Judge in the following words:

“At this stage, witness started weeping and stopped responding to the question. Witness is consoled by the counsel for the complainant as well as supporting person. At last witness is called at the DIAS and undersigned has spent some more time with the witness to make her comfortable. At the request of the witness, mother of witness was sent outside the Court as witness told that she is not comfortable in the presence of her mother. At her request, her father is called inside the Court room. After spending about 30 minutes with witness, witness becomes ready to make statement. Accordingly, I proceed to examine the witness in further.”

22. In the present context, the law as regards the testimony of a child witness may be noted. 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.”

23. In ***Ranjeet Kumar Ram v. State of Bihar 2015 (6) SCALE 529***, it was observed: “Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one.”

24. In the present case, the trauma experienced by the young victim in having to reconstruct the unpleasant events in the Court and be subjected to extensive cross-examination, as is evident from the reading of her testimony, can well be imagined. Despite all of this, the victim mustered the courage to speak the truth enabling the trial Court to convict the Appellant on the basis of her testimony. This Court too has no doubts whatsoever about the truthfulness of her testimony.

25. In this regard, the law regarding appreciation of the evidence of a victim of rape requires to recapitulation. 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.”

26. 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.”

27. In the present case, the testimony of PW-4 stands corroborated by both the medical evidence as well as the forensic evidence which has already been adverted to by this Court. The counsel for the Appellant had no explanation to offer for the clinching evidence about the DNA of the semen stains on the *pyjama* of the victim matching with the DNA of the accused except stating that such semen was not found in the underwear of the victim. In the considered view of the Court, the fact that the DNA of the semen stains found on the *pyjama* of the victim matched the DNA of the Appellant was by itself sufficient to connect the Appellant with the crime. Added to this is the fact that the Appellant does not dispute that at the time when the victim was recovered, she was found with him. Clearly, by examining DW-1 and claiming that he was at DW-1’s house till 8.30 pm on the day of the incident, the Appellant was putting forth a false plea of alibi.

28. This Court, therefore, concurs with the trial Court that the prosecution has been able to prove the guilt of the Appellant for the offences for which he has been convicted, beyond reasonable doubt.

Sentence

29. Lastly, learned counsel for the Appellant pleaded that a lenient view make be taken as regards the sentence awarded to the Appellant by the trial Court since he had no criminal antecedents.

30. The Court is unable to accept the above plea. The victim was as young as 8 years old at the time of commission of the crime. The sexual attack on her was so brutal that she had to undergo surgical procedure for repairing the vaginal tear. She had to be hospitalized for nearly 10 days. This apart, the psychological trauma this young girl would have to live with cannot possibly be easily remedied. In the circumstances, the Court finds no ground whatsoever made out for taking any lenient view in the matter.

31. For the aforementioned reasons, the Court upholds the judgment of conviction and the order on sentence of the trial Court.

32. The appeal and the application are dismissed. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

V. KAMESWAR RAO, J.

SEPTEMBER 04, 2018

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