

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

R-20

+

CRL.A.839/2015

PANKAJ

.....Appellant

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

versus

STATE

....Respondent

Through: Mr. Kewal Singh Ahuja, APP for the
State.

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL**

JUDGMENT
17.09. 2018

Dr. S. Muralidhar, J.:

1. This is an appeal against the judgment dated 16th January 2015 passed by Additional Sessions Judge (North-West)-01 (HEREAFTER THE 'TRIAL Court') in SC No.40/2014 arising out of FIR No.239/2013 registered at PS Vijay Vihar finding the Appellant guilty of the offence under Section 5(m) POCSO Act punishable under Section 6 POCSO Act. It also seeks to assail the order on sentence dated 20th January 2015 whereby he was sentenced for the aforesaid offence by the trial Court to rigorous imprisonment for life

with fine of Rs.5,000/- and in default of payment of fine, to undergo further simple imprisonment for three months.

2. The trial Court also directed the Secretary of the District Legal Services Authority (DLSA) (North-West) (NW) to grant compensation of Rs.2 lakhs to the victim child to be used for his welfare and rehabilitation.

Charge

3. The Appellant was charged with having committed aggravated penetrative sexual assault upon the victim (PW-6) aged 6 years thereby committing the aforementioned offence at around 10:20 am on 5th May 2013 at his house at Budh Vihar Phase-I, Delhi.

Case of the prosecution

4. The case of the prosecution is that the Appellant was working in the factory situated in the neighbourhood of the victim's home. On 5th May 2013, at around 10:30 am, PW-6 went to his mother (PW-5) and told her that he was suffering due to pain. He pointed to the Appellant and told his mother that the Appellant had done something to the rear side (anal region) of PW-6. PW-5 then went after the Appellant and confronted him but the Appellant denied any wrongdoing. When she removed the underwear of PW-6, she noticed blood. She grew suspicious and raised an alarm. Public persons collected at the spot and gave a beating to the Appellant. Someone called the police at 100 number.

5. The Police Control Room ('PCR') form (Ex.PW-7/A) shows that a call

was made at 11:46 am with the information that a man had committed a wrong act (“*galat kaam*”) with a young boy of 7-8 years age and that the said man had been apprehended there itself. The information noted in the PCR form at 12:33 pm, after the police reached there, is that the grandmother of PW-6, i.e. PW-9, had informed the police that the Appellant had committed sexual assault on the child and that the child had been taken to hospital.

6. Sub-Inspector (SI) Virender (PW-15) of PS Vijay Vihar upon receiving the DD, reached the house along with Ct. M. Laxmaiah and was told that the child had been removed to the BSA Hospital by the PCR van. Leaving the constable at the spot, PW-15 went to the BSA Hospital.

Medical evidence

7. The MLC of the child (Ex.PW-10/A) noted that the child had been brought to the BSA Hospital at 10:45 pm on 5th May 2013 with an alleged history of sexual assault as informed by his grandmother (PW-9). The child was referred to Paediatric SR Dr. Manish whose handwriting was identified by Dr. Shiv Kumar (PW-17) of BSA Hospital. He made his observations on the MLC regarding the presence of the nail mark and the laceration over the anal region posterior with faecal matter admixed with some secretion.

8. The examination of the child by Dr. Shahnawaz Alam besides the surgery was confirmed by Dr. Rekha Diwan (PW-16) and, in particular, the observation that although the nature of the injuries was simple, the possibility of sexual assault could not be ruled out.

9. The only suggestion put to these doctors in the cross-examination was that the possibility of the injury in the anal region being due to constipation cannot be ruled out. However, the FSL reports (Ex. PX and PY) left no matter of doubt that the victim had suffered sexual assault at the hands of the present Appellant.

Forensic evidence

10. The biological examination revealed that human semen was detected on the underwear (Ex.1a) of the child. Further, blood was detected on the rectal swab (Ex.1g), the perianal swab (Ex.1h), and certain other exhibits. The result of the DNA examination was that “the alleles from the source of exhibit ‘1a’ (underwear of the victim), ‘4a’ (Curtain cloth), and the ‘4b’ (Bed sheet) are accounted in the alleles from the source of exhibit ‘2d’ (blood in the gauze of accused)”.

11. The conclusion reached in the FSL report dated 28th March 2014 read as under:

“The DNA Fingerprinting performed on the source of exhibits '1a' (underwear of victim), '1d' (Blood in gauze of victim), '2d' (Blood in gauze of accused), '4a' (Curtain cloth) and '4b' (Bed sheet), is sufficient to conclude that the stains i.e. seminal stains on the source of exhibits '1a' (Underwear of victim), '4a' (Curtain cloth) and '4b' (Bed sheet) and blood stains on the source of exhibit '2d' (Blood in gauze of accused), are from the same source.”

Testimony of the victim

12. As far as the victim (PW-6) is concerned, in his statement under

Section 164 Cr PC was recorded by the learned Metropolitan Magistrate ('MM') (PW-2) on 6th June 2013, he clearly explained the sexual assault committed on him by the Appellant in the factory premises where he worked.

13. The child when examined during the trial again clearly spoke about the sexual assault committed against him, which was a forceful penetrative act by the Appellant. Since there is hardly any difference from the version of the victim in his statement under Section 164 Cr PC and his version in his deposition in Court, it is not necessary to reproduce the precise answers given by the victim to the questions put to him.

14. At this stage, it may be useful to recall the settled legal position as regards appreciation of the testimony of a child witness. In ***Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5 SCC 341***, the Supreme Court held:

“A child witness if found competent to depose to the facts and reliable 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 question 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. There is no practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the corroboration to such

evidence from other dependable evidence on record.”

15. Again in *Panchhi v. State of U.P. (1998) 7 SCC 177*, it was explained: “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.”

16. In *State of Karnataka v. Shantappa Madivalappa Galapuji JT 2009 (5) SC 660* the Supreme 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.”

17. In *Radhey Shyam v. State of Rajasthan (2014) 5 SCC 389*, after reviewing the entire case law till then, the Supreme Court summarized the legal position thus:

“The conclusion which can be deduced from the relevant pronouncements of this Court is that the evidence of a child witness must be subjected to close scrutiny to rule out the

possibility of tutoring. It can be relied upon if the court finds that the child witness has sufficient intelligence and understanding of the obligation of an oath. As a matter of caution, the court must find adequate corroboration to the child witness's evidence. If found, reliable and truthful and corroborated by other evidence on record, it can be accepted without hesitation."

18. In the present case, both the learned MM who recorded the statement of PW-6 as well as the trial Court which recorded his deposition satisfied themselves about his 'capacity and intelligence as well as his understanding of the obligation of an oath.' The child answered the questions very clearly. The trial Court closely questioned him to rule out the possibility of tutoring.

19. On carefully perusing his evidence, this Court is left in no matter of doubt that the child has spoken truthfully and cogently about the Appellant committing sexual penetrative assault which resulted in the child then screaming in pain, bleeding from the anal region, and then telling his mother as to what had happened with him and pointing out the Appellant as the person who committed the assault upon him. The identification of the Appellant by the victim, therefore, was unambiguous. The only suggestion given to the victim was about the victim's father having taken some money from the Appellant, which the victim denied.

20. With the deposition of the victim on what had happened to him at the hands of the Appellant going virtually unchallenged in the cross-examination and with the medical and forensic evidence clearly establishing that it was the Appellant who committed the crime, the trial Court reached the correct conclusion regarding the guilt of the Appellant.

21. Mr. Ankur Sood, learned counsel for the Appellant, presented the case before this Court fairly. He submitted that there were some contradictions in the depositions of the mother of the victim (PW-5) and his grandmother (PW-9). Having examined those depositions, this Court is of the view that the so-called contradictions are not material and do not affect one bit the clear, cogent, and reliable testimony of the victim which stands fully corroborated by both the medical and the forensic evidence.

Defence evidence

22. The Appellant has also sought to bring on the record in his statement under Section 313 Cr PC and by examining his own brother Gulab Singh Yadav (DW-1) to show that the victim's father had borrowed money from him. In the cross-examination of DW-1 by the APP, he showed a lack of knowledge about the monthly salary of the Appellant. He also was unable to give the address of the factory where the Appellant was working or even the name of the factory's owner. He could not tell the date on which the Appellant had given the loan to the father of the victim.

23. No suggestion was given either to PW-5 or PW-9, in their respective cross-examination that a loan was borrowed by the father of the victim from the Appellant. On the other hand, what came across from that testimony was that the Appellant himself was hard-pressed financially and was unable to send money even to his parents. It was highly unlikely that he gave any loan to the father of the victim.

24. With PW-6 being corroborated by the medical and the forensic evidence,

the trial Court rightly concluded that DW-1 was not a reliable witness.

25. This Court is not able to find any error committed by the trial Court in its evaluation of the evidence and the conclusion reached regarding the guilt of the Appellant.

Sentence

26. Turning now to the question of sentence, this Court finds that the trial Court has given clear and cogent reasons for awarding the sentence of rigorous imprisonment for life to the Appellant. Given the gravity of the crime, and the immeasurable trauma it will continue to cause to the victim of a tender age for many years, this Court is unable to find any ground to interfere with the sentence awarded by the trial Court.

Compensation

27. However, as regards compensation to the victim, the Court is of the view that this was a case where the highest possible compensation, i.e. Rs.5 lakhs, ought to be awarded considering the tender age of the victim at the time of commission of the offence. The Court accordingly directs that the compensation amount payable to the victim should be enhanced to Rs.5 lakhs and that the additional sum be now paid to the victim under the Victim Compensation's Scheme in terms of Section 357A Cr PC, not later than eight weeks from today.

Conclusion

28. The appeal is accordingly disposed of in the above terms. The trial Court

record be returned forthwith together with a certified copy of this judgment.

29. A copy of this order will be sent to the Secretary, DLSA (North-West District) for compliance.

S. MURALIDHAR, J.

VINOD GOEL, J.

SEPTEMBER 17, 2018

tr

