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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 17th September, 2018

+ CRL.A. 12/2018

RAKESH

..... Appellant

Through: Mr. Naomi Chandra, Advocate

versus

STATE

..... Respondent

Through: Mr. Ashish Dutta, APP

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The appellant faced prosecution in Sessions case no.70/14 arising out of first information report (FIR) no.76/14 of police station Gandhi Nagar, involving offences punishable under Sections 376, 506 of the Indian Penal Code, 1860 (IPC) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (in short, "POCSO Act"). By order on sentence dated 18.09.2017, after conviction by judgment dated 13.09.2017, punishment was awarded in the form of rigorous imprisonment for 10 years with fine of Rs.10,000/- for offence under Section 376(2) IPC, rigorous imprisonment for one year for offence under Section 506 Part-II IPC, no separate sentence having been awarded under Section 6 of POCSO Act. By the said order, directions were also given for compensation in the sum of Rs.1 Lakh to be paid to the victim.

2. By the appeal at hand, the said judgment of conviction and order on sentence have been assailed. The learned counsel appointed by Delhi High Court Legal Services Committee for the appellant and Additional Public Prosecutor for the State have been heard. The trial court record which was requisitioned has been perused.

3. The prime grievance raised on behalf of the appellant by the counsel representing him is that he was deprived of effective legal aid and assistance at the trial which, in the submission of the counsel, has vitiated the process, particularly in view of the fact that there was virtually no contest or endeavour made to dig out the truth or test the veracity of the case of the prosecution after the charge had been amended. The counsel also pointed out that there was confusion in the evidence of the prosecution on the issue of chain of custody of the biological samples (of the appellant and the prosecutrix). While conceding to the prevailing confusion in the evidence, which was recorded during the trial on the above score, the Additional Public Prosecutor also submitted that there is a need to examine atleast one more witness for prosecution to bring clarity.

4. Since upon consideration of the above noted submissions, this court is inclined to accept the prayer for remit of the case, as is pressed by the counsel for the appellant, it will not be necessary to go into the other contentions.

5. Given the above indicated result of the appeal, detailed mention or scrutiny of the background facts or evidence is not required. Suffice it to note that the case concerns alleged sexual assault vis-à-vis

an eight years old female child (PW-3). The FIR was registered on the complaint of her mother (PW-2), the incident allegedly having taken place at about 5.30 p.m. on 30.01.2014 in a *jhuggi* cluster within the jurisdiction of the police station where the case was registered.

6. The prosecutrix (PW-3), a student of third standard had allegedly gone out to play with other children of the locality. She returned to her mother crying and, when asked, she told her mother that the appellant, a neighbour, had taken her inside his *jhuggi* and had fiddled with her private parts. The first informant (PW-2) found the clothes of the child in wet condition. She accompanied the child towards the *jhuggi* of the appellant who upon seeing them, allegedly fled away from the scene. The police was informed, this leading to daily diary (DD) no.32A being logged. The prosecutrix was taken to a hospital where she was medically examined as per medico legal certificate (MLC) (Ex. PW7/A) by Dr. Neelam, Sr. Resident (Gynae). The appellant was arrested and was also taken to hospital for his medical examination, the MLC (Ex. PA1) in his respect having been admitted under Section 294 of the Code of Criminal Procedure, 1908 (Cr. PC).

7. The biological exhibits taken from the persons of both the prosecutrix child and the appellant were handed over to the investigating agency at the time of their respective medical examination. It is stated that semen stains were also found, *inter alia*, at the scene of crime and on the lower garment of the child.

8. The biological exhibits statedly had been sent to Forensic Science Laboratory (FSL), by Road Certificate (Ex.PW4/C) by PW-4, the then Moharrer, Malkhana on 17.02.2014. The FSL reports (Ex. PW12/A and B) dated 24.09.2014 are relied upon by the prosecution.

9. The statement of the prosecutrix child (Ex. PW3/A) was also recorded under Section 164 Cr. PC by the Magistrate. By the said statement, the child informed that after she had been taken inside the *jhuggi*, the appellant had opened the zip of his trousers and had removed her lower garment, Payjama, and having made her lie on the cot, he had touched her private part (she would refer to the vaginal area) with his male organ.

10. On the basis of evidence collected, the report under Section 173 Cr.PC was filed seeking trial of the appellant for offence under Section 376 of IPC and under Section 4 of POCSO Act. Cognizance was taken on the said charge-sheet by the said court by order dated 29.03.2014. On 05.05.2014, charge was found made out against the appellant and framed accordingly for offences punishable under Sections 376 read with Section 511 IPC (attempt to rape), Section 506 IPC (criminal intimidation) and Section 10 of POCSO Act (aggravated sexual assault). The prosecution examined thirteen witnesses including the prosecutrix (PW-3), her mother (PW-2), Dr. Neelam (PW-7), the investigating officer (IO), SI Pooja Pandey (PW-13) and particularly three police officials relating to the chain of custody of the exhibits (and certain other facts) they being HC Surender (PW-4), Constable Vishnu Kumar (PW-9) and ASI Manoj Kumar (PW-11).

11. In her deposition, the prosecutrix (PW-3) testified, *inter alia*, that when the appellant had touched her private part with his male organ, she had felt “pain” and had started crying.

12. The FSL report (Ex. PW12/A) indicates human semen was detected, amongst others, in the cotton wool swab on a stick (vaginal secretion), the lower garment of the child and the gauze cloth piece described as semen lifted from the scene of crime. The DNA examination report, which is based on allelic data (Ex. PW12/B) further seems to confirm that the DNA profile generated from the blood sample of the appellant was found matching with DNA profile generated from the vaginal secretion of the prosecutrix, pyjama and the gauze cloth piece lifted from the scene of crime. The FSL reports have statedly been proved by the prosecution through Mr. Naresh Kumar (PW-12), Senior Scientific Officer (Biology) of FSL.

13. As indicated earlier, the prosecution had concluded its evidence by examining thirteen witnesses, the last (PW-13) having been examined on 03.08.2017. But before deposition of the said witness had been recorded, the Additional Public Prosecutor had moved an application under Section 216 Cr. PC seeking amendment of the charge, it bearing the date 01.07.2017 taken on record on 03.07.2017 with observations of the trial Judge that the same would be considered on the next date. On 03.08.2017, the trial Judge began the proceedings by calling upon the prosecution to examine the investigating officer (PW-13). After her deposition had been taken, noting that no other witness was present or to be examined, the

prosecution evidence was ordered to be closed. It is then that the application under Section 216 Cr. PC was taken up.

14. The request of the prosecutor in the aforesaid application was with reference to the above noted testimony of the prosecutrix (PW-3) with particular reference to she having felt pain at the time of sexual assault and the result of the FSL examination of the biological samples. In the submission of the Additional Public Prosecutor, the charge required amendment in that, instead of attempt to rape, she requested the charge of rape (Section 376 IPC) and Section 6 of POCSO Act (aggravated penetrative sexual assault) to be framed. The record indicates that the legal aid counsel assisting the appellant gave his “no objection” also stating that he did not want recall of any witness who had already been examined. The charge was amended and, thus, in place of charges framed earlier for offences under Sections 376/511 and 506 of the IPC and under Section 10 of POCSO Act, fresh formal charges were framed for offences under Sections 376 and 506 and Section 6 POCSO Act. The Sessions court then adjourned the matter for recording of the statement of the appellant under Section 313 Cr. PC. After the said statement had been recorded, final arguments were heard and the impugned judgment and order on sentence were passed.

15. The counsel appearing for the appellant has argued that since the charge earlier framed was only of attempted rape, no questions were raised, or could have been raised, on the issue of possibility of penetration particularly during the deposition of the medial officer

(PW-7). She also submitted that, given the FSL result, it is essential to have clarity about the chain of custody of the biological samples. She pointed out that PW-4 (*Moharrer, Malkhana*) has deposed that he had handed over the exhibits on 17.02.2014 to a police official (described by him as) HC Manoj, who had taken the road certificate (Ex. PW4/C) which was returned with copy of acknowledgement of receipt by FSL. She argued that the police official named HC Manoj (referring to PW-11) was silent about he having carried out any such task.

16. The learned Additional Public Prosecutor, however, submitted that there has been a confusion on the part of PW-4 in mentioning the name of HC Manoj in as much as the road certificate and the other records show that it was a police official named Constable Manohar (no.2309/E PIS 28092859) of police station Gandhi Nagar, Delhi who had taken the biological exhibits from the *Malkhana* and deposited the same with FSL.

17. Conceding to the argument of inadequate legal aid and assistance, and the gaps in the evidence, the learned Additional Public Prosecutor submitted that prosecution would also request for additional opportunity for evidence by examining the said Constable Manohar whose name was inadvertently omitted from the charge-sheet. He requested that in view of the above, the need and possibility of further examination of the investigating officer may also be kept open.

18. Though at the stage of appeal, in terms of the jurisdiction and power vested in this court by Section 391 Cr. PC, additional evidence

may be permitted to be brought on record before this court, given the above background facts particularly wherein, after the amendment of the charge, no effective opportunity came to be available to the defence to bring out its version or, to put it differently, to test the veracity of the prosecution witnesses, appropriate course would be to accede to the request of the appellant for the impugned judgment and order on sentence to be set aside and the case to be remitted to the trial court for further proceedings in accordance with law. Ordered accordingly.

19. For the foregoing reasons, the impugned judgment and order on sentence are set aside. The case is remitted to the court of the Special Judge. The Special Judge shall ascertain from the prosecution the names of such witnesses as it proposes to recall, or additionally call (for example, Constable Manohar), in evidence, grant an opportunity for such purposes, subject to admissibility and relevancy, and give renewed opportunity to the defence for recall for further cross-examination of witnesses examined prior to the amendment of the charge as indeed cross examination of additional witnesses. After compliance with such requirements of the criminal procedure, the learned trial Judge will take the case to the further stages starting with fresh statement of the accused and decide the case afresh. Needless to add, in fresh adjudication, the trial Judge will not feel bound, or be influenced, by expression of opinion on merits as appearing in the impugned judgment or order of this court.

20. The case shall be taken for further proceedings by the Special Court on 22.10.2018. The trial Judge will take steps to ensure that the appellant is produced before it on the said date from the judicial custody.

21. The appeal is disposed of in above terms.

R.K.GAUBA, J.

SEPTEMBER 17, 2018

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