

\$~R-4A

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 4th July, 2019

+ CRL.A.235/2019

PILLUWA @ PAPPU

..... Appellant

Through: Mr. Sulaiman Mohd. Khan,
Advocate (DHCLSC) and Ms.
Taiba Khan and Mr. Ashish
Choudhary, Advocates

versus

STATE

..... Respondent

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

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. By judgment dated 15.11.2018 the Additional Sessions Judge (ASJ) presiding over the special court under Protection of Children from Sexual Offences Act, 2012 (POCSO Act) in Sessions Case No.440657/2016, the appellant was held guilty and convicted on the charge for offence under section 6 read with section 5(n) of POCSO Act. By subsequent order dated 22.11.2018, the trial court awarded rigorous imprisonment for twelve years with fine of Rs.10,000/- as the punishment against the appellant directing that in the event of default in payment of fine he would undergo further simple imprisonment for two months though affording to him the benefit of set off under section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C.). It may

be added here that by the said very order, the trial court also directed the District Legal Services Authority (DLSA) of South-West District to grant compensation in the sum of Rs.4,50,000/- to the prosecutrix (the victim), this amount being over and above the amount of compensation that had been earlier released as interim compensation.

2. The appeal at hand challenges the conviction and order on sentence. At the hearing, however, the appellant who was called to Court by production warrant submitted through the learned counsel appointed by Delhi High Court Legal Services Committee to represent him that he does not press the appeal on merits in so far as it challenged the judgment holding him guilty, he conceding that his complicity has been brought home through evidence he cannot impeach, his only prayer being for reduction of sentence awarded to the minimum prescribed in law.

3. Notwithstanding the above concession, the Court has heard both sides in light of material on record to satisfy its judicial conscience about the correctness of the conclusion reached by the trial court.

4. Upon perusal of the trial court record and the memorandum of appeal which has been presented, besides grounds set out in the appeal, certain indisputable facts emerge. This part of the prosecution case may be taken note of at the outset.

5. The prosecutrix concededly is biological daughter of PW-12, a native of a village in Uttar Pradesh. The appellant herein stood trial with two others, they being Parkash (A-2) and his wife Sunita (A-3),

both of whom have been residents of a locality known as Sadh Nagar in area of Palam Colony, New Delhi, the said A-2 being a close relative of PW-12, the biological father of the prosecutrix. There is unimpeachable evidence available to confirm that the prosecutrix was less than eight years' old at the relevant point of time, her date of birth having been confirmed as 15.03.2006 by PW-8, the principal of the school where she had been enrolled on 23.04.2011 by A-2 Parkash, the relevant school record having been proved in evidence as Ex.PW-8/A. The biological mother, *i.e.*, the wife of PW-12 had died long back. She had left behind three daughters and a son. It is the evidence of PW-12, and the same is not refuted, that he (PW-12) had given the prosecutrix in adoption to A-2 Parkash at a time when she was 1½ or two years' old. After adoption, the prosecutrix was brought by A-2 Parkash and his wife A-3 (Sunita) to Delhi, they having no child of their own.

6. The evidence clearly establishes, and there is no contest to this, that the appellant is brother of A-2, the adoptive father of the prosecutrix and, therefore, in domestic relationship with her within the meaning of clause (n) of section 5 of POCSO Act. It may be added here that the prosecutrix would address the appellant as “*mama*”, he indisputably also tracing his origin from the same native village as that of the biological father of the prosecutrix.

7. The prosecution also rested on the word of Laxmi (PW-5), a woman who lives in the neighbourhood. Her testimony has brought out vividly that the property where the relevant persons connected to

this case were living has several parts, each in the occupation and use of different tenants, PW-5 being a next door neighbor to the appellant (A-1) as also to the other persons who were brought to trial (*i.e.*, A-2 and A-3).

8. On 27.12.2013, at about 1:25 p.m., a telephonic information was received in the Police Station Palam Village (“the Police Station”), through police control room (PCR), the input having been reduced to writing by SI Balwan Singh (PW-3) vide daily diary (DD) No.27-A, copy whereof has been proved as Ex.PW-3/A. As per the said input the prosecutrix had been subjected to sexual assault by an uncle. It is not very clear from the DD entry as to who was the person that had made the said telephone call to inform the police about such incident. But then, it has come in the testimony of PW-5 that it was she who, having rescued the child and taken her under her care for the time being, had come back to her tenanted portion to make the telephone call on phone No.100.

9. For the record, it may be observed that it would have been proper if the PCR record had clearly brought out the source of intimation leading to logging of DD entry No.27-A.

10. Be that as it may, the matter arising out of DD entry No.27-A was entrusted for inquiry to SI Jagdish Chander (PW-13) who was working at that point of time on emergency duty in the Police Station. PW-13, the investigating officer (“the IO”) set out for the place in question, accompanied by Constable Pankaj Gupta (PW-14). The endorsement (Ex.PW-13/A) in his hand leading to registration of first

information report (FIR) No.460/2013 shows that when he had reached the house in question he met PW-5 along with the prosecutrix child, the appellant also being present at the scene.

11. The *rukka* (Ex.PW13/A) which was sent by the IO to the police station at 7.30 p.m. on 21.12.2013 leading to registration of the FIR (Ex.PW2/A) by Head Constable Bharat Lal (PW-2), the duty officer at that point of time, is based, *inter alia*, on the statement (Ex.PW1/A), of the prosecutrix child which was recorded by the IO in the presence of a lady Constable Mamta (PW-7) and the neighbor (PW-5). It may be added that the prosecutrix was later brought before a Metropolitan Magistrate (PW-11) on 27.12.2013 when her statement (Ex.PW1/B) was recorded under Section 164 Cr.P.C. The narration in the FIR, as per the statement (Ex. PW1/A), and the sequence of events set out in the statement (Ex.PW1/B) under Section 164 Cr.P.C. are more or less similar.

12. Briefly put, the child informed the police, and the Magistrate, that after she had been taken in adoption by A-1, her mother having died several years ago, she was brought by A-2 and A-3 to Delhi where she had started residing. She would narrate some incident of A-2 (the adoptive father) having also sexually exploited her, not being specific about timeline(s). She would also attribute complicity on the part of A-3 (the adoptive mother) in her said sexual exploitation at the hands of the adoptive father. She spoke about the specific incident that had happened on 21.12.2013 at about 1.00 p.m., when she had returned from school, her adoptive parents being not home, the

appellant having called her to his room and having closed the door. She spoke about her underwear having been removed and she being made to lie on the bed and the appellant having forcibly indulged in sexual intercourse with her after having removed his trousers. She spoke about she having raised a cry in pain in response to which PW-5 (the neighbouring woman) came and took her away from the clutches of the appellant and called the police.

13. The prosecutrix was examined in the hospital by Dr. Ritu Kathuria, Senior Resident (Casualty), the MLC notes (Ex.PW9/A) recorded by her having been proved (in her absence and due to her non-availability) by Dr. Dhananjay Kumar (PW-9), who has affirmed that he is acquainted with her hand-writing and signatures. The MLC (Ex.PW9A), it may be noted, was recorded at 3.35 p.m. on 21.12.2013. The prosecutrix was referred for internal examination by a gynecological surgeon. Dr. Nidhi (Senior Resident in Obstetrics and gynaecology department of the hospital) recorded her observations on the MLC, in continuation of the clerical notes in the hand of Dr. Ritu Kathuria. The notes recorded by Dr. Ritu Kathuria have been proved (in her absence and due to her non-availability) by Dr. Nikita Pahuja (PW-10) who is also acquainted with her hand-writing and signatures. Noticeably, the evidence adduced through PW-9 and PW-10 is not challenged by the defence.

14. The notings in the MLC, particularly the observations recorded by the senior resident of gynecological department, indicate in particular, a torn hymen, the tear being old and healed. The said

doctor had taken care to collect biological samples of the private parts and had also taken over the clothes of the prosecutrix, the said clothes having been passed on by her to Constable Mamta (PW-7), who deposited the same with *Moharrer Malkhana*, MHC(M), this being proved by Head Constable Vishram (PW-4), who was working at relevant point of time as MHC(M), with reference to the entries in the store room register (Ex PW4/A).

15. The appellant, as indeed A-2, were also sent for medical examination to the same hospital. It will not be necessary to refer to the MLC of A-2 in as much as he has been acquitted by the trial court, the said judgment not having been challenged by the State. The MLC (Ex.PW15/A) in respect of the appellant was proved by Ram Kumar (PW-15), the medical record clerk of the hospital, its author Dr. Manjit Kumar having left the services of the hospital, it not being possible to secure his presence without undue delay. The appellant was also sent for yet another medical examination to RML Hospital on 06.01.2014. The result of his said medical examination, more to ascertain his potency and capability to perform sexual intercourse, has been proved by Dr. Anurag Singla (PW-16), in lieu of Dr. Sandeep Kumar, the author of the report (PW-16/A). Pertinent to note that the appellant does not challenge the said part of the evidence as well.

16. It may be noted that the evidence also unmistakably shows that at the time of his medical examination, the blood sample of the appellant was taken and preserved, the same alongwith other exhibits having been sent to Forensic Science Library (FSL), this part of the

evidence being proved, amongst others, by the MHC(M) (PW-4), Constable Sandeep (PW6) and the acknowledgement (Ex.PW4/D) of the exhibits by FSL.

17. The FSL report dated 23.2.2017 which was submitted before the trial court (pages 913-917 of the trial court record) shows that the clothes of the prosecutrix which had been taken over by the senior resident (gynecology) at the time of her examination included one underwear having dirty stains (referred to as Ex.12a), one *pyjama* (referred to as Ex.12b), one top (referred to as Ex.12c) and one sweater (referred to as Ex.12d). The senior scientific officer (Biological) of DNA Unit of FSL, as per her report dated 23.02.2017 has mentioned that she had subjected the exhibits to examination and found that the DNA profiling STR analysis performed on underwear of the victim (Ex.12a) and the blood sample of the appellant (Ex.16) showed the underwear had seminal stains which were similar to the source of Ex.16. This conclusively connects the appellant to the act of having discharged his semen in or around the private parts of prosecutrix that had eventually smeared her underwear.

18. At the trial, the prosecutrix was examined as PW-1, the neighboring woman Laxmi being called in as PW-5. While PW-1 confirmed the prosecution case of sexual assault at the hands of the appellant in his room at about 1.00 p.m. on 21.12.2013, she disowned the allegations against her adoptive father (A-2) and adoptive mother (A-3). She was confronted with her earlier statement to the police and subjected to cross-examination by the public prosecutor at which stage

she did state some facts reiterating the original version. But then, during cross-examination she again went back to the version that no wrong had been committed against her by her adoptive parents. Her narration about the incident of afternoon of 21.12.2013 is almost identical to that set out in the FIR, as repeated in her statement made a few days later to the Metropolitan Magistrate under Section 164 Cr.P.C. PW-5, the neighboring woman, also corroborated the word of the prosecutrix, she asserting that her attention had been drawn to the room of the appellant when she had heard the screams and stated that when she had gone to the said room she had found it not bolted from inside. She pushed the door open to find the appellant and the prosecutrix in nude condition, the appellant trying to commit wrong with her. She stated that she had brought the child back after making her wear the clothes and thereafter had informed the police telephonically. She also spoke about her role during the investigation that followed.

19. It may be noted here that in her statement in the court, the prosecutrix child (PW-1) stated that when the appellant had brought her to the room before committing the rape, he had bolted the room from inside. Indeed, there is a contradiction appearing in the evidence in this regard since PW-5 was clear in her deposition to say that the door was not bolted from inside, she having been able to push it open to find the incident in the midst of happening.

20. It is noted that the defence taken by the appellant at the time of prosecution evidence essentially was that there had been incidents of

quarrel between PW-5 on one hand and the adoptive parents of the prosecutrix on the other. It was suggested that PW-5 had used the prosecutrix by tutoring her to depose falsely so as to frame the accused persons in the case. Suggestions to this effect were denied by PW-5, as indeed by the prosecutrix.

21. The trial Court found the evidence of PW-1 and PW-5 credible. It referred to the FSL report based on DNA analysis and found it sufficient corroboration of the deposition of the material witnesses to hold the appellant guilty of aggravated penetrative sexual assault against PW-1 essentially on account of domestic relationship with the parents of the child, thus convicting him under Section 6 of the POCSO Act.

22. PW-5, in the course of her deposition, has spoken about she having had some reasons to believe in the past that the child was being sexually exploited. She spoke about the child having earlier confided in her in this regard. There is, however, no foundation laid about such previous information. The MLC revealing old, torn and healed hymen may be a pointer to what PW-4 has indicated. But, the fact remains that no complaint was lodged to that effect with any authority, even the prosecutrix not having been called upon to speak about it during her court deposition. Nothing much, therefore, turns on this aspect.

23. An attempt was made before the trial court to question the credibility of PW-1 and PW-5. It was argued that allegations against the adoptive parents were seemingly fanciful in as much as the prosecutrix while deposing at the trial, would not support the same,

this showing the possibility that the child is prone to speak what she may have imagined.

24. This court is not inclined to doubt the veracity of PW-1 in so far as the case against the appellant is concerned on her failure to stick to her original version vis-à-vis her adoptive parents. Apart from the narration about the past events in the FIR and, in the statement under Section 164 Cr. PC, there is no corroboration from any independent quarter. The incident implicating the appellant, in contrast, is confirmed by PW-5 who was living in the neighbourhood and quite clearly a natural witness who had come on the scene upon hearing the shrieks of the girl being molested. The failure of the case for prosecution against the adoptive parents cannot mean the evidence against the appellant should be junked.

25. The contradiction in the evidence of PW-1 about bolting of the door from inside, neighboring women (PW-5) speaking facts to the contrary, is not a circumstance on which the case ought to be thrown out. The fact that sexual assault took place is confirmed by the FSL report. PW-5 was on the scene and was the first one to intimate the police by making an immediate telephone call to PCR. She was present with the child throughout the stages of reporting to the police and her medical examination in the hospital. She is a middle-aged woman, whose word that she had pushed the door open to find the offence being committed must be accepted on its face value. The prosecutrix, in contrast, was a child of tender years, just above seven years in age, when the offence was committed against her. Her turn to depose in

the court came almost a year thereafter. The child apparently took the closing of the door leaves mistakenly for bolting of the door from inside and believing this to be the scenario narrated the facts accordingly in the court. This cannot be the reason why the other credible evidence confirming that she was subjected to sexual assault should be disbelieved.

26. It is true that no fresh external injury was found to be suffered by the prosecutrix in the wake of the sexual assault by the appellant. As per the record, particularly the medico-legal certificate (MLC) which was recorded on 22.12.2013 (Ex.PW15/A) in Deen Dayal Upadhyay Hospital (the hospital), the appellant at that point of time was about 30 years old. Penetrative sexual assault by him against the girl child of such age as the prosecutrix was at the relevant point of time would have been excruciatingly painful, notwithstanding the fact that she had a ruptured hymen, the healing indicating possibility of previous assault (if any) being old.

27. The evidence indicating that the girl had cried in pain upon being sexually assaulted, such assault having been seen by PW-5 also with her own eyes, FSL report also confirming the presence of his spermatozoa on her under garments, it not being possible to have been passed on but for its presence on her private parts, there is no escape from the conclusion that the appellant had indulged in sexual intercourse by inserting his male organ into the vaginal orifice of the child, it being inconsequential if the penetration was partial only.

28. On the foregoing facts, and in the circumstances, this court finds no error, illegality or infirmity in the view taken by the trial court in holding the appellant guilty on the charge of aggravated penetrative sexual assault defined in Section 5(n) and punishable under Section 6 of POCSO Act, 2012. The finding to such effect reached by the trial court and the conviction of the appellant under Section 6 of POCSO Act is, thus, confirmed.

29. The trial judge awarded the sentence of rigorous imprisonment for twelve years with fine of Rs.10,000/- as the punishment. Section 6 of POSCSO Act provides for punishment which may extend to imprisonment for life with fine, it specifying imprisonment for a term not less than ten years to be the minimum. In the considered view of this court, in absence of any past criminal record, the minimum sentence of imprisonment for ten years with fine as imposed by the trial court should be sufficient to meet the ends of justice in the present case.

30. Thus, the order on sentence is modified. The appellant shall undergo rigorous imprisonment for ten years with fine of Rs.10,000/-, in default simple imprisonment for two months. Needless to add, the appellant shall continue to be entitled to the benefit of set off under Section 428 IPC for the period of detention already undergone during the period of investigation, trial and appeal. The order of compensation to the prosecutrix is also confirmed.

31. The appeal is disposed of in above terms.

32. Though the appellant was present in the court when this judgment was orally dictated, passed and pronounced, a copy hereof shall be made available to him through Superintendent, Central Jail.

R.K.GAUBA, J.

JULY 04, 2019

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