

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

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Judgment reserved on: 8th July, 2019
Judgment delivered on: 10th October, 2019

+ CRL. A.9/2019

VIJAY

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant: MR. Aditya Wadhwa, Advocate

For the Respondents: Ms. Meenakshi Dahiya, Addl. PP for the State

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. Appellant impugns judgment on conviction dated 19.07.2018 and order on sentence dated 02.08.2018 whereby the appellant has been convicted for the offence punishable under Section 4 POCSO Act as well as for the offences punishable under Sections 367/377/506 IPC and sentenced to undergo rigorous imprisonment for a period of 7 years under Section 4 of POCSO Act and to pay a fine of Rs. 20,000/- and in default of payment of fine to further undergo simple imprisonment for a period of six months, for the offence under Section 367 IPC for a period of six years with fine of Rs. 10,000/- in default to further undergo simple imprisonment for a period of three

months and rigorous imprisonment for a period of two years for the offence punishable under Section 506 IPC with fine of Rs. 5000/-, in default to further undergo simple imprisonment for a period of one month.

2. On 25.02.2015 an intimation was received of an offence having been committed. When the Investigating Officer reached the spot, he found that there was a crowd which had gathered and he was informed that the parents of the victim had caught hold of the Appellant who was handed over to the Investigating Officer. It was contended that the Appellant had performed unnatural sex with the victim/male who was aged 13 years.

3. Statement of the victim was recorded who stated that on 24.02.2015 at about 7.00 PM he was playing with his brother and the Appellant who resided in the rear lane came and asked him if he wanted to see a movie. He took him towards the side of the drain and after going some distance he crossed the boundary wall adjacent to the drain and told him that he was going for urination and asked the victim if he would accompany him. The victim also went there. There, the Appellant showed him a blue film on his mobile phone but victim refused to see it and told that he did not want to see such a bad movie.

4. The victim further stated that when he wanted to go from there, the Appellant opened the zip of his pant and took out his penis and asked him to hold it. The victim was scared and in fear, he held it. He

had further stated that the Appellant told him that he would tell his father that he had held his penis. When the victim requested not to tell his father, the Appellant asked him to move his penis up and down, which he did under fear of the accused. He further deposed that he took him near a tree where he asked him to remove his pant which he did and he started inserting his penis inside the rectum of the victim. He felt a lot of pain and started shouting but somehow, he got himself released. He further deposed that the accused again asked him to move his penis up and down which he did and the accused ejaculated and sperm of accused came in his hand which he cleaned with his shirt. Thereafter he asked the victim to go back home.

5. The victim was frightened and he asked accused if accused would do this act daily, on which appellant replied that he would do so whenever he would feel like it. Thereafter they came back home.

6. He further deposed that on the next day, after returning from school, he told all the facts to his mother, who called PCR. He was taken to the Hospital for medical examination.

7. The trial court based on the testimony of the prosecution convicted the appellant of the said offences.

8. Learned counsel for the appellant contended that the version of the victim was contradicted by the MLC as also the report of the forensic science laboratory.

9. He submits that in the MLC it is reported that there was no fresh external injury seen. Learned counsel contends that if the allegations of the victim were correct that the appellant had attempted to insert his penis into his rectum and he felt a lot of pain then he would have suffered external injury marks. Because there were no external injury marks found during medical examination, the allegations that he had started inserting his penis into the rectum, was not established.

10. Further it is contended by learned counsel for the appellant that the story of the victim that he had moved the penis of the appellant up and down on account of which he had ejaculated and his sperm came on his hand and he cleaned it with his shirt, is also not substantiated as the report of the FSL shows that semen could not be detected on the clothes of the victim and as such the contention that appellant had ejaculated on the hand of the victim and he had wiped his hand with his shirt, is not substantiated.

11. In the impugned judgment, the trial court after noting the testimony of the victim as also his mother has held that the victim had been consistent in his testimony. No contradiction had emerged in the testimony of the victim. The trial court further noticed that from his initial statement under Section 164 Cr. P.C. till his testimony before the Court, the victim had been completely consistent. No contradictions were found in the testimony of the victim. The Trial

court has observed that the victim appeared to be a completely credible witness.

12. Countering the plea about the delay in not reporting the incident the same night, the trial court held that the fact that victim did not disclose about the incident to anyone during the night or the day when the incident had taken place is consistent with the conduct of a small child who had gone through such a trauma especially when in such a sexual act, some amount of shame is also attached.

13. Trial court further held that the conduct of the victim is further consistent with the conduct of a child of that age because when the victim returned from school, threat of the accused that he would repeat his acts as and when he wanted, was grooming large over the head of the victim and it was possible that the victim might have thought about it throughout the day and finally thinking that he would be subjected to same acts again if he would go out of his house, he started crying and finally told his mother.

14. With regard to the medical evidence not pointing towards any injury upon the rectum of the victim, the trial court has held that it is not in all cases that a victim of sodomy would suffer such injuries. Injuries suffered by victim would depend upon the depth of penetration, size of penis of the assaulter and the fact whether any lubrication was used or not and, in every case, it is not necessary that there would be a clear injury.

15. Further, the trial court has noticed that the doctor who had examined the victim, had examined him after a gap of almost 20 hours of the sexual assault and has accordingly held that the injuries on the rectal portion heal very fast. The Trial Court has opined that had there been any redness or bruises because of a slight penetration, there is a possibility that they would have healed by the time the doctor had examined the victim.

16. Trial court further held that absence of any positive FSL report would not in any manner shake the confidence in the testimony of victim. Positive report would have corroborated the testimony of the witness but a negative report does not discredit the testimony.

17. In the impugned judgment the Trial Court has held as under:

“36. In the present case from his initial statement EX.PW3/A to his statement u/s 164 Cr.P.C till his testimony before the court when he appeared as PW3, victim has been completely consistent. No contradictions have been found in the testimony of the victim. Victim appears to be a completely credible witness. The fact that victim did not disclose about the incident to anyone during the night of the day when the incident had happened, is consistent with the conduct of a small child who had gone through such a trauma especially when in such sexual acts, some amount of shame is also attached. The conduct of the victim is further consistent with the conduct of the child of that age because when victim returned from school, threat of accused that he would repeat his acts as and when he wanted, was grooming large over the head of the victim. It is possible that victim might have thought about it throughout the day and finally thinking that he would be subjected to same acts

again if he went out of the house, he started crying and then on being inquired, finally, he told his mother.

37. It is correct that the medical evidence does not point towards any injury upon the rectum of the victim. However, it is not in all cases that a victim of sodomy would suffer such injuries. Injuries suffered by victim would depend upon the depth of penetration, size of penis of the assaulter and the fact whether any lubrication was used or not. Therefore, it cannot be said that in all cases there has to be a clear injury.

38. It is also to be seen that doctor had examined victim at about 03.45 p.m. one the day after he was sexually assaulted. So, there is a gap of almost 20 hours between the sexual assault and the victim being medically examined. Injuries in the rectal portion heal very fast. Therefore, had there been any redness or bruises because of a slight penetration, there is a possibility that they would have been healed by the time the doctor had examined victim.

39. Similarly, absence of any positive FSL report would not in any manner shake the confidence in the testimony of victim. I say so because FSL report, if positive, could have corroborated the testimony of victim. However, in the circumstances, where it was rectal penetration and during the evening of 24.02.2015 and in the morning of 25.02.2015, victim would have defecated, the presence of any semen could not have been detected in the rectal swabs.

40. Even otherwise, it is only a corroborative piece of evidence and if the testimony of victim is otherwise found to be reliable, merely because the FSL report has not given any positive result, the testimony of victim cannot be discarded.

41. It is also to be noticed that no motive has been attributed for the false implication of accused. Merely a bald suggestion was given that there was some monetary dispute between the accused and the family of victim. However, what kind of monetary dispute was there, has nowhere been brought on record. No positive evidence has been brought to show the motive for false implication. In absence of any motive for false implication of accused, it would be perilous to discard the consistent testimony of such a child whose conduct has also been found to be very credible.

42. I accordingly find that the testimony of victim is credible and is of sterling quality and is sufficient to bring home the guilt of accused. The prosecution beyond all reasonable doubts has proved that on 24.02.2015 at about 7.00 p.m., accused had taken victim out of the lawful guardianship of his parents in order to satisfy his unnatural lust and therefore, committed an offence punishable u/s 367 IPC. The prosecution has also proved beyond all reasonable doubts that after taking the victim to a secluded place, accused had committed penetrative sexual assault upon victim by inserting his penis into the rectum of victim. Thus, the accused has committed offence punishable u/s 377 IPC and u/s 4 POCSO Act.

43. As regards section 506 IPC, I find that as the accused had threatened victim that in case he failed to obey his commands, he would tell victim's father that he had touched his penis. Accused had threatened victim with an injury to his reputation. It is to be seen that even a child of 12/13 years has a reputation and has a sense of shame. Such a threat would certainly be taken by victim or a child in the sense that his reputation would be injured in the eyes of his family. This threat also had the effect as victim complied with the directions of accused. Thus, I find that accused had criminally intimidated

victim and committed an offence punishable u/s 506 IPC.”

18. As noticed by the trial court the victim appears to be a completely credible witness and has been consistent with his version of the incident starting from the initial complaint to the statement under Section 164 Cr. P.C. and his deposition before the Court.

19. There is no material produced either before the trial court or before this Court which would shake the testimony of the victim or create any doubt on the manner in which the alleged incident had happened.

20. Merely because there is no positive FSL report, would not cast any doubt on the testimony of the victim. FSL report is only a corroborative piece of evidence and merely because it does not corroborate the testimony of the victim would not, in any manner, render the testimony of the witness, which is otherwise reliable, as unreliable or liable to be discarded.

21. Further it may be seen and as noticed by the trial court, no motive has been attributed for false implication of the accused. The trial court has, in my view, rightly discarded the suggestion given during cross-examination that there was monetary dispute between the families. No kind of monetary dispute has been brought on record and further no evidence has been brought on record to show motive for false implication. Trial court has rightly held that in the absence of

any motive of false implication of the accused it would be perilous to discard the consistent testimony of the child victim whose conduct has also been found to be very credible.

22. Trial court has rightly held that the testimony of the victim is credible and is of sterling quality and is sufficient to bring home the guilt of the accused. Trial court has found that the prosecution has proved beyond all reasonable doubts that the subject offence was committed by the appellant against the victim.

23. Reliance placed by the learned counsel for the appellant on the judgment of the Supreme Court in *Radhey Shyam Vs. State of Rajasthan (2014) 5 SCC 389* to contend that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and, thus, a child witness is an easy prey to tutoring and further that evidence of a child witness must find adequate corroboration before it is relied upon, is not applicable in the facts of the present case, in as much as, the trial court has noticed that the victim has been consistent in his version from the first statement to his deposition before Court and also found that the evidence of the child victim was of sterling quality.

24. Even before this Court, no material could be pointed out by learned counsel for the appellant to shake the confidence reposed in the testimony of the child victim.

25. I find no infirmity in the view taken by the trial court in holding that the prosecution has proved beyond reasonable doubt that the appellant had committed the offence under Section 377 IPC and Section 4 of POCSO Act as also the offence under Section 367/506 IPC. I find no infirmity in the judgment on conviction.

26. It may further be noticed that the trial court in the order on sentence has noticed that the appellant had committed an unnatural assault upon a minor child of 13 years which made the crime very serious.

27. However, the facts that appellant was not involved in any other offence, had a widowed mother and was a young boy were found to be mitigating circumstances for not awarding the maximum sentence and accordingly appellant was convicted for the minimum prescribed sentence of 7 years for the offence under Section 4 POCSO Act.

28. In view of the above, I find no merit in the appeal. The appeal is accordingly dismissed.

29. Order *dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

OCTOBER 10, 2019

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