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

+ CRL.A. 1271/2019

NIRANJAN

..... Appellant

Through Mr.Sumit Choudhary with
Ms.Aakanksha Bansal, Advocates.

versus

STATE

..... Respondent

Through Ms.Aashaa Tiwari, APP for the State
with Inspector Ravi Kant,
PS Mahendra Park and SI Seema,
PS Dwarka South.

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Reserved on: 07th January, 2020
Date of Decision: 15th January, 2020

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:-

1. Present appeal has been filed on behalf of appellant-convict challenging the judgment dated 17th July, 2019 and the order on sentence dated 20th July, 2019 passed by the Additional Sessions Judge-01/Special Judge: POCSO Act (North), Rohini Courts, Delhi in Sessions Case No. 58825/2016 arising out of FIR No.1123/2015 registered with Police Station Mahendra Park, whereby the appellant-convict has been convicted under

Section 376(2) IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO Act”) and sentenced to undergo rigorous imprisonment for life with fine of Rs.10,000/- under Section 376(2) IPC.

BRIEF FACTS OF THE CASE

2. The facts of the present case, as noted by the Trial Court, are reproduced hereinbelow:-

“2. The facts in brief, which are borne out from the record are that in the year 2015, victim A, aged about 13 years, alongwith her family including her mother, two younger brothers and her father/accused, was residing in village Bhadola, Delhi. Her mother used to work in a factory, while her father accused used to work in Mandi. On 08.12.2015, when she returned back from her school she found her father/accused at home, while her mother was at her work and her younger brothers in school. Her father asked her to take her meal and go to sleep. When the victim went to her bed to sleep, accused/her father came to her and started fondling with her, pressed her breast and thereafter removed her legging and inserted his finger in her urinal part. The victim started crying, where-after the accused told her not to disclose about the incident to anyone. Again on 09.12.2015, when the victim came back from her school, the accused repeated the same incident. However, this time, the victim narrated the entire incident to her mother, after she returned back from her work, where-after a quarrel took place. On 11.12.2015, the victim called the Women Helpline number i.e. 1098, pursuant whereto an official from Women Helpline came to her house on 12.12.2015, who inquired from the victim and called the police at 100 number.

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5. On appearance in the court, the accused was supplied with the copies, and after hearing the counsel for the accused and Ld. Addl. P.P. for the State, since prima facie case was made out, the accused was charged for the offence u/s 6 POCSO Act and in

alternative u/s 376(2)(f) IPC, on 06.02.2016 by the Ld. Predecessor of this court, to which he pleaded not guilty and claimed trial. However, since the offence of penetrative sexual assault/rape, which was alleged to be committed by the accused, was covered under general law i.e. u/s 376 (2)(f) IPC as well as u/s 6 POCSO Act simultaneously and not in alternative, the charge was amended accordingly, and amended charge for the offence punishable u/s 6 POCSO Act and u/s 376(2)(f) IPC, was framed against the accused on 04.07.2019, to which he pleaded not guilty and claimed trial.....”

FINDING OF THE TRIAL COURT

3. The Trial Court convicted the appellant-convict under Section 6 POCSO Act and Section 376(2) IPC. The conclusion of the Trial Court is reproduced hereinbelow:-

“47. In view of my discussions above, it emerges that :

- (i) on the day of incident, the victim was aged about 12 years and 8 months;*
- (ii) testimony of the material witnesses i.e. victim (PW1) and her mother (PW2) are reliable and trustworthy,*
- (iii) the medical evidence, corroborates the version of the victim that fingering was done in the vagina of the victim,*
- (iv) on 08.12.2015 and 09.12.2015, the accused started fondling with his daughter / victim, and then inserted his finger in her vagina repeatedly,*
- (v) the defence of the accused is a sham one, which do not inspire any confidence,*
- (vi) the prosecution has succeeded in proving its case against the accused.*

48. Conclusion: In the light of my discussion above, the testimony of prosecution witnesses are found to be trustworthy and reliable, and the prosecution has succeeded in proving that the accused, being the father in a position of trust of the victim, subjected her to aggravated penetrative Sexual assault by inserting his fingers in vagina on 08.12.2015 and 09.12.2015

repeatedly and thus having committed an offence of aggravated penetrative sexual assault as described u/s 5(l) & (n) of the POCSO Act, and punishable U/s 6 of POCSO Act and for the offence punishable u/s 376 (2) IPC.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT

4. Mr. Sumit Choudhary, learned counsel for the appellant-convict stated that the prosecutrix (PW-1) had been tutored by her mother to falsely implicate the appellant-convict i.e. her father, on account of matrimonial discord. He contended that since the statement made by the prosecutrix (PW-1) before the Court was identical to her statement before the police, the possibility of the prosecutrix (PW-1) being tutored could not be ruled out. He submitted that since the prosecutrix was a minor, the possibility of her being tutored was higher and therefore, her deposition required corroboration. However, according to him, in the present case the prosecution had failed to furnish any corroboration. In support of his submission, he relied upon *Nivrutti Pandurang Kokate and Ors. vs. State of Maharashtra (2008) 12 SCC 565*.

5. He pointed out that as per the medical evidence i.e. the MLC (Ex. PW-5/A), there was no history of ‘penetration’. He also laid emphasis on the fact that in the MLC (Ex. PW-5/A), the date of the incident of 09th December, 2015 had been subsequently added and word “harassment” was crossed out and replaced with the word “assault”. According to him these changes/overwriting had been done to falsely implicate the appellant-convict.

6. Learned counsel for the appellant-convict stated that there was an inordinate and unexplained delay in the registration of the FIR in the present

case as the first alleged incident had happened on 8th December, 2015 but the FIR was registered on 11th December, 2015. He contended that delay in lodging the FIR casts a serious doubt on the story of the prosecution. He also stated that the PCR call allegedly made to the police had not been proved as no one from the helpline/NGO was examined by the prosecution. Consequently, he prayed that the appellant-convict should be given benefit of doubt and the impugned order be set aside.

ARGUMENTS ON BEHALF OF THE STATE

7. *Per contra*, Ms. Aashaa Tiwari, learned APP for the State stated that the appellant-convict had not given any details of the alleged matrimonial discord to support the contention that he had been falsely implicated. She pointed out that the mother of the prosecutrix (PW-2) had stated in her cross-examination that the appellant-convict used to beat her but she had not reported the same due to the fear of social stigma and the same had not been controverted by the appellant-convict. Learned APP for the State emphasised that the present case had been reported only because of the gravity and seriousness of the offence committed by the appellant-convict upon his daughter repeatedly.

8. Ms. Aashaa Tiwari, learned APP for the State contended that the prosecutrix (PW-1) had accounted for the delay between the incident and the FIR. She stated that the prosecutrix (PW-1) had called the helpline number 1098 on 11th December, 2015 and the next day i.e. 12th December, 2015, helpline personnel arrived at her house and reported the matter to the police. She further stated that the PCR call received regarding the incident was reduced into DD No. 15 PP (Ex. PW-13/A) by Constable Monika (PW-13)

and marked to HC Prem Ram (PW-11). The relevant portion of their testimonies are reproduced hereinbelow:-

A) Testimony of Constable Monika (PW-13)

“On 12.12.2015, I was posted as DD Writer in PS Mahendra Park, and was on duty from 8 am to 4 pm. On that day at about 12:45 pm wireless operator informed about sexual assault happening on a 13 year old child at (address of the prosecutrix). I recorded this information vide DD No.15PP. I further informed about this incident to HC Prem Ram via telephone.....”

B) Testimony of HC Prem Ram (PW-11)

“On 12.12.2015, I was on emergency duty from 8 AM to 8 PM. ON that day at about 12.45 PM, DD No.15PP was marked to me for investigation. I alongwith Ct. Babloo reached at (address of the prosecutrix). There, victim A, her mother and her father (accused) (present in the court today and identified correctly) were present. An NGO official was also there. On enquiry, it was revealed that victim was sexually assaulted. I informed the Duty Officer in this regard. Thereafter, SI Seema, Lady Ct. Santosh and Ct. Pradeep came at the spot. I handed over the spot to SI Seema. IO recorded my statement.”

9. In support of her contention, she relied upon the Supreme Court judgment in *State of Rajasthan vs. N.K. The Accused*, (2000) 5 SCC 30, wherein it has been held as under:-

“15. We may however state that a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the court it cannot be counted against the prosecution.....”

COURT'S REASONING

IT IS AN ADMITTED FACT THAT THE PROSECUTRIX (PW-1) i.e. THE DAUGHTER OF THE APPELLANT-CONVICT WAS A MINOR ON THE DATE OF THE INCIDENT AS THE APPELLANT-CONVICT HAD ACCEPTED THE SAID FACT IN HIS SECTION 313 CR.P.C STATEMENT.

10. Having heard the learned counsel for the parties and having perused the evidence on record, this Court is of the view that it is an admitted fact that the prosecutrix (PW-1) i.e. the daughter of the appellant-convict was a minor aged about thirteen years on the date of the incident i.e. 8th and 9th December, 2015 as the appellant-convict had accepted the said fact in his statement recorded under Section 313 Cr.P.C.

THIS COURT IS OF THE OPINION THAT THE TESTIMONY OF THE PROSECUTRIX (PW-1) HAS A RING OF TRUTH, IS CLEAR, COGENT, CONSISTENT, CREDIBLE, TRUSTWORTHY AND IS ALSO CORROBORATED BY HER MLC AND THE DEPOSITION OF HER MOTHER. THE CONTENTION THAT THERE WAS NO HISTORY OF "PENETRATION" MENTIONED IN THE MLC IS CONTRARY TO FACTS AS THE MLC SPECIFICALLY MENTIONS IN CONCLUSION "MAY BE FINGERING DONE BY FATHER IN VAGINA". CONSEQUENTLY, PENETRATIVE SEXUAL ASSAULT AS DEFINED UNDER SECTION 3(b) AND AGGRAVATED PENETRATIVE SEXUAL ASSAULT AS DEFINED UNDER SECTION 5(1) AND (n) OF POCSO ACT ARE MADE OUT.

11. The prosecutrix (PW-1) had categorically deposed that her father/appellant-convict had committed penetrative sexual assault upon her on the aforesaid two dates. This Court is of the view that in order to examine the veracity of her statement, it is essential to examine the same. The relevant portion of the testimony of the prosecutrix (PW-1) is reproduced hereinbelow:-

"On 08.12.2015, when I returned from my school, my father at home and my mother had gone to her job. My brothers

had gone to their School. My father asked me to take meals and sleep. After taking sleep, I went to sleep. Then, my father (Present in the Court today and correctly identified by witness) came near me and after inserting his hands in my clothes, he started pressing my breast. Then he removed my legging and he inserted his finger in my urinating part. I started crying. He asked me to hush down and told me not to disclose the same to anybody. I did not tell this to anybody out of fear. Next day, when I returned from my School, my father again inserted his finger in my urinating part and I started crying loudly. Then my father left me. When my mother returned from her work, I narrated the incident to her. My parents quarrelled with each other.

As my mother was not in her senses, on 11.12.2015, I called at 1098 from mobile of my mother. Next day, one aunty came at our residence and she called at 100 number. Police reached at our house. My mother produced our father before police....”

(emphasis supplied)

12. The fact that there were no contradictions in the deposition of the prosecutrix shows that the prosecutrix has remained consistent with her previous statement in the form of *tehrir* (Ex.PW-1/A) as well as her statement recorded under Section 164 Cr.P.C (Ex.PW-1/B).

13. The mother of the prosecutrix had also deposed along similar lines and supported the version of the prosecutrix. The relevant portion of the testimony of the mother of the prosecutrix (PW-2) is reproduced hereinbelow:-

“...On 09.12.2015 when I returned from my duty, my daughter narrated the whole incident to me. She told me that accused (present in the Court, correctly identified) who is my husband, had removed her leggings and inserted his finger in her urinating part. She also told me that on 08.12.2015 also accused had committed wrong act with her, when I confronted accused

On 11.12.2015, my daughter called at helpline from my mobile and informed them about the incident. On 12.12.2015, one madam came at our residence and she made inquiries from my daughter. That madam called at 100 number. Police officials arrived at my residence. In the meantime accused also came back. I produced accused before the police. IO recorded statement of my daughter and my daughter was taken to medical examination. I also accompanied her....”

14. The aforesaid testimony of the prosecutrix finds corroboration in her MLC (Ex. PW-5/A) wherein the prosecutrix had stated that her father i.e. the appellant-convict had sexually assaulted her. The examining medical officer had observed “*reddish area near hymen*” and concluded that “*may be fingering done by father in vagina*”. The relevant portion of the MLC (Ex. PW-5/A) is reproduced hereinbelow:-

xxx xxx xxx

Date of Examination 12/12/15

B/B Police for ME

A/H/O Sexual harassment assault by father told by Patient

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No h/of penetration given by her.

xxx

xxx

xxx

Reddish area near hymen

No bleed

No tear

Hymen intact

xxx

xxx

xxx

Conclusion- may be fingering done by father in vagina.”

(emphasis supplied)

15. The contention of the learned counsel for the appellant-convict that there was no history of “penetration” mentioned in the MLC (Ex. PW-5/A) is contrary to facts as the MLC (Ex. PW-5/A) specifically mentions in conclusion “*may be fingering done by father in vagina*”. It is relevant to note that insertion of any object or part of body amounts to penetrative sexual assault as defined under Section 3 (b) of the POCSO Act, which reads as under:-

“3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—

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(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person.”

(emphasis supplied)

16. Since the appellant-convict is the father of the prosecutrix i.e. ‘relative of the child through blood’ and he had committed the penetrative assault on two separate occasions i.e. 08th and 09th December, 2015, the offence of aggravated penetrative sexual assault as defined under Section 5 (l) and (n) of POCSO Act are also made out. Section 5 (l) and (n) of POCSO Act read as under:-

“5. Aggravated penetrative sexual assault.—

xxx xxx xxx

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

xxx xxx xxx

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(emphasis supplied)

17. As far as the alleged overwriting/changes in the MLC (Ex. PW-5/A) are concerned, this Court is of the view that the same are not fatal to the case of the prosecution. Firstly, the fact that the date of the second incident i.e. 9th December, 2015 was added subsequently could be possible due to an error/omission by the examining medical officer. Secondly, the examining medical officer had signed next to where the word “harassment” had been struck off and the word “assault” was written. This proves that these changes were done contemporaneously. In any event, since no question regarding overwriting was put to the witness, it cannot be raised at this stage. The Supreme Court in ***Mahavir Singh Vs. State of Haryana, (2014) 6 SCC 716*** has held as under:-

*“16. It is a settled legal proposition that in case the question is not put to the witness in cross-examination who could furnish explanation on a particular issue, the correctness or legality of the said fact/issue could not be raised. (Vide *Atluri Brahmanandam v. Anne Sai Bapuji and Laxmibai v. Bhagwantbuva.*”*

(emphasis supplied)

18. Though this Court finds merit in the submission of the learned counsel for the appellant-convict that minor witnesses are susceptible to being tutored and their statements should be corroborated; yet in the present case there is nothing on record to suggest that the prosecutrix was tutored. In fact, the testimony of the minor prosecutrix is corroborated by her MLC (Ex.PW-5/A) and evidence of her mother. Consequently, the judgment of the Supreme Court in *Nivrutti Pandurang Kokate* (supra) offers no assistance to the appellant-convict.

19. Keeping in view the aforesaid, this Court is of the opinion that the testimony of the prosecutrix (PW-1) has a ring of truth, is clear, cogent, consistent, credible, trustworthy and is also corroborated by other evidence on record.

IT IS SETTLED LAW THAT IF THE TESTIMONY OF THE PROSECUTRIX INSPIRES CONFIDENCE, THE SAME CAN BE RELIED UPON TO CONVICT THE ACCUSED PERSON.

20. It is also settled law that if the testimony of the prosecutrix inspires confidence, the same can be relied upon to convict the accused person. The Supreme Court in *State (Govt. of NCT of Delhi) vs. Pankaj Chaudhary* 2018 SCC OnLine SC 2256 has held as under:-

“26. It is now well-settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence. [Vishnu alias Undrya v. State of Maharashtra, (2006) 1 SCC 283]. It is well-settled by a catena of decisions of this Court that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration and as such it has been laid down that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic

infirmity and the 'probabilities factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. [State v. N.K. The accused (2000) 5 SCC 30]”

(emphasis supplied)

THE CONTENTION OF THE APPELLANT-CONVICT THAT HE HAD BEEN FALSELY IMPLICATED AT THE INSTANCE OF HIS WIFE IS UNSUBSTANTIATED AND CANNOT BE ACCEPTED.

21. Further, this Court is in agreement with the contention of the learned APP that the appellant-convict has failed to give any details or evidence with respect to the matrimonial discord between him and the mother of the prosecutrix. Consequently, the contention of the appellant-convict that he had been falsely implicated at the instance of his wife is unsubstantiated and cannot be accepted.

THE DELAY OF A FEW DAYS IN REGISTRATION OF THE FIR IS NOT FATAL TO THE PROSECUTION'S CASE AS IT HAS BEEN DULY EXPLAINED BY THE PROSECUTRIX.

22. This Court is in agreement with the learned APP for the State that the PCR call regarding the incident had been duly proved by the testimonies of Constable Monika (PW-13) and HC Prem Ram (PW-11) and that there was no inordinate delay in registration of the FIR inasmuch as the prosecutrix had informed her mother about the incident on 09th December, 2015 and her mother had quarrelled with the appellant-convict but had not taken any further action. Thereafter, the prosecutrix called the helpline number 1098 on 11th December, 2015 and the helpline personnel arrived at her house on

12th December, 2015 and informed the police. It is settled law that mere delay in registration of FIR cannot be a reason to disbelieve the case of the prosecution. The Supreme Court in *State of Punjab vs. Gurmit Singh & Ors.*, (1996) 2 SCC 384 has held as under:-

“8. ...The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged...”

(emphasis supplied)

23. Consequently, this Court is of the view that the delay of a few days in registration of the FIR is not fatal to the prosecution's case as it has been duly explained by the prosecutrix.

THE APPELLANT-CONVICT HAS FAILED TO REBUT THE PRESUMPTION ENSHRINED UNDER SECTIONS 29 & 30 OF POCSO ACT.

24. Further, the appellant-convict has failed to rebut the presumption enshrined under Sections 29 & 30 of POCSO Act.

CONCLUSION

25. In view of the aforesaid, this Court is in agreement with the findings of the Trial Court. Consequently, the impugned judgment and order on sentence passed by the Trial Court are upheld and the present appeal, being

bereft of merit, is dismissed. A copy of the judgment be supplied to the appellant-convict through the concerned Jail Superintendent.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

JANUARY 15, 2020

js/rn

