

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

CRL.A. 41/2020 & CRL. M. (BAIL) 75/2020

Reserved on: 20.10.2020

Date of Decision: 05.11.2020

IN THE MATTER OF:

RAHIM

..... Appellant

Through: Mr. Sharad Malhotra, Advocate

Versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Manjeet Arya, APP for State
with SI Mahesh Bhargav, P.S. Kamla Market,
Delhi

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present appeal is preferred under Section 374(2) Cr.P.C. on behalf of the appellant *Rahim* challenging the judgment on conviction dated 25.10.2019 and order on sentence dated 30.10.2019 passed by the Special Judge (POCSO Act)/ASJ-05 (Central)/THC, Delhi, in SC No. 27269/16 arising out of FIR No. 87/2014 registered under Sections 323/354 IPC & Section 8 of the POCSO Act, at Police Station Kamla Market, Delhi whereby the appellant was convicted for the offence punishable under Sections 323/354 IPC & Section 8 of the POCSO Act. Further, vide order on sentence dated 30.10.2019, the appellant was directed to undergo RI for a period of 5 years for the offence punishable under Section 8 of the POCSO Act along with payment of fine of Rs.5,000/- in default thereof, to undergo SI for 6 months. He was further

directed to undergo RI for a period of 1 year for the offence punishable under Section 323 IPC along with payment of fine of Rs.2,000/- in default thereof, to undergo SI for 3 months.

2. The brief facts as noted by the trial court are as under:-

“Brief facts of the case, as borne out from the charge-sheet are that on 10.03.2014 at about 05.30 p.m. when minor victim/complainant 'S' (name withheld to protect her identity) aged about 17 was coming from her work place and reached at a circle near public toilet, accused came out from the said toilet and followed her. It is further stated that she changed her way and accused asked her to stop but she did not stop. The victim further stated that when she reached near the circle of the road for crossing the road, accused caught hold of her hand and when she shouted and tried to get rid of accused, accused slapped her. The victim further stated that accused also caressed (touched) her chest at the said place at that time. It is further alleged that at the time of incident, accused had covered his face with a cloth and were wearing black goggles and cap. The victim further stated that two persons came on motorcycle and caught the accused who fought with them as well. He was taken to the Police Station. The witness further stated that she made complaint Ex.PW6/A to the police and pointed out the place of incident to the Police”.

3. After completion of investigation, a charge-sheet was filed and the charges were framed against the appellant. The trial court framed the charges under Sections 323/354 IPC & Section 8 of the POCSO Act vide order dated 12.05.2014. The appellant pleaded not guilty and claimed trial.

CONTENTIONS

4. Learned counsel for the appellant contended that the MLC placed on the record in fact, did not belong to the child victim as her signatures

on the MLC differ from the signatures appearing on other documents i.e., the complaint and her statement recorded under Section 164 Cr.P.C. He also contended that the defence taken by the appellant was not properly appreciated by the trial court. Lastly, it was contended that the child victim has substantially improved her statement while deposing before the Court as compared to her statement recorded under Section 164 Cr.P.C. and that there are material contradictions in the statements of the witnesses.

5. Learned APP for the State, on the other hand, has supported the impugned judgment. It was submitted that all the material witnesses have consistently stated about the incident.

MATERIAL WITNESSES

6. In support of its case, the prosecution examined *Sunny Kumar* (PW-1) & *Anmol Ratan* (PW-2) respectively who were the passersby. The child victim 'S' was examined as PW-6 and the mother of the child victim 'M' was examined as PW-8. To prove the age of the child victim, the prosecution examined *Gourav Batra*, Sub-Registrar, Birth & Death, City Zone, Delhi as PW-3. The MLC of the child victim and the appellant were proved by Dr. *Aishwarya Kapur* (PW-5) & Dr. *Nitin* (PW-10). W/ASI *Pushaplata*, the first Investigating Officer was examined as PW-12 and W/Inspector *Veena Kumari*, who took over the investigation on 16.03.2014 was examined as PW-11.

AGE OF THE CHILD VICTIM

7. The child victim 'S' stated her date of birth as 06.05.1997. *Gourav Batra*, Sub-Registrar, Birth and Death, City Zone, Delhi brought the birth register and proved the date of birth of the child victim as 06.05.1997.

The I.O. also seized the documents relating to the child victim's birth record from her mother vide seizure memo Ex. PW8/A.

8. During the course of arguments, learned counsel for the appellant did not dispute the age of the child victim. Accordingly, this Court concurs with the finding of the trial court that on the date of incident, the child victim 'S' was less than 18 years of age (about 16 years and 10 months) and thus, a 'child' within the meaning of Section 2(d) of the POCSO Act.

ANALYSIS

9. The child victim 'S' during her testimony stated that on 10.03.2014 at about 5:30-6:00 p.m., she was coming from her work place. When she reached the circle near a public toilet, the appellant came out from the said toilet and started following her. She changed her path but the appellant continued to follow her. He asked her to stop, but she did not. When she was standing near the circle for crossing the road, the appellant caught hold of her hand. She shouted and tried to get rid of him but he slapped her. The appellant also caressed her chest. At that moment, two persons came on a bike and caught the appellant. The appellant fought with them as well. Thereafter, the appellant was taken to the police station. She proved her complaint given to the police as Ex. PW6/A, the site plan as Ex. PW6/B and her statement recorded under Section 164 Cr.P.C. as Ex. PW6/C. The child victim correctly identified the present appellant.

In cross-examination, she stated that there was a distance of about 15-20 feet between the public toilet and the place where the appellant had caught hold of her hand. She denied the suggestion that the appellant had collided with her by accident. She again denied the suggestion that

the appellant was wearing black goggles for which reason he could not see properly and thus collided with her. She denied the suggestion that no incident had taken place on that date.

10. The independent witness, *Sunny Kumar* deposed that on 10.03.2014, he along with his friend *Anmol Ratan* was coming from Zakir Hussain College on motorcycle at around 6:00 p.m. When they reached near a *golchakkar* (roundabout), they saw the appellant committing sexual assault upon the child victim, who was crying loudly. They heard her shrieks. He saw the appellant catching hold of the victim and giving slaps to her. He also stated that the appellant's face was covered. When the witness intervened, the appellant uncovered his face and threatened to kill him and the victim. The witness saw burn marks on the face of the appellant.

In cross examination, the witness stated that the appellant also committed *dhakka-mukki* (scuffle) with him and his friend. He denied the suggestion that he had not witnessed the incident.

11. The testimony of *Anmol Ratan*, the other independent witness is cumulative to the testimony of *Sunny Kumar*.

12. So far as the appellant's presence on the spot on the date and time of the incident is concerned, it is pertinent to note that the appellant was caught at the spot by the aforementioned two independent witnesses, who also handed him over to the police. In the initial complaint itself, it was stated that the appellant had burn marks on his face. After his arrest, the appellant was medically examined and, in his MLC, the factum of him having burn marks was also noted. The appellant was also identified during the trial by the child victim as well by both the independent witnesses. In fact, during the cross examination of the child victim, the

appellant himself had given suggestions that he collided with the child victim by accident as he was wearing black goggles.

13. Coming to the first contention raised by the learned counsel for the appellant, it was submitted that the MLC placed on the record did not belong to the child victim as the signatures appearing on the MLC are different from her signatures on the other documents. It was contended that in the MLC, the signatures appear differently from what they appear in the initial complaint and in her statement recorded under Section 164 Cr.P.C.

14. After the incident, the child victim was taken to Lok Nayak Hospital, where her age and address were mentioned in the MLC. Besides taking her signatures, her thumb impression was also obtained on the said MLC. In the cross examination, no suggestion in this regard was given on behalf of the appellant either to the child victim or to the I.O. In absence of any cross examination on this aspect, the contention being meritless, is rejected. Even otherwise, a perusal of the signatures on above mentioned documents would show that the difference pointed out by the learned counsel is immaterial.

15. It was next contended that the appellant's defence was not properly appreciated by the trial court. In trial, while cross examining the child victim, it was suggested on behalf of the appellant that he accidentally collided with the child victim as he was wearing black goggles. However, in complete contrast to the above suggestion, the appellant in his statement recorded under Section 313 Cr.P.C., while answering question no. 21, stated that on the date of the incident, the child victim was sitting in his rickshaw with a boy and when he asked for a fare of Rs. 40/-, that boy gave him Rs.30/- due to which a scuffle took

place between him and that boy. The child victim approached the traffic police and thereafter, the appellant was taken to the police station. The aforesaid defence was taken by the appellant for the first time at the stage of his examination under Section 313 Cr.P.C. and was not put to any of the witnesses. The appellant has taken completely different stands at the two stages of the trial. The trial court rightly disbelieved the defence taken by the appellant.

16. Learned counsel for the appellant next contended that the child victim made improvements in her testimony and that there are material contradictions in the testimonies of the witnesses. It was contended that while *Sunny Kumar* stated that he saw that the appellant had caught hold of the child victim but on the other hand, the child victim deposed that two public persons reached the spot after 3-4 minutes and at that time, she had already freed her hand from the appellant. It was also contended that while *Sunny Kumar* stated that the traffic was slow at the place of the incident but on the other hand, the child victim stated that the vehicles were moving at a very fast speed on the circle.

17. So far as the contention regarding the contradiction with respect to the speed at which the traffic was moving is concerned, it has no merit and the same does not discredit the testimony of the child victim in any manner. The independent witness namely *Sunny Kumar*, in his cross examination, stated that the speed of their bike was slow as there was a lot of traffic and also because they were taking a turn at the roundabout. The statement with respect to speed of the traffic is relative. The perception of two individuals can be different and as such, the contention raised has no merit.

18. To appreciate the other contentions raised by the learned counsel for the appellant, it is pertinent to note that in MLC of the child victim (Ex.PW5/A), the history of assault was noted in detail. It was specifically mentioned that there was “*No history of sexual assault/trauma*”. During her medical examination at 12.15 am, it was noted as follows:

“Pt. referred from main causality for Gynae evaluation. Pt. brought by her relative and police (Geeta 2284/1). H/o Physical assault at 5.30 pm, 10/3/14, at Golchakkar near Kamla market police station. Some unknown person held her hand & slapped her...(illegible) People around her saw her and took her to police station.

No h/o any sexual assault.”

19. The only narration of the incident prior to recording of the MLC was the complaint on the basis of which the FIR was registered. A perusal of the testimony of *Anmol Ratan* would show that in his cross examination, he admitted that when he reached the police station, he along with his friend *Sunny Kumar* had drafted the complaint and handed over the same to the duty officer.

20. So far as the presence of the two independent witnesses at the spot and their witnessing the incident is concerned, it is worthwhile to note that in her testimony, the child victim stated that the two independent witnesses had reached the spot after 3-4 minutes and by that time, she had already got her hand freed from the appellant.

21. In view of the above discussion and analysis, this Court is of the view that the testimony of the child victim to the extent that the appellant had caused physical assault on her on the day of the incident, is reliable and admissible. The trial court also noted its evaluation on the competency of the child victim.

22. So far as presence of the two independent witnesses on the spot is concerned, this Court is of the opinion that although the independent witnesses reached the spot at the time of the incident and heard the cries of the child victim but whether they witnessed the entire incident is not beyond the shadow of doubt.

23. In view of the above, this Court is of the opinion that although the prosecution has been able to prove the physical assault committed by the appellant on the child victim but so far as sexual assault is concerned, the appellant is entitled to the benefit of doubt.

24. Accordingly, the appellant's conviction under Section 323 IPC is upheld and his conviction under Section 354 IPC and Section 8 of the POCSO Act is set aside.

25. As per the Nominal Roll, the appellant has already undergone a sentence of more than 4 years and 3 months (including remission) which is more than the awarded sentence including the default sentence for non-payment of fine under Section 323 IPC. Accordingly, it is directed that the appellant be immediately set free, if not wanted in any other case.

26. The appeal is allowed to the above extent. In view of the judgment passed today, the pending application seeking suspension of sentence is dismissed as infructuous.

27. A certified copy of this order be communicated to the trial court as well as to the appellant through the concerned Jail Superintendent.

(MANOJ KUMAR OHRI)
JUDGE

NOVEMBER 05, 2020

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