

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

CRL. A. 510/2020

Reserved on : 07.12.2020

Date of Decision : 14.12.2020

IN THE MATTER OF:

LAXMAN

..... Appellant

Through: **Ms. Richa Dhawan, Advocate**

Versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: **Dr. M. P. Singh, APP for State**

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

(VIA VIDEO CONFERENCING)

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of the present appeal, filed under Section 374 Cr.P.C., the appellant has assailed the judgment on conviction dated 01.11.2019 and order on sentence dated 25.11.2019 passed in Sessions Case No. 58126/2016 arising out of FIR No. 428/2013 registered under Section 10 of the POCSO Act at P.S. Shahbad Dairy, passed by the learned ASJ-06, Special Court, POCSO, North, Rohini Court, Delhi whereby the appellant was convicted for the offence punishable under Section 10 of the POCSO Act and sentenced to undergo RI for a period of 5 years

along with payment of fine of Rs.5,000/-, in default whereof, to further undergo SI for 1 month.

2. For the sake of felicity, the brief facts as noted by the Trial Court, are reproduced below :-

“The accused was chargesheeted for commission of offences of aggravated penetrated sexual assault on the victim S (identity not disclosed as S is a child victim who was aged about 6 Yrs. at the time of offence). In brief, the allegations against the accused are that on 23.08.2013, G, the mother of the victim S returned to her home in the evening and S told her that the accused had committed wrong act (penetrative sexual assault) with her (S) in the day time. G narrated the incident to her father in law B. The next day, matter was reported to the police and investigation was set into motion after registration of FIR.”

The Trial Court vide order dated 07.12.2013 had framed charge under Section 6 of the POCSO Act.

3. To prove its case, the prosecution examined 15 material witnesses. The child victim was examined as PW1. Ms. ‘G’, the mother of the child victim, was examined as PW2. Mr. ‘BS’, the grandfather of the child victim was examined as PW3. Dr. Nitika Gupta and Dr. Sidharth, who proved the MLC of the child victim, were examined as PW5 and PW12 respectively. Mr. Charanjeet Singh, MM, who proved the statement of Ms. ‘G’, recorded under Section 164 Cr.P.C., was examined as PW13. Ms. Rachna Lakhanpal, MM, who proved the statement of the child victim, recorded under Section 164 Cr.P.C., was examined as PW14. The other witnesses were official witnesses cited in relation to various steps taken during the investigation.

CONTENTIONS

4. Ms. Richa Dhawan, learned counsel for the appellant, has assailed the impugned judgment by contending:

- i) that the testimony of the child victim was vague, lacking in material particulars and uncorroborated as even though the incident was stated to have occurred in broad daylight but no independent witness was examined.
- ii) that the MLC of the child victim did not support the case of the prosecution as the concerned Doctor did not state as to whether the bleeding noticed in her medical examination was old or new.
- iii) that no blood was found on the clothes of the child victim in the Forensic examination.
- iv) that no judicial TIP was conducted and that the appellant was already shown to the child victim.
- v) that the appellant was falsely implicated on account of construction of a washroom in front of the house of the complainant.
- vi) that the prosecution did not examine the brother and grandmother of the child victim or any other independent witnesses.
- vii) that there are contradictions in the testimonies of the mother and the grandfather of the child victim on the aspect as to when the grandmother was informed about the incident.

5. Dr. M.P. Singh, learned APP for the State, on the other hand, supported the impugned judgment. He submitted that the testimony of the child victim is consistent and reliable. He also submitted that the appellant was living in front of the house of the child victim. It was also submitted that no judicial TIP was required as the appellant was already known to the child victim being her neighbour.

6. I have heard learned counsels for the parties and perused the entire material on record including the Trial Court record.

7. During investigation, Ms. 'G', mother of the child victim, stated that the age of the child victim was about 6 years. The child victim's age was also recorded as 6 years in her MLC as well as her statement recorded under Section 164 Cr.P.C. In her testimony, Ms. 'G' stated that although she did not remember the exact date of birth of the child victim but she was 6 years old at the time of the incident. During the trial, the appellant had not disputed the age of the child victim. Even during the course of arguments in the present appeal, the age of the child victim has not been disputed. Further, at the time of recording of the statement of the child victim, the Trial Court observed that the child victim was very young. The prosecution was able to prove that the age of the child victim was less than 12 years in terms of Sections 9 and 10 of the POCSO Act.

MLC

8. The child victim was initially examined by Dr. *Sidharth* in Maharishi Valmiki Hospital. He referred the child victim to a Gynecologist. He proved the MLC of the child victim as Ex. PW12/A. Later, on the same day, the child victim was examined in Dr. Baba Saheb Ambedkar Hospital. The medical examination was proved by Dr. *Nitika* as Ex. PW5/A. As per the MLC of the child victim, her internal medical examination was conducted. On local examination, her hymen was found torn. It was also mentioned that 'labia minora on left side excoriation present, slight bleeding present and painful to touch'.

FSL

9. In the FSL report, blood was not detected on the exhibits. In this regard, it is noteworthy that Ms. 'G', during her testimony, stated that she had washed the clothes of the child victim after returning from work.

MATERIAL WITNESSES

10. The statement of the child victim was recorded under Section 164 Cr.P.C. (Ex.PW14/A). She narrated the incident by stating that her urinating part was touched by “*doosre wale bhaiya*”. It was mentioned that because of her tender age, the child could not take the name of the accused. The learned Magistrate uttered four names before her i.e., *Ram, Raju, Laxman* and *Vinod*. After hearing the name of the appellant, the child victim said “yes” and said that he had pulled her underwear. The child victim also enacted the act of taking off her underwear and making her lie down.

11. The examination of the child victim was recorded during trial. She was of tender age, being aged about 6 years. She was asked some preliminary questions by the Trial Court. She was asked some leading questions by the learned prosecutor with the permission of the Court, to which, no objection was taken on behalf of the appellant. The child victim answered in affirmative gesture to the incident and on the identification of the appellant being the accused. In cross-examination, the grandfather was summoned to the Court at the request of the learned counsel for the appellant. The child victim denied by gesture the suggestion that it was her grandfather who had committed the offence. The learned defence counsel did not ask any further questions.

12. Ms. ‘G’, the mother of the child victim, in her testimony stated that her husband had already expired. She used to work as a maid in houses and her father-in-law used to sell *samosas*, etc. on a *rehri*. On the day of the incident, when she returned from work, the child victim told her that the appellant had put off her panty and made her lie on the bed. The appellant had touched his finger on her urinating part. The appellant used to live opposite to their house. She narrated the incident to her father-in-

law. She along with her father-in-law and the child victim went to the police station and lodged the complaint. She also stated that before going to the police station, she had washed the clothes of the child victim. She also stated that the child victim was constantly pointing towards the house of the appellant as the house of the assailant.

In her cross-examination, she denied the suggestion that there was any money transaction between her and the family of the appellant. She stated that her son was not attending any school and used to stay at the house. She further stated that she herself did not check the private part of the child victim after she was told about the incident. She also washed the clothes of the child victim on the day after the incident. She also denied the suggestion that the appellant was falsely implicated on account of construction of a toilet outside their *jhuggi*.

13. Mr. 'BS', the grandfather of the child victim, in his testimony, deposed that he used to work as a labourer and the brother of the child victim was also doing the same work with him. He was told about the incident by his daughter-in-law. On the next day, he along with her daughter-in-law and the child victim went to the police station to lodge a complaint. Although at about 01:30/02:00 p.m., on the day of the incident, the child victim came to him and while saying '*bhaiya bhaiya*' was pointing her fingers towards her panty but he could not understand and rather scolded her.

In his cross-examination, he denied the suggestion of any money transaction between his family and the family of the appellant. He stated that though the appellant had constructed a toilet in front of their house but he did not object to the same.

14. Const. *Sudesh*, who was examined as PW7, deposed that he took the child victim for her medical examination to Maharishi Valmiki Hospital. From there, she was referred to Dr. Baba Saheb Ambedkar Hospital.

15. The appellant's statement was recorded under Section 313 Cr.P.C. wherein, while answering to question no. 27, he stated that he did not commit sexual assault upon the child victim as on the date of the incident, he was not present at the spot and rather was on his duty. However, the appellant did not examine any defence witness in this regard.

ANALYSIS

16. In a trial involving examination of a child witness, the Trial Court is required to first record its satisfaction as to the competency of the child witness. For such purpose, the Trial Court needs to test the capacity of a child witness. It has been held in plethora of decisions that no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the Court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the Court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child

understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined. [Refer: P. Ramesh v. State reported as **2019 SCC OnLine SC 927**]

17. The primary purpose of examination is to elicit the complete evidence. To ensure that a child victim of sexual assault is not further traumatized in a Courtroom, which is an unfamiliar place for him/her, a series of reforms and guidelines have been introduced for recording their statement. In fact, guidelines have also been framed by the United Nations titled as ‘United Nations Guidelines on Justice in Matters involving Child victims and Witnesses of Crimes 2005’ which also provide for the special need, assistance and prevention of further trauma as a result of criminal proceedings.

18. Subsequently, Delhi High Court issued ‘Guidelines for recording of evidence of vulnerable witnesses in criminal matters’, which are applicable to every Criminal Court in Delhi. These guidelines define a vulnerable witness as follows:

“Vulnerable Witness – is a child who has not completed 18 years of age.”

The relevant portion of the aforesaid guidelines reads as follows:

“34. Rules of deposition to be explained to the Witnesses

The court shall explain to a vulnerable witness to listen carefully to the questions and to tell the whole truth, by speaking loudly and not to respond by shaking head in yes or no and also to specifically state that the witness does not remember where he has forgotten something and to clearly ask when the question is not understood.

A gesture by a child to explain what had happened shall be appropriately translated and recorded in the child's deposition."

19. A Co-ordinate bench of this Court, in Virender v. The State of NCT of Delhi reported as **2009 (4) JCC 2721** issued slew of guidelines in relation to recording the statement of a child witness. The relevant portion for the purpose of the present case reads as follows:

"(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record"

The guidelines were later reiterated by a Division Bench of this Court in State v. Rahul reported as **2013 SCC OnLine Del 1459**.

20. Again, a Co-ordinate bench of this Court in Hunny v. State reported as **2017 SCC OnLine Del 8833**, found the testimony of a child victim of sexual assault, aged about 5 years, admissible even though the child victim was reluctant to answer the questions and took the help of a doll in her hand to convey as to what was done by the appellant with her.

21. Before appreciating the statement of the child victim, let me recapitulate the law on the evaluation of the testimony of a child victim, which is well settled. This Court, in the case of Sudarshan Mishra v. State reported as **2020 SCC OnLine Del 314**, while relying on the earlier decisions of the Apex Court and this Court, found the testimony of the child witness to be credible and observed as follows:

"17. In Dattu Ramrao Sakhare v. State of Maharashtra reported as (1997) 5 SCC 341, the Supreme Court held that conviction on the sole evidence of the child witness is permissible, if the witness is found competent and the testimony is trustworthy. Similarly, in State of Rajasthan v. Om Prakash reported as (2002) 5 SCC 745 while reversing the decision the High Court and upholding the conviction of the appellant, the Court held:—

“13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In State of Punjab v. Gurmit Singh reported as (1996) 2 SCC 384, referring to State of Maharashtra v. Chandraprakash Kewalchand Jain reported as (1990) 1 SCC 550 this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr. Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

14. In State of H.P. v. Gian Chand reported as (2001) 6 SCC 71 Justice Lahoti speaking for the Bench observed that the court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined.”

18. Similarly, in State of H.P. v. Sanjay Kumar reported as (2017) 2 SCC 51, while relying on the testimony of a child witness to restore the conviction, the following observations were made:—

“31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”

19. Recently, this Court in *Mahinder v. State (NCT of Delhi)* reported as (2019) SCC OnLine Del 9548 held as follow: -

“It is well settled that in a case of rape, the finding of guilt can be recorded even on the basis of

uncorroborated testimony of the prosecutrix provided it is cogent and reliable. Reference in this regard is made to the decisions rendered by the Supreme Court in Vijay@Chinee v. State of Madhya Pradesh reported as (2010) 8 SCC 191 and Rajinder @ Raju v. State of H.P. reported as (2009) 16 SCC 69.””

22. In the present case, it is seen that the Trial Court, after putting questions, correctly recorded its satisfaction as to the competency of the child victim by asking few questions which the child victim answered. This Court, in view of the satisfaction recorded by the Trial Court, has no hesitation to hold that the child victim was a competent witness.

23. In the present case, the child victim was of tender age i.e., about 6 years, at the time of her examination. The Trial Court noted that the child victim gave few answers but was reluctant to give verbal answers to some of the questions put to her. During her examination in Court, on being asked as to whether anyone had touched her urinating part, the child victim nodded in yes. The appellant was brought out from the wooden partition and shown to the child victim and she was asked as to whether the appellant had touched her urinating part, to which the child victim nodded yes.

In the cross-examination, the learned counsel for the appellant took the defence that it was the grandfather of the child victim who had touched her urinating part and at his request, the grandfather was asked to come in the Court. The grandfather appeared in Court. On being asked if it was her grandfather who had touched her urinating part, the child victim gestured in negative.

24. Ms. 'G', the mother of the child victim, also stated that when she returned from her work, the child victim told her about the incident committed by the appellant.

25. The contention that no blood was detected on the clothes of the child victim in the FSL report is of no significance. In this regard, it is relevant to note that Ms. 'G' deposed that she had washed the clothes of the child victim. In these circumstances, non-detection of blood in the FSL report is of no assistance to the appellant.

26. So far as the contention raised by learned counsel for the appellant that no judicial TIP was carried out is concerned, it is relevant to note that admittedly, the appellant used to live in front of the house of the child victim. It is also on record that the child victim had initially narrated the incident by addressing the appellant as *bhaiya*. Since the appellant was already known to the child victim, there was no need to conduct any judicial TIP. Accordingly, I do not find any force in this contention raised by learned counsel for the appellant and the same is rejected.

27. The contention that the incident stated to have taken place in broad daylight, ought to have been witnessed by some person, is rejected for the reason that it would be unimaginable that any accused would commit such an incident in presence of any public person. So far as the next contention raised as to non-examination of the brother and grandmother of the child victim is concerned, the same also has no merit as neither of them had witnessed anything. The prosecution had examined the child victim's mother and grandfather. Even otherwise, it is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the Court to place credence on the statement.

[Refer: Harbeer Singh v. Sheeshpal & Ors. reported as (2016) 16 SCC 418 and Shanker & Ors. v. State of Madhya Pradesh reported as (2018) 15 SCC 725].

28. The contradictions in the testimonies of Ms. 'G' and Mr. 'BS' with respect to the timing as to when the grandfather was informed about the incident, is also of no consequence. In fact, Ms. 'G' stated that after being told about the incident by the child victim, she told the same to the grandfather. A perusal of the testimony of Mr. 'BS' would show that at about 1:30 p.m., the child victim tried to say something to him but he could not understand and only when the child victim's mother returned from work at about 5:00 p.m., she told him about the incident.

29. Although not argued but in the written submissions filed on behalf of the appellant, it was stated that the testimony of the child victim is not of sterling quality as she was not cross examined. The submission is factually incorrect as a suggestion that it was the grandfather of the child victim who had touched her urinating part, was given, but denied. The Trial Court recorded the statement of the appellant's counsel that he did not want to ask any more questions. No other contention was raised by learned counsel for the appellant.

30. As mentioned earlier hereinabove, the Trial Court had framed charge under Section 6 of the POCSO Act against the appellant but, on the basis of the statement of the child victim, convicted the appellant only under Section 10 of the POCSO Act. The Trial Court held that in her statement recorded under Section 164 Cr.P.C. as well as her statement before the Court, the child victim had only stated about touching of her urinating part and as such, the same was insufficient to draw a conclusion of penetration/insertion of any part of the appellant's

body inside the private part of the child victim. This finding has not been challenged by the State.

31. In view of the consistent statements of the child victim, the positive identification of the appellant as analyzed hereinbefore, this Court concurs with the opinion of the Trial Court that the testimony of the child victim is both reliable and admissible.

32. Consequently, the appellant's conviction and sentence awarded for the offence punishable under Section 10 of the POCSO Act, is maintained and the present appeal is dismissed.

33. A certified copy of this judgment be communicated to the Trial Court as well as to the appellant through the concerned Jail Superintendent.

(MANOJ KUMAR OHRI)
JUDGE

DECEMBER 14th, 2020
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