

\$~29

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Judgment reserved on: 21.04.2023
Judgment pronounced on: 25.05.2023

+ **CRL.A. 531/2020 & CRL.M.A. 7892/2023**

KISHORE KUMAR Appellant
Through: Mr. Prashant Mehta, Mr. Charanpreet
Singh, Advs.
versus

STATE Respondent
Through: Mr. Ajay Vikram Singh, APP
SI Ajit Singh, PS KNK Marg

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

JASMEET SINGH, (J)

1. The appellant has filed the present appeal seeking setting aside of the impugned judgment of conviction dated 03.02.2020 and order of sentence dated 20.02.2020 convicting the appellant u/s 10/12 Protection of Children from Sexual Offences Act, 2012 (herein after called 'POCSO') and section 454/506 (II) IPC in session case no. 57694/2016 titled "*State vs Kishore Kumar*."
2. By the order dated 20.02.2020, the appellant has been sentenced to undergo Rigorous Imprisonment for three years along with a fine of Rs. 2500/- for committing an offence punishable under Section 454 IPC. He was awarded similar sentences for committing the offence punishable under Section 506(II) IPC and Section 12 of the POCSO Act. In addition, he was

sentenced to rigorous imprisonment for a period of five years along with a fine of Rs 2500/- for an offence punishable under Section 10 of the POCSO Act. The sentence of the appellant was suspended during the pendency of the appeal but due to the appellant's incapacity to furnish the surety amount, he could not be released. Hence the appeal has been taken up for hearing.

3. The facts of the case are that the complainant (mother of the child victim) was not present in her house, when accused/appellant Kishore Kumar along with one another boy came to her house at H. No. - H-04/119, Sector-16, Rohini and made her son/child victim namely "HS" age about 07 years open the door of her house by threatening her son.

4. After entering the house, appellant told the victim to sit in a corner and committed unnatural sex with his companion in plain sight of the child victim. It is further alleged that after few days accused/appellant Kishore Kumar again committed the same act.

5. It is also stated the appellant exhibited his private parts and also touched private parts of the child victim.

6. Hence, the present case was registered.

7. It is submitted by the ld.counsel for the appellant that the victim's mother and Appellant are neighbours. Sometime before the incident,, the Appellant's friend's dog attacked the victim's mother and tore her clothes that were drying in her house. She had animosity against the Appellant since that day even though the friend of the Appellant had bought her new clothes. She also threatened the Appellant that she will make sure that the Appellant will not be seen in the locality.

8. Due to the same, she falsely implicated the Appellant in this false and fabricated case.

9. It is also submitted that the prosecution has failed to establish that the Appellant had any motive to commit the offence. Moreover, there are no medical / forensic documents that can corroborate the testimonies of the victim and/or Complainant and there is nothing incriminating against the Appellant in the said MLCs.

10. It is further submitted that victim was merely of 7 years of age at the time of the incident and he was tutored by the Complainant to exert vengeance upon the Appellant. As regards the testimony of the victim, it is submitted that the same is inconsistent.

11. Mr Ajay Vikram Singh, Id APP opposes the same and state states that the child victim testimony is clear and consistent and the trial court has correctly appreciated the facts and the law.

Analysis

12. I have heard learned counsel for the parties.

13. Under section 29 of the POCSO Act, there is a presumption of guilt against the accused. The prosecution is only required to lay the foundational facts which disclose the commission of offence by the accused persons. Once the same has been done, it is the accused who has to rebut the presumption of guilt.

14. In the present case, the testimony of the victim recorded by the prosecution reveals the appellant had come and threatened the victim to open the door. Thereupon the appellant committed sexual assault on the victim.

15. The victim consistently described the incident as follows: While he was alone at home, the accused arrived with another person and threatened

him to open the door. The accused stated that he would break in and kill the victim if he didn't comply. Feeling threatened, the victim opened the door. The accused then entered the bedroom and engaged in inappropriate behaviour with the person accompanying him. The victim also mentioned that the accused touched his private parts. Before leaving, the accused warned the victim not to disclose the incident to anyone, including his mother, or else he would be killed.

16. The victim's account does not appear to be tutored or fabricated, and he consistently described the incident where the accused engaged in inappropriate behaviour with another person in his presence. The victim also stated that the accused touched his private parts. The victim, who is approximately 7 years old, provided a consistent narrative, which was corroborated by his mother (PW2). She testified that her son disclosed the incident to her after seeing the accused in the area, causing her son's heart rate to increase. The accused quickly fled the scene. The mother explicitly stated that her frightened son narrated the entire incident of sexual assault to her. The fact that u/s 164 statement, the victim stated that on the second occasion the appellant did not touch the victim's private parts alone does not disprove the previous occurrence of the accused visiting the victim's house.

17. So far as abovesaid submissions made by Ld counsel for appellant are concerned, it is pertinent to mention that the alleged act of sexual assault was committed upon a victim child aged less than 7 years who has categorically stated in his statement before the Court that the accused entered the house and committed the assault, (Ganda Kaam).

18. In "*Rakesh @ Diwan v. State*" [CRL. A. 454/2020, Delhi High Court, dated 10.08.2021]2021:DHC:2415 that:

“15. Insofar as the sufficiency of the statement of child victim in convicting an accused is concerned, it has been repeatedly held that if the testimony of the child victim inspires confidence and is reliable, it is sufficient to record the conviction. In DattuRamraoSakhare and Others 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 of 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."

16. Similarly, in *State of Himachal Pradesh v. Sanjay Kumar alias Sunny* 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. The Court cannot lose sight of the fact that alleged offence was committed with a child victim of tender age who got frightened by the threats extended to him by the accused as well as by the alleged act of the accused and it is not expected that a child of such a tender age would behave like an adult by raising the alarm promptly.

20. In the present case as well the child with his vocabulary and comprehension, was able to describe the incident and had a clear picture in describable words. He at 7 years of age, is not expected nor is it possible for a child of his age to recapitulate the harrowing incidents with mathematical precision.

21. The statement of the child victim is of sterling quality. The combined evidence of the prosecution lays down the foundational facts which disclose the commission of offence and this Court finds no reason to disbelieve or discredit the statement of the child victim. Hence, the testimony inspires confidence.

22. In my opinion the inconsistencies, improvements and contradictions in the evidence of the child victim such as not knowing the name of the appellant, exact date, month or year of the incident are of a minor character and do not call into question the veracity of the prosecution's story. The basic version regarding the manner and commission of offence is constant.

23. In addition, the appellant has not entered the witness box and has not led any evidence to rebut the presumption of foundational facts laid down by prosecution. Since the appellant has not led any evidence, defence of the appellant that he has been framed for the incident where the dog of his friend tore the clothes of mother of the victim doesn't inspire my

confidence. The appellant did not produce the said friend whose dog attacked the mother of the victim, for evidence.

24. As regards the MLC report not corroborating the testimonies of the victim/complainant, I am of the opinion since the appellant is not convicted u/s 6 POCSO, and hence the same does not have a significant bearing on the case.

25. Moreover, since the testimony of the victim is clear, reliable and trustworthy, the allegation of the appellant that the victim was tutored or that appellant's partner with whom the sexual act was performed was never identified again becomes secondary.

26. The judgement of the learned Trial Court is well reasoned. The learned Trial Court has also rightly relied upon the judgements to state that the testimony of the victim alone is sufficient to prove the guilt of the accused and minor contradictions or insignificant discrepancies in the statement of a child victim should not be a ground for throwing out an otherwise reliable prosecution case.

27. In this view of the matter, I find no reason to interfere with the judgement dated 03.02.2020 and order of sentence dated 20.02.2020 convicting the appellant u/s 10/12 POCSO act and section 454/506 (II) IPC in session case no. 57694/2016 titled "*State vs Kishore Kumar.*"

28. The appeal is accordingly dismissed.

29. Copy be sent to DSLSA Member Secretary to ensure that compensation has been paid to the prosecutrix.

JASMEET SINGH, J

MAY 25, 2023