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

+ CRL.A. 1008/2019

AJAY KUMAR SAINI Appellant
Through Mr. S.B. Dandapani, Advocate.

versus

STATE Respondent
Through Ms. Neelam Sharma, APP for the
State with SI Vikas Sharma, P.S.:
Tilak Nagar

Reserved on: 20th December, 2019
Date of Decision: 06th January, 2020

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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 22nd March, 2019 and the order on sentence dated 23rd April, 2019 passed by the Additional Sessions Judge-01, West, Special Court under the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act"), Tis Hazari Courts, Delhi in Sessions Case No. 56451/2016 arising out of FIR No.1134/2014 registered with Police Station Tilak Nagar whereby the appellant-convict has been sentenced to undergo rigorous imprisonment for life with fine of Rs.50,000/- under Section 6 of POCSO Act as well as rigorous imprisonment of three years with a fine of Rs. 5,000/- under Section 506 IPC.

BRIEF FACTS OF THE CASE

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

“2. Accused Mr. Ajay Kumar Saini, has been prosecuted on the allegations that for about four years before the date of complaint i.e. 26.09.2014 in the house of the minor prosecutrix at Guru Nanak Nagar, New Delhi (name and address of the prosecutrix are mentioned in the file and are withheld to protect her identity) within the jurisdiction of Police Station Tilak Nagar, he had committed aggravated penetrative sexual assault on the prosecutrix (a minor girl of aged about 13 years, born on 04.04.2002) many times and lastly on 30.08.2014; alternatively, during aforesaid period and at aforesaid place, he had committed rape upon the prosecutrix (a minor girl of aged about 13 years, born on 04.04.2002) many times and lastly on 30.08.2014; secondly during the aforesaid period and at aforesaid place after committing the aforesaid offences, accused had threatened to kill the prosecutrix in case she disclosed the offences committed by him against her to anyone.

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5. After hearing arguments, charge for offence under section 6 of the POCSO Act alternatively under Section 376 of the IPC and under section 506 of the IPC was framed against accused Mr. Ajay Kumar Saini vide order dated 27.02.2015 by the learned predecessor of this Court to which the accused had 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 506 IPC. The conclusion of the Trial Court is reproduced hereinbelow:-

“88. It may be observed here that the accused has failed to show that he is not the person who had committed the offences of aggravated penetrative sexual assault and rape upon the minor prosecutrix, whose date of birth is 04.04.2002, and threatened her for about four years prior to the date of complaint i.e. 26.09.2014 and lastly on 30.08.2014. The accused has also failed to lead any evidence to substantiate his claim or falsify the prosecution version or show that the evidence of the prosecution witnesses is not reliable and credible.

89. The prosecutrix, by examining the Principal of the school of the prosecutrix, the prosecutrix and the Investigation Officer, whose testimonies are completely reliable and believable, has successfully proved that the accused has committed the offences of aggravated penetrative sexual assault and rape upon the minor prosecutrix for about four years prior to the date of complaint i.e. 26.09.2014 and lastly on 30.08.2014 and threatened her against disclosing about the same to her mother.

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91. Applying the above principles of law to the facts of present case, it is evident that the evidence of the prosecution, especially the prosecutrix, is reliable, believable and trustworthy and the prosecution has established the case against the accused of committing the offences of aggravated penetrative sexual assault and rape upon the minor prosecutrix, whose date of birth is 04.04.2002, and threatened her for about four years prior to the date of complaint i.e. 26.09.2014 and lastly on 30.08.2014. The facts of the case are consistent with the hypothesis of guilt of the accused.

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95. Accordingly, accused Mr. Ajay Kumar Saini is hereby convicted for having committed offences of aggravated penetrative sexual assault upon the minor prosecutrix and of extending threats to her punishable under section 6 of the POCSO Act and under section 506 of the IPC.

96. As the learned predecessor, vide order dated 27.02.2015, had framed the alternative charge under section 376 of the IPC

to the charge for the offence punishable under section 6 of the POCSO Act, no separate order is being passed regarding the conviction of the accused under section 376 of the IPC although the prosecution has successfully proved the charge of rape punishable under section 376 of the IPC also against the accused besides the charge of the offence of aggravated penetrative sexual assault punishable under section 6 of the POCSO ACT.”

ARGUMENTS ON BEHALF OF THE APPELLANT-CONVICT

4. Mr. S.B. Dandapani, learned counsel for the appellant-convict stated that initially the prosecutrix (PW-2) had made allegations against her mother in the PCR call (DD No.17) wherein she had stated that her mother was getting wrong work (*galat kaam*) done through her. He contended that the mother of the prosecutrix was a sex worker and she was letting her friends abuse the prosecutrix (PW-2) with the intention to introduce her to the flesh trade. He emphasised that in the MLC of the prosecutrix, it was mentioned that “*she was forced*” to have sexual intercourse with one of her mother’s friend. He pointed out that even in her statement recorded under Section 164 Cr.P.C., the prosecutrix (PW-2) had stated that her mother used to beat her and she had refused to live with her mother and consequently, she was taken to *Nirmal Chhaya*. He stated that since the allegations were against the mother, prosecution should have examined her and her non-examination is detrimental to the case of the prosecution.

5. He contended that the mother of the prosecutrix had falsely implicated the appellant-convict in the present case as the appellant-convict had asked her to return the amount of Rs. 40,000/- that she had borrowed from him.

6. He stated that there was no evidence, other than the statement of the Investigating Officer–SI Anju Tyagi (PW-3), that the mother of the

prosecutrix had died.

7. He also contended that the age of the prosecutrix (PW-2) had not been proved by the prosecution as no age certificate from village *panchayat* had been produced.

8. Learned counsel for the appellant-convict submitted that since the prosecutrix (PW-2) had materially improved upon her initial statements, the appellant-convict could not have been convicted on the basis of the sole testimony of the prosecutrix (PW-2) and benefit of doubt ought to have been given to the appellant-convict. He relied upon the judgment of the Supreme Court in ***Radhu vs. State of Madhya Pradesh 2007 Cri. L.J. 4704, Krishan Kumar Malik vs. State of Haryana (2011) 7 SCC 130*** and ***Narender Kumar vs. State (NCT of Delhi) AIR 2012 SC 2281***.

ARGUMENTS ON BEHALF OF THE STATE.

9. *Per contra*, Ms. Neelam Sharma, learned APP for the State contended that the prosecutrix (PW-2) had been consistent throughout and she had specifically named the appellant-convict in her statements under Sections 161 and 164 CrPC. She pointed out that, the *tehrir* (PW-2/A) as well as MLC of the prosecutrix (Ex. PW-3/B) had corroborated her testimony. The relevant portion of the English translation of the *tehrir* (PW-2/A) is reproduced hereinbelow:-

“A friend of my mother namely Ajay visits our house and has been raping me for many years. Today I rang at 1091. I got much disturbed with Ajay who would threaten me to kill. Today, I made a telephonic call. Ajay may be punished.”

10. She submitted that since the testimony of the prosecutrix (PW-2) had remained unimpeachable, the same can be relied upon. In support of her

submission, she relied upon the judgment of the Supreme Court in *Rameshwar vs. State of Rajasthan, (2000) 10 SCC 300* and *State of Punjab vs. Gurmit Singh and Others, (1996) 2 SCC 384*.

11. She contended that the age of the prosecutrix (PW-2) had been duly proved by the Principal of her school – Mr. Yogesh Sharma (PW-1), as he had produced the admission form of her school in which her date of birth was 04th April, 2002.

12. She further contended that since the mother of the prosecutrix had died, she could not be examined and the said fact had been stated by the Investigating Officer – SI Anju Tyagi (PW-3) in her testimony before the Court. She submitted that since neither of the aforesaid witnesses had been cross-examined on these issues, their testimonies remain uncontroverted.

13. Learned APP for the State submitted that in view of Sections 29 and 30 of POCSO Act, there was a presumption against the appellant-convict, which he had failed to rebut. Consequently, according to her, the conviction of the appellant-convict should be confirmed.

COURT'S REASONING

THIS COURT IS OF THE OPINION THAT THE TESTIMONY OF THE PROSECUTRIX (PW-2) HAS A RING OF TRUTH, IS CLEAR, COGENT, CONSISTENT, CREDIBLE, TRUSTWORTHY AND CORROBORATED BY THE EVIDENCE ON RECORD. FURTHER, SINCE THE PROSECUTRIX (PW-2) IN HER STATEMENT UNDER SECTION 164 CR.P.C. HAD REFUSED TO GO BACK HOME WITH HER MOTHER, IT CAN BE SAFELY INFERRED THAT SHE HAD NOT FALSELY IMPLICATED THE APPELLANT-CONVICT IN COLLUSION WITH HER MOTHER.

14. Having heard the learned counsel for the parties, this Court is of the view that it is imperative to examine the testimony of the prosecutrix (PW-2). The relevant portion of her testimony is reproduced hereinbelow:-

“At this stage the accused is shown to the witness on the screen installed in the witness room and she correctly identified the accused Ajay as friend of her mother.

Q. What wrong was done by the accused Ajay with you?

A. AJAY NE MUJHE CHHEDA THA.

Q. What else was done by accused with you?

A. ISNE MERE SAATH GALAT KAAM KIYA THA JO HUSBAND APNI WIFE KE SAATH KARTA HAI.

Q. What do you mean by Galat Kaam?

A. ISNE APNA SUSU MERE SUSU ME DALA THA.

Q. How many times, the accused raped you.

A. he raped me about 4-5 years.

Q. Do you remember as to when this accused raped you last year.

A. Accused raped me lastly on 30.08.2014 and thereafter I filed the complaint.

Q. Whether accused has done anything else with you.

A. AJAY KE MERE SAATH GALAT KAAM KARNE KE BAAD MAIN KEHTI THI ME MUMMY KO BATAYONGI YE BOLTA THA KI AGAR ME MUMMY KO BATAYONGI TO MERI MUMMY MUJHE HI MAREGI.

Q. At what place the accused had raped you.

A. AJAY MERE GHAR (TILAK NAGAR) ME HI BALATKAAR KARTA THA JAB MERI MUMMY GHAR PER NAHI HOTI THI.”

15. The aforesaid testimony of the prosecutrix is corroborated by her MLC (Ex. PW-3/B) as well as the *tehrir* (PW-2/A). It is pertinent to mention that the prosecutrix (PW-2) had not levelled any allegations against her mother or her mother's friends as contended by learned counsel for the appellant-convict but against one of her mother's friend i.e. the appellant-convict. In fact, the prosecutrix in her testimony had specifically mentioned the appellant-convict as the person who had committed rape upon her. Also, her hymen was found to be torn. The relevant portion of the MLC (Ex. PW-

3/B) is reproduced hereinbelow:-

“DEEN DAYAL UPADHYAY HOSPITAL, Hari Nagar, New Delhi-110064

*Govt. of N.C.T. OF DELHI
MEDICO LEGAL REGISTER FOR SEXUAL ASSAULT VICTIM*

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Brief description of the incident.

....As per history by victim, she was forced to have sexual intercourse with one of her mother's friend (AJAY). He used to threaten her that he will kill her repeatedly. H/o Penetration of penis present. No H/o oral and rectal penetration. No H/o use of condom. Last Intercourse happened on 30/8/14. Patient changed clothes and taken bath several times after that and had menses after that also.”

(emphasis supplied)

16. Insofar as the possibility of appellant-convict being falsely implicated on account of borrowed money is concerned, this Court finds that the prosecutrix (PW-2) had not denied that a transaction had taken place between her mother and the appellant-convict. In fact, she had deposed that her mother had returned the borrowed amount to the appellant-convict. Further, since the prosecutrix (PW-2) in her statement under Section 164 Cr.P.C. had refused to go back home with her mother, it can be safely inferred that she had not falsely implicated the appellant-convict in collusion with her mother as contended by the learned counsel for the appellant-convict. The relevant portion of her cross-examination on this aspect is reproduced hereinbelow:-

“ XXXXXX

Q. Is it correct that your mother had borrowed Rs.40000/ from this accused?

A. HAAN MERI MUMMY NE AJAY SE MERE MAMA KI SHADI MEIN RS.40000/ LIYE THE.

Q. Is it correct that accused had demanded many times to your mother for returning of Rs.40,000/-?

A. It is correct.

Q. Is it correct that your mother did not return same Rs.40,000/- to accused?

A. It is incorrect. My mother had returned same Rs.40,000/- to accused.

Q. In whose presence, your mother had returned same Rs.40,000/- to accused?

A. MERI MAA NE ACCUSED AJAY KO RS.40,000/- KUCHH KISHTON ME DIYE THE. KABHI 2,000/- OR KABHI 5,000/- DIYE THE OR EK-DO BAR MERI MAA NE MERI HAZARI ME KUCHH PAISE AJAY TO DIYE THE.

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It is wrong to suggest that my mother had not returned Rs.40,000/- to accused. It is further wrong to suggest that any quarrel had taken place between my mother & accused in view of non-returning of Rs.40,000/- to accused by my mother. It is wrong to suggest that I have filed a false complaint against the accused at the instance of my mother.”

17. Perusal of the aforesaid reveals that the prosecutrix (PW-2) was a natural and honest witness who had withstood the test of cross-examination. Consequently, this Court is of the opinion that the testimony of the prosecutrix (PW-2) has a ring of truth, is clear, cogent, consistent, credible, trustworthy and corroborated by the 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

18. It is 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 PROSECUTRIX (PW-2) WAS A MINOR AGED ABOUT TWELVE YEARS AND FOUR MONTHS ON THE DATE OF THE LAST INCIDENT I.E. 30th AUGUST, 2014. THE AGE OF THE PROSECUTRIX (PW-2) HAD BEEN ESTABLISHED BY HER SCHOOL RECORD, WHICH WAS PROVED BY THE PRINCIPAL OF HER SCHOOL – MR. YOGESH SHARMA (PW-1).

19. Further, as per the evidence on record, the age of the prosecutrix (PW-2) had been established by her school record, which was proved by the Principal of her school – Mr. Yogesh Sharma (PW-1), wherein the date of birth of the prosecutrix was mentioned to be 04th April, 2002. Since

Mr.Yogesh Sharma (PW-1) had not been cross examined on this aspect, despite being granted opportunity, his testimony cannot be challenged at this stage. Consequently, the prosecutrix (PW-2) was a minor aged about twelve years and four months on the date of the last incident i.e. 30th August, 2014.

20. Similarly, since the Investigating Officer – SI Anju Tyagi (PW-3), who had deposed in Court that the mother of the prosecutrix had died, was not cross-examined on that point, that issue also 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)

21. Consequently, this Court finds no merit in the contention of the learned counsel for the appellant-convict that since the mother of the prosecutrix was not examined, he should be given benefit of doubt.

THIS COURT IS OF THE OPINION THAT THERE IS NO EVIDENCE ON RECORD TO SUBSTANTIATE THE BALD CLAIMS MADE BY THE LEARNED COUNSEL FOR THE APPELLANT-CONVICT THAT THE MOTHER OF THE PROSECUTRIX WAS LETTING HER FRIENDS ABUSE THE PROSECUTRIX (PW-2). THE DEFENCE OF THE APPELLANT-CONVICT DOES NOT IN ANY MANNER REBUT THE PRESUMPTION ENSHRINED UNDER SECTIONS 29 & 30 OF POCSO ACT

22. This Court is also of the opinion that there is no evidence on record to substantiate the bald claims made by the learned counsel for the appellant-

convict that the mother of the prosecutrix was letting her friends abuse the prosecutrix (PW-2) with the intention to introduce her to the flesh trade. In fact, the Investigating Officer–SI Anju Tyagi (PW-3) had deposed to the contrary stating that the mother of the prosecutrix was not found to be involved in the commission of crime. The relevant portion of the testimony of Investigating Officer–SI Anju Tyagi (PW-3) on this aspect is reproduced hereinbelow:-

“Q. As per DD no.17PP, the information was that the mother of the prosecutrix abetted her for committing wrong acts. (prosecutrix Ms. X aged 13 years jiski ummy usse galat kaam karati hai). What investigation has been conducted by you on this aspect?

Ans. I conducted local inquiry and it was not revealed that the mother of the prosecutrix is involved in commission of the offence. Further, the prosecutrix has not levelled any allegation against her mother regarding her involvement in the offence in a complaint Ex.PW2/A and during her statement recorded u/s 164 Cr.PC (Ex.PW2/D).....”

(emphasis supplied)

23. In any event, even if the contention of the learned counsel for appellant-convict was to be believed, it would not exonerate the appellant-convict as the prosecutrix (PW-2) had specifically named the appellant-convict to be the person who had raped her on numerous occasions in the previous four years. Since there were multiple incidents dating back four years from the date of the last incident, it is proved that the prosecutrix (PW-2) was aged about eight years when the appellant-convict had first committed aggravated penetrative sexual assault upon her. Further, the defence of the appellant-convict does not in any manner rebut the presumption enshrined under Sections 29 & 30 of POCSO Act.

CONCLUSION

24. In view of the aforesaid, this Court finds no reason to interfere 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 06, 2020

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