

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

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Judgment delivered on: 05th March, 2020

+ CRL.A. 1044/2019

STATE (Govt. of NCT of Delhi)

...Appellant

Through: Mr. Ashish Dutta, APP.

versus

ARIF

...Respondent

Through: Mr. Harsh Prabhakar, Amicus
Curiae with Mr. Dhruv
Chaudhary, Advocates.

CORAM:

JUSTICE SIDDHARTH MRIDUL

JUSTICE I.S.MEHTA

JUDGEMENT

I.S. Mehta, J.

1. Instant appeal is arising from the Judgment dated 02.08.2018 passed by the learned Additional Sessions Judge, (North-West)-01 Special Court, POCSO, Rohini, District Courts, Delhi in Sessions Case No. 124/15 arising out of FIR No. 538/15 registered under Sections 354A/354D/376/384 IPC and Section 4 POCSO Act at PS Sultan Puri, Delhi whereby the respondent/accused was acquitted from the charges leveled against him.

2. Brief facts stated are that on 08.06.2015, PW6 W/ASI Sajni received information through wireless from SHO PS Sultan Puri of sexual assault on minor girl, on receiving said information, PW6

alongwith NGO Counselor reached to PS Sultan Puri and made preliminary inquiry from PW3 prosecutrix 'E' and her mother PW10. Thereafter, PW6 got prosecutrix 'E' counseled and her statement (*rukka*) Ex.PW3/A was got recorded and W/ASI Sajni sent prosecutrix to SGM Hospital alongwith her mother and Lady Ct. Manju for conducting her medical examination vide MLC Ex.PW3/B and thereafter FIR No. 538/15 was got registered under Sections 354A/354D/376/384 IPC and Section 4 POCSO Act at PS Sultan Puri, Delhi on basis of said statement. Statement Ex.PW3/A is reproduced below :

She stated that she is 12th pass and is living with her parents on aforesaid address. She knows one boy Arif who works at lathe mill shop in front of their house. He follows her while she goes up and down to school. She overlooked many times but Arif kept on stalking her. She did not narrate her parents due to fear of consequences. Accused Arif took her phone number forcefully and used to call her from Mobile No. 9015124453. Accused Arif used to threaten her saying he has taken her photograph and he will defame her if she will not speak with him. The accused Arif asked her to fetch money, gold earring and gold ring, which she gave on 24.12.2014 when she was on her way to tuition, Arif followed her and proposed a date with him to which she refused and went to her tuition. On her way back to home, Arif met her just couple of feet away from her house and told her to accompany him on motorcycle under the fear. However, she does not know the number of Motorcycle. The accused Arif took her to Japanese Park and started teasing her. Accused then started molesting her to which she objected, despite her objection, accused Arif groped her and opened her *salwar* and forcefully fingered into her private parts. Accused Arif till date follows her and

tells her to meet at a secluded place as he intends to make physical relation with her. On 08.06.2015, her mother Suman opened her almirah and found missing some money and gold ornaments. Her mother inquired whereabouts of missing money and gold ornaments from her. She under the fear disclosed everything to her mother. Her parents brought her to PS Sultan Puri. Legal action be taken against accused Arif, missing money and gold ornaments be returned to her. She made statement in presence of her mother voluntarily. Statement is read over to her, same is correct.

Sd/-

3. After registration of said FIR, on same day i.e. 08.06.2015, investigation was handed over to W/SI Omwati PW7 who, on the next day i.e. 09.06.2015, arrested the accused Arif vide Arrest Memo Ex.PW3/D, his personal search was got conducted vide personal search memo Ex.PW3/E and his medical examination was got done vide MLC Ex. PW4/A. Thereafter, accused vide his disclosure statement Ex.PW7/A pointed out place in Japanese Park vide pointing out memo Ex.PW7/B. Accused took the police team to Muthoot Fincorp Ltd. at Budh Vihar and got recovered gold articles vide pointing out memo Ex.PW7/C. PW2 Sh. Suraj Sharma, manager of said Muthoot Fincorp Ltd. branch was got examined under Section 161 Cr.P.C. and produced documents of pledge of said gold articles i.e. one Gold Jhumki of 9.1 gms (Ex.P1) and one Gold Ring of 2.7 gms (Ex.P2) in lieu of which accused Arif had taken Rs.20,000/- from the branch same were seized vide Seizure Memo Ex.PW7/D. Said Gold articles were seized vide Seizure Memo Ex.PW7/E. On 11.06.2015 PW7 got statement of prosecutrix 'E' recorded under

Section 164 Cr.P.C. vide application Ex.PW1/A. Thereafter, on same day site plan Ex.PW3/C of the place of incident was made at instance of prosecutrix 'E'.

4. Thereafter on 25.07.2015 TIP of the said gold articles was conducted in Court of Ld. MM Sushil Anuj Tyagi vide TIP proceedings Ex.PW8/B, wherein prosecutrix 'E' was unable to identify the pair of Gold Jhumki Ex.P1. Thereafter, Section 384 IPC was added to the FIR while Section 406 IPC was removed.

5. After recording statements of the witnesses and completion of the investigation chargesheet under Section 354A/354D/376/384/506 IPC and Section 4 POCSO was filed.

6. Charges for commission of offence 12 POCSO Act or in the alternate 354A/354D IPC, 4 POCSO Act or in the alternate 376(2) IPC and 506/383 IPC were framed against the accused on 15.12.2015 to which accused pleaded not guilty and claimed trial.

7. In order to prove its case, prosecution has examined 10 witnesses namely Ms. Susheel Bala Dagar, Ld. M.M. (PW1), Sh. Suraj Sharma (PW2), Prosecutrix 'E' (PW3), Dr. Rohit Kumar (PW4), Dr. Akanksha Setya (PW5), W/ASI Sajni (PW6), W/SI Omwati (PW7), Sh. Sushil Anuj Tyagi (PW8), Sh. Sanjay Solanki (PW9) and Smt. Suman Lata (PW10) after which the prosecution evidence was closed.

8. Thereafter, statement of accused was recorded under Section 313 Cr.P.C. Thereafter, defence evidence was closed.

9. After concluding arguments, Court below acquitted the accused from charges framed against him vide Judgment dated 02.08.2018 in

Sessions Case No. 124/15. Aggrieved from impugned Judgment State preferred present appeal.

10. Ld. APP on behalf of State has submitted that Court below misread the evidence on record and reached to the wrong conclusion. Ld. APP pointed out that statement of prosecutrix 'E' recorded under Section 164 Cr.P.C. and statement of prosecutrix 'E' recorded before the Trial Court is consistent with her Statement Ex.PW3/A.

11. Ld. APP further submitted that statement of prosecutrix 'E' PW3 is sufficient to bring home conviction against the present accused/respondent. The Ld. APP further submitted that statement of prosecutrix 'E' PW3 is corroborated with statement of her parents PW9 and PW10 and other independent witnesses. Ld. APP further submitted impugned Judgment deserves to be set aside and accused be convicted of the charge framed against him.

12. Per contra, Ld. Counsel for accused has submitted that statement of the prosecutrix does not inspire confidence, the statement of the prosecutrix suffers from material contradiction and the manner of happening of the incident. He further submits that Court below has rightly acquitted the accused from all the charges and present appeal of the State be dismissed.

13. The statement of prosecutrix 'E' in trial Court is as under:-

she stated that she knew accused Arif, the accused used to follow her on her way to school in year 2014. She used to avoid him but the accused did not stop following her and even started harassing and commenting on her person for more than 3-4 months. Due to this fear she did not disclose this fact to any of the family members. Once she was stopped by the accused and she has given her

residence mobile phone number on being threatened by the accused. Thereon he started calling her on the said mobile number. Initially she did not respond to his calls but, after accused threatened her to defame her, she started talking to him on his mobile phone.

One day, the accused threatened her to such an extent that she handed over to the accused a pair of gold jhumki and gold ring alongwith cash Rs. 9,500/-.

On 24.12.2014 she was going to attend her tuition when accused followed her and asked her to accompany him for roaming. She had refused to go with him and attended her tuition class. After attending her tuition when she came out at 4 PM, accused Arif met her on the way and again asked to accompany him on the motorcycle, she again refused to go with him but accused threatened to kidnap her brother, due to the fear she went with accused and he took her to "Japinees Park". In the Japanese Park accused made her write 2-3 letters and accused started misbehaving with her and when she protested accused pressed her breast. Thereafter accused opened string of her salwar and put his finger in her private parts. In the meanwhile the accused received a phone call and she ran away from there. Accused wanted to meet her in a lonely place and he wanted to establish physical relations with her. She did not disclose about this incident to her family members due to fear.

On 08.06.2015 her parents had to go to the native village and her mother had opened the almirah and found her jewelry and cash missing from the almirah, she made inquiry from prosecutrix 'E' and then only prosecutrix disclosed about the incident and all the facts to her parents, who then took prosecutrix to the PS. In the PS one counselor was called by the police, who had counseled prosecutrix and thereafter her statement was recorded by the police in presence of her mother. Thereafter, the police had taken her to the hospital where her medical examination was conducted vide MLC Ex.PW3/B, and her statement under Section 164 Cr.P.C.

Ex.PW1/B was recorded. She was taken to the place of incident by IO to the Japanese Park and the site plan Ex.PW3/C was prepared at her instance. The accused was arrested by police on her identification vide Arrest Memo Ex.PW3/D and his personal search was carried out vide Personal Search Memo vide. Ex.PW3/E.

14. Although, testimony of the prosecutrix is usually sufficient to prove guilt of the accused in sexual offence cases. However, in the present case the statement of PW3 prosecutrix 'E' does not inspire confidence on account of delay in lodging the FIR, FIR No.538/15, material contradiction and the manner in which the incident happened. It is an admitted fact coming on record that the incident took place on 24.12.2014 whereas the FIR was registered on the basis of rukka Ex.PW3/A on 08.06.2015. Admittedly, prosecutrix 'E' met with her parents PW9 and PW10 at the parental home and she remained there in the company of her parents.

15. As per PW9, father of the prosecutrix 'E', he stated that prosecutrix had come late to the house on 24.12.2014 and on asking reason of reaching late at home, prosecutrix 'E' got perplexed and narrated the incident to him which is reproduced as under as:-

"On 24.12.2014 my daughter had reached home at about 5:15-5:30 p.m. My wife had asked from her about the reason of her late coming. Again said, on that day me and my wife both had asked about the reason of late coming of my daughter on that day. At that time she was very perplexed and when on the asking of my wife she had told her that the accused had taken he(r) to Japinees Park. Again said this fact was told by my daughter to my wife of 08.06.2015."

16. Since, the incident took place on 24.12.2014 and parents of the prosecutrix did not lodge the complaint with the police station soon after the incident despite having knowledge of the incident being taken place and later coming with the *rukka* dated 08.06.2015 under the garb of non disclosure by prosecutrix 'E' under fear is not convincing.

17. As per the prosecution version, prosecutrix 'E' was subjected to sexual assault by accused Arif whereas the prosecutrix herself narrated the place of the incident as Avantika Park to PW5 Dr. Akanksha Setya the Doctor PW5 who examined her on 08.06.2014 at 10:25 PM vide MLC Ex. PW3/B.

The version of the prosecutrix 'E' that she could not narrate the incident to her parents due to fear of the accused too does not seem to be correct.

18. The statement of the prosecutrix 'E' to the effect that the accused Arif threatened her to such an extent that she had handed over to him one pair of gold ear rings (jhumki), one gold ring and Rs. 9500/-cash too is inconsequential in presence of the letters written by the prosecutrix 'E' to the accused i.e. Ex.PW3/DX-1(Colly).

19. It is an admitted fact emerging on the record that the prosecutrix knew accused Arif for about a year, the incident took place towards end of year 2014 i.e. 24.12.2014. Prosecutrix 'E' never alleges against the accused of extending threat through a weapon i.e. knife, pistol, etc. On the date of the incident too i.e. 24.12.2014 the prosecutrix 'E' stated that when she was in the company of accused Arif, accused received a phone call at place of the incident i.e. Japanese Park and she ran away from the spot. But during the cross-examination she has

clarified that she did not raise alarm while return journey on motorcycle with accused Arif, extract of same is reproduced:-

“ I did not raise alarm even at the time of return journey while on motorcycle”

20. Statement of prosecutrix ‘E’ under Section 164 Cr.P.C., Ex. PW1/B was recorded on 11.06.2015 and the same is proved by Ms. Susheel Bala Daggar, Ld. MM, Rohini, Delhi. As per the statement, there is no mention of threat extended to prosecutrix by accused on point of knife. The statement of the prosecutrix under Section 164 Cr.P.C., also she does not disclose the writing of letters under the threat of pointing of knife by the accused.

The prosecutrix ‘E’ in her statement before the Court stated that she has accompanied accused on motorcycle at Japanese Park at point of knife and she was made to write 2-3 letters on the point of knife is an improvement made with the passage of the time to justify her position and conduct as the letters so written were already in possession of the accused and she was having the knowledge of the same. The contents of letters Ex.PW3/DX-1(Colly) indicates the development of contemporaneous natural relationship between the two individuals and element of extending any kind of threat or fear is missing.

21. The prosecutrix 'E' made visible improvement in her statement before Court which she did not disclosed in her *rukka* Ex.PW3/A and statement under Section 164 Cr.P.C. Ex.PW1/B pertaining to threat extended by the accused. The prosecutrix 'E' refused her internal medical examination vide MLC Ex.PW3/B, consequentially, nothing

incriminating is emerging from MLC Ex.PW3/B. The prosecution neither able to explain the delay in registration of FIR Ex.PW6/B of more than 5 months from date of the incident satisfactorily in the instant case nor could establish the place of the incident beyond reasonable doubt i.e. Japanese Park or Avantika Park as both the parks are located at different places. The letters Ex.PW3/DX-1 (Colly) indicates the development of contemporaneous natural relationship between the two individuals which compels us to disbelieve the version of the prosecution of accused extending any kind of threat to the prosecutrix 'E' on date of the incident or accused extending any kind of the threat in demand of cash or jewellery. Thus, we are in a complete agreement with the finding reached by the Trial Court to be correct and as such there is no other material point to take the contrary view. The reliance is placed on *Union of India v. Bal Mukund & Ors.* (2009) 12 SCC 161.

22. As discussed above we find no merit in contention of Ld. APP, consequentially, appeal of the State is accordingly dismissed. The trial court record be sent back alongwith one copy of this Judgment.

No order as to costs.

I.S.MEHTA, J.

SIDDHARTH MRIDUL, J.

MARCH 05, 2019