

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 18.11.2020

+ **CRL. A. 674/2017 & CRL. M. (BAIL) 7993/2020**

VIKAS

.....Appellant

Versus

STATE NCT OF DELHI

..... Respondent

Advocates who appeared in this case:

For the Appellant :Mr Azhar Qayum, Advocate.

For the Respondent :Ms Meenakshi Dahiya, APP for State.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant impugns a judgment dated 25.02.2017, whereby he was convicted of committing an offence punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') – for committing aggravated penetrative sexual assault. He also impugns an order dated 25.03.2017, whereby he was sentenced to rigorous imprisonment for a period of ten years along with a fine of ₹20,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of six months.

2. It is the prosecution's case that on 30.09.2013 at about 07:00 a.m., the appellant had met the victim, a girl aged ten years at the material time (hereinafter referred to as 'the prosecutrix'). She had

gone to the ration shop to purchase rusk. The appellant was employed as a mason and was residing in a room near the prosecutrix's home. He was acquainted with the prosecutrix for about one year and six months prior to that date. The appellant asked her to accompany him, however, she refused. The appellant, thereafter, threatened her and she got scared and proceeded along with him. He took her to Shashi Garden and locked her inside a room. He came back to the room at about 12:00 midnight and forcibly removed her clothes and raped her (he inserted his penis in her vagina). He forced himself on her twice in the intervening night of 30.09.2013 and 01.10.2013.

3. The appellant left the room next day but locked the prosecutrix inside. He returned at about 08:00 p.m. and offered her food, which she refused. During the night, he once again raped her. On the day thereafter, he shifted her to another room nearby. And thereafter, at about 03:00 pm, he put the prosecutrix on a rickshaw and gave money to the rickshaw puller with the given direction to drop her near Ashok Nagar Metro Station. The rickshaw puller dropped her there and she returned back home on her own on 02.10.2013.

4. The mother of the prosecutrix had filed a report on 01.10.2013 with PS New Ashok Nagar. She had said that her daughter (the prosecutrix), who was about ten years old, had left home at about 07:30 a.m. to go to a nearby shop to buy rusk but had not returned. She stated that she and her family members had tried to find her but their search was in vain. She apprehended that her daughter had been lured by some person and was abducted. On the basis of the said

information, an FIR was registered – FIR bearing No. 484, under Section 363 of the Indian Penal Code, 1860 (hereinafter ‘IPC’) with PS New Ashok Nagar (Ex.PW1/A).

5. The prosecution established its case by examining twelve witnesses.

6. ASI Zahid Hussain was examined as PW1. He testified that on 01.10.2013, he was working as a Duty Officer at PS New Ashok Nagar. On that day at about 05:30 a.m., Ct. Dinesh had produced a *rukka* sent by SI Mahesh and on the basis of the same, he had got the FIR registered. SI Mahesh was examined as PW8. He had testified that on 01.10.2013, he was posted at PS New Ashok Nagar and the complainant (the mother of the prosecutrix who was examined as PW2) had come to the police station and made a complaint stating that her daughter, aged 10 years, was missing since 30.09.2013. He stated that he recorded the complaint (Ex.PW2/A), prepared a *rukka* (Ex.PW8/A) and handed it over to the Duty Officer for registration of the FIR. He stated that he searched for the missing girl but could not find any clue. He testified that on 02.10.2013, he received information from the family of the prosecutrix that she had returned home. On receipt of the said information, he went to the house of the prosecutrix and took the prosecutrix and her mother to LBS Hospital. SI Meenakshi was also called there. The doctor had examined the prosecutrix and handed over the exhibits to SI Meenakshi. On directions of the SHO, further investigation was handed over to her.

7. The mother of the prosecutrix was examined as PW2. She stated that the age of the prosecutrix was about ten years at the material time. She stated that on 30.09.2013, at about 07:30 a.m., she was not present at her home. However, her two daughters including the prosecutrix were at her home. She stated that she worked as a maid servant in the locality and she had gone to do her work. When she returned home, she came to know that the prosecutrix had gone to purchase a cake from a nearby shop but had not returned home. She testified that they tried to trace the victim at her school and other places but she could not be found. Therefore, she reported the matter to the police on the next day.

8. PW2 further testified that the prosecutrix had returned home on 02.10.2013 in the morning and she had informed her that Vikas (the appellant herein) had come to the shop where she had gone to purchase a cake and had forcibly taken her in a car and had confined her in his room for two days and had raped her. She testified that she had taken the prosecutrix to the police station and had narrated the said facts to the police officials. The police officials had taken her to LBS Hospital and she had also accompanied them. The prosecutrix was medically examined and she had given her consent for the same. She also identified her signatures on the MLC.

9. The case of the prosecution largely rests on the testimony of the prosecutrix in addition to medical and forensic evidence. The prosecutrix was examined as PW3. She stated that on 30.09.2013, at about 07:00 a.m., she was going to the ration shop to purchase cake

(rusk). While she was on the way, the accused (the appellant herein) met her and asked her to come with him. He threatened her that if she did not, he would slap her. She testified that the accused was working as a mason and was residing in a room near their house. She also stated that he was known to her for the last one and a half years. She stated that she got scared and went with him. He took her to Shashi Garden and he put her in a room and locked the same from outside. She stated that at about 08:00 p.m. in the evening, he brought her food but she refused to consume it. She testified that she went to sleep but at about 12:00 midnight, the appellant had forcibly removed her *pajami* and forced himself on her (*jabardasti*). The court asked her to explain what she meant by *jabardasti*. She explained that the accused had put his penis inside her vagina (*usne apni susu wali cheez meri susu wali jagah me dal diya*). She further testified that he did so twice. She felt pain and she cried. She stated that on the next morning, he left the room after locking it from outside and returned back at about 08:00 p.m. He once again asked her to take some food but she refused. She alleged that he raped her once again at night. On the next day, the appellant left the room and took her to another room located nearby. She stated that at about 03:00 p.m., one Jhuman, who was a friend of the accused, called him and informed him that his friends Raja and Jhuman had been caught by the police. She stated that accused put her in a rickshaw, gave money to the rickshaw puller and directed him to drop her at New Ashok Nagar Metro Station. She stated that she went to her house on her own. She also reiterated that the police had taken her to LBS Hospital, where her medical examination was conducted.

She stated that thereafter, she was produced before a Judge. She identified her signatures on her statement recorded under Section 164 of the Cr.PC (Ex.PW3/A).

10. The statement of the prosecutrix under Section 164 of the Cr.PC was recorded on 03.10.2013. Her testimony as noted above is consistent with her statement recorded under Section 164 of the Cr.PC in all material aspects. She was extensively cross-examined. It was suggested that she was well acquainted with the appellant and she used to call him on his mobile phone from the mobile phone of her brother. It was suggested that she had developed friendship with the appellant and had asked him to marry her. The appellant had refused and had told her that he would marry her, if both the families agree. It was suggested that she had implicated him in a false case as he had refused to marry her. The prosecutrix had responded to all the questions that were put to her. She had also further explained that she was raped on the floor. She had bled after the incident and the blood had stained her clothes. She also stated in her cross-examination that she had offered her resistance and tried to push him away. She also stated that the appellant had placed one of his hands on her mouth, when he had taken her to the rickshaw. She stated that some persons had noticed them but did not react. In her cross-examination, she also described the vehicle in which she was taken (a white coloured van).

11. This Court has also examined the testimony of the prosecutrix and does not find any reason to doubt the same. Her responses to the questions put to her in her cross-examination are unambiguous.

12. SI Meenakshi was examined as PW12. She testified that she was informed by SI Mahesh Singh that the victim (the prosecutrix) had been recovered and he had called upon her to come to LBS Hospital. She stated that she had proceeded to LBS Hospital and the investigation in the case was assigned to her on 02.10.2013. She testified that the parents of the prosecutrix and the prosecutrix were present in the hospital along with SI Mahesh. She stated that she inquired from the prosecutrix about the incident and recorded her statement under Section 161 of the Cr.PC. The prosecutrix was medically examined in the hospital. She stated that she had seized the exhibits of the victim collected during her medical examination and had prepared the seizure memo (Ex.PW9/A). She identified her signatures on the same. She had stated that she had searched for the accused and during the course of investigation, they had gone to Shashi Garden to the house of the accused. The police officials were accompanied by the prosecutrix and the accused was apprehended on identification by the prosecutrix. She testified that after identifying the accused, she had arrested him and prepared the arrest memo (Ex.PW12/A). She identified her signatures on the same. She further stated that she had got the accused medically examined through Ct. Mohit and he had handed over the exhibits collected during his medical examination. She stated that she had seized the same and

prepared the seizure memo (Ex.PW12/C). She identified her signatures on the same. She further testified that she had got the statement of the victim recorded under Section 164 of the Cr.PC and had also obtained a copy of the same.

13. PW12 further testified that the exhibits collected during the medical examination of the victim as well as the accused were sent to FSL. During the course of examination, she had also collected the proof of age of the prosecutrix from the Principal of Nagar Nigam Girls School. She had stated after completion of the investigation, she had filed the challan. The FSL Report (Ex.PW12/B) was received and filed subsequently.

14. Dr. Maneesha Singh, SR. Obs. Gynae, LBS Hospital, Delhi was examined as PW7. She testified that she had examined the prosecutrix. She had conducted the local examination and had found that her *“hymen was ruptured with recent tears, not bleeding, introitus admitting one finger easily.”* but there was no sign of external injury. She was cross-examined. She denied the suggestion that introitus admitting of one finger easily meant that the prosecutrix was habitual of sexual intercourse. The MLC (Ex.PW7/A) also records that the *“hymen was ruptured with recent tears, not bleeding, introitus admitting one finger easily”*.

15. The MLC (Ex.PW7/A) also records that the samples of the prosecutrix were taken. PW7 had also testified that she had taken samples as per protocol and handed over the same to the police.

16. The prosecution had also examined HC Harender Singh as PW10. He had testified that he was working as MHC(M) on 08.10.2013 and he had handed over the samples (four *pullandas*) vide a road certificate No.120/21/13 sealed with the seal of LBS Hospital, along with two sample seals to Ct. Vijay Pratap. He had also produced the Register No.21 (Ex.PW10/A). Ct. Vijay Pratap was examined as PW6 and he had testified that on 08.10.2013, he had taken four sealed *pullandas* and two sample seals of LBS Hospital from the concerned MHC(M) along with a road certificate and deposited it with FSL Rohini. On his returning back, he had returned the copy of the road certificate as well as the acknowledgment from FSL. Both, PW6 as well as PW10, testified that the samples were not tampered with while they were in their possession.

17. The FSL Report (PW12/B) records that DNA was isolated from the source of exhibits '1j' ("Step 9 cervical mucus collection [C]" of the prosecutrix), '1p1' (blood sample of the prosecutrix) and exhibit '3' (blood in gauze of the accused) and the alleles from the source of exhibit '1l' (sample of the victim) was accounted in the alleles from the source of exhibit '3' (blood in gauze of the accused). The conclusion of the analysis, as set out in the FSL Report is reproduced below:

“The DNA fingerprinting performed on the source of exhibit '1j' (sample of victim) & exhibit '3' (Blood in gauze of accused) is sufficient to conclude that the biological stains i.e. seminal stains present on the source of exhibit '1j' (sample of victim) and blood stains on the

source of exhibit '3' (Blood in gauze of accused) are from the same source."

18. There is some controversy as to the age of the prosecutrix inasmuch as in her testimony, she was described as aged fourteen years; but in the FIR, her age was stated to be about ten years. Further, the mother of the prosecutrix (PW2) had also testified that the prosecutrix was aged about ten years. The prosecution had examined Sh. Omvir, Attendant, MCD, Delhi Nagar Nigam Prathmik Balika Vidyalaya, Ward No.212, Delhi as PW4. He had produced the school record, which recorded the date of the birth of the prosecutrix as 06.09.2003. He produced the Admission Register (Ex.PW4/A) and had also identified the signature of the Principal on the same. He testified that as per the school records, the prosecutrix was admitted to the school, in first standard, on 26.04.2011. In view of the above, the Trial Court had, thus, concluded that the age of the prosecutrix, at the material time, was about ten years.

19. This Court has examined the testimony of various witnesses and finds that there is no inconsistency in regard to any material aspects. There are certain minor inconsistencies, such as in her statement recorded under Section 164 of the Cr.PC (Ex.PW3/A), the prosecutrix had stated that she had gone to the ration shop at 07.30 a.m. in the morning for purchasing rations. However, in her testimony, she stated that she had gone to the ration shop at 7.00 a.m. to purchase cake/rusk. In her statement under Section 154 of the Cr.PC, the prosecutrix had stated that at about 4 o'clock, one Jhuman had called and told Vikas

that Raja and Jhuman had been caught by the police and that he should leave her and the accused had left her and put her in a rickshaw. Although she did testify that Jhuman had called the accused at about 03:00 p.m. and informed him that his friends Raja and Jhuman had been caught by the police, she did not state that Jhuman had asked the accused to let her go.

20. This Court is of the view that such inconsistencies are not material. A plain reading of the statement of the prosecutrix recorded under Section 164 of the Cr.PC indicates that her narration of the events are unambiguous. And, this Court finds no reason to doubt the testimony of the prosecutrix or not to consider her as a reliable witness. Furthermore, her testimony is also consistent with the testimony of her mother (PW2). PW2 had also testified that on returning home, the prosecutrix had informed her that the accused had come to the shop, where she had gone to purchase cake and had forcibly taken her in a car and had confined her in his room for two days and had raped her.

21. The allegations made against the accused are also not belied by the MLC of the prosecutrix. On the contrary, the MLC does indicate that the hymen of the prosecutrix had recent tears. Although, the hymen being torn or intact is not conclusive of whether the victim has been subjected to a penetrative assault or not; it does not in any manner raise any doubt as to the case set up by the prosecution.

22. The evidence obtaining in this case leaves little room for entertaining any doubt that the appellant had not committed the crime, for which he was convicted. The forensic evidence clearly establishes that the DNA of the accused was generated from the sample (cervical mucus) collected from the prosecutrix. And, this establishes that the appellant had established physical relations with the prosecutrix. Considering that the prosecutrix is a minor, there is no doubt that the appellant had committed the offence for which he has been convicted.

23. In view of the above, the present appeal is unmerited and is, accordingly, dismissed. The pending application is also disposed of.

NOVEMBER 18, 2020
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VIBHU BAKHRU, J

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