

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

CRL.A. 265/2020

Reserved on : 02.08.2021

Date of Decision : 15.09.2021

IN THE MATTER OF:

MOHAN KUMAR

..... Appellant

Through: Mr. Sharad Malhotra, Advocate
(DHCLSC).

Versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Hirein Sharma, APP for State.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The present appeal has been filed under Section 374(2) Cr.P.C. on behalf of the appellant against the judgment of conviction dated 19.04.2018 and the order on sentence dated 24.04.2018 passed by the learned Addl. Sessions Judge-01/Special Judge, POCSO Act, North District, Rohini Courts, Delhi in SC No. 59140/2016 arising out of FIR No. 245/2016 registered under Sections 354/354A IPC and Sections 8/10 of the POCSO Act at Police Station Adarsh Nagar, Delhi, whereby the appellant was convicted for the offences punishable under Section 354 IPC and Section 10 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for a period of 05 years alongwith fine of

Rs.20,000/- in default whereof to undergo Simple Imprisonment for a period of 30 days for the offence punishable under Section 10 of the POCSO Act.

2. The brief facts, as noted by the Trial Court, are that on 25.05.2016, the child victim as well as both her parents were at home, when at about 9 a.m., the mother of the child victim sent her to the market, to bring some articles. On her way back, while the child victim was climbing the stairs to her house, the appellant came there and caught hold of her hand. He pulled her towards the corner and started kissing her and removing her underwear, upon which she started shouting. The child victim's younger brother saw her, and in the meantime, the mother of the child victim also arrived at the spot. She apprehended the appellant and by that time, the child victim's father also reached the spot and called the police telephonically.

3. The charge sheet was filed and the Trial Court framed charge against the appellant for the offences punishable under Sections 354/354A IPC and Section 10 of the POCSO Act, to which he pled not guilty and claimed trial.

4. To prove its case in the trial, the prosecution examined a total of 9 witnesses. The child victim was examined as PW-1. The mother of the child victim, Ms. 'L', was examined as PW-2 and the father of the child victim, Mr. 'A', was examined as PW-8. The age of the child victim was proved by PW-3, a teacher of the school where she had studied. *ASI Ram Avtar*, the Investigating Officer of the case, was examined as PW-9. The child victim was medically examined on the day of the incident and an MLC prepared, as per which no external injury was visible. The mother of the child victim had refused the internal examination of the child victim. As there were no allegations of penetrative sexual assault having been committed upon the child victim, no samples were collected and sent to the FSL.

5. I have heard learned counsels for the parties and gone through the Trial Court Record. Learned counsel for the appellant submitted that though as per the Nominal Roll placed on record, the appellant has served the entire sentence awarded to him, he is pressing the appeal on merits.

AGE OF THE CHILD VICTIM

6. On the date of the incident, i.e., 25.05.2016, the child victim was less than 8 years of age, as her date of birth is 28.10.2008. The prosecution has proved the age of the child victim through PW-3 who was a teacher at the school where the child victim had studied. She brought on record the admission and withdrawal register maintained in the school (Ex.PW-3/A), a copy of the admission form (Ex.PW-3/B) and the affidavit (Ex.PW-3/C) sworn and given by the parents of the child victim at the time of her admission. She also exhibited the certificate (Ex.PW-3/D) issued by the school Principal certifying the child victim's date of birth as per the school records. Further, during her in-Court examination, the child victim's age was noted as 10 years. The appellant has not disputed the age of the child victim in the trial or even in the present appeal. Consequently, this Court concurs with the finding of the Trial Court that the child victim on the date of the incident was about 8 years old and thus a 'child' within the meaning of Section 2(d) of the POCSO Act.

ANALYSIS

7. The child victim during her examination stated that the alleged incident occurred at about 9-9.30 a.m. She had gone to buy some vegetables. When she reached her house back, the appellant who was standing at the ground floor pulled her in a corner and started kissing her. He also started to remove her underwear. In the meanwhile, her younger brother came at the spot. She screamed, on which her mother also reached the ground floor. Her mother

apprehended the appellant and her father informed the police. During the course of examination, the child victim correctly identified the appellant as the accused.

8. In her cross-examination, she replied that on the day of the incident she had seen the appellant for the first time. She stated that though her mother used to work in a factory from 9 a.m. to 9 p.m., on the day of the incident her mother was on her weekly off. She further stated that when her mother came, the appellant had tried to escape, however, her mother apprehended him. She also admitted that except her mother, no one else came at the spot. She admitted that one *Sita Ram* was their neighbor and she had seen the appellant visit his house. She denied that there was any dispute between them and *Sita Ram*. She also stated that her father came to the spot later on. She denied that she was tutored by her mother to falsely implicate the appellant. The Trial Court had observed that considering the tender age of the child victim, the suggestions to be given to the child witness and the contradictions in her testimony would be considered at the stage of final arguments.

9. Ms. 'L', the mother of the child victim deposed that the day of the incident was a Wednesday and she had a holiday on that day. She deposed that it was about 10 a.m., when she had sent her daughter to buy some household articles. While she was cooking breakfast, her son came and disclosed that the appellant had caught hold of his sister and she was crying. She ran downstairs and saw that the appellant was in the process of removing the underwear of her daughter. She immediately caught hold of the appellant and called her husband who reported the matter to the police. She also proved the statement of the child victim given to the police as Ex.PW-1/A. She also identified the arrest memo of the appellant bearing her signatures as Ex.PW-2/A. In her cross-examination, she denied the suggestion that she knew that the appellant was visiting the house

of *Sita Ram*. She also stated that their house was in a thickly populated area. She denied the suggestion that she knew the appellant prior to the date of the incident or that she was aware that the appellant used to work as a waiter in marriages/functions. She also denied the suggestion that in one marriage function, where the appellant was working as a waiter, he had denied giving her the packed food for which reason she has falsely implicated him.

10. Mr. 'A', the father of the child victim, deposed that on the day of the incident he and his wife were at home. His son came and informed his wife that the child victim was crying downstairs. When they reached downstairs, they saw that the appellant was holding the child and trying to kiss her, while she cried. On being asked, the child victim told them that the appellant was kissing her and pulling down her underwear. In cross-examination, he admitted that there were other tenants who lived near his room and that in the morning time, there was hustle and bustle in the area. He denied the suggestion that he knew the appellant beforehand or that his wife earlier had a quarrel with the appellant.

11. *ASI Ram Avtar*, the Investigating Officer, deposed that on 25.05.2016, DD No. 16A was recorded at 11.15 a.m., wherefore he along with *Ct. Dharmender* (PW-4) visited the place of incident and met the child victim, her parents and the appellant. He deposed about the various steps taken in the investigation and arrest of the appellant.

12. In his statement recorded under Section 313 Cr.P.C., the appellant denied the prosecution case. In answering Question No. 23, the appellant stated that on the day of the incident, he was sitting in the stairs when the child victim was running upstairs listening to music on the mobile phone and he merely asked her to give him the mobile phone but she declined and made the complaint to her mother for which reason he was falsely implicated in the present case.

13. The Trial Court at the time of recording statement of the child victim had asked questions and after noting her response reached the conclusion that the child victim was a competent witness.

14. On a conspectus reading of the testimonies of the child victim, her mother Ms. 'L' and her father Mr. 'A', this Court is of the opinion that Mr. 'A' had not witnessed the incident. He reached the spot only after the incident had taken place. The child victim has stated that when she screamed, her mother came downstairs and she disclosed it to her. In the cross-examination, she has stated that her father came later. Accordingly, this Court is of the opinion that the testimony of the father to that extent is nothing but hearsay.

15. Before proceeding to analyse the evidence on record especially the testimony of the child victim and her mother, let me cull out briefly, the law on appreciation of testimony of a child victim.

16. It is well settled that the testimony of a victim of sexual assault can be relied upon by the Courts. Equally, the law on the testimony of the child victim is well encapsulated. In Dattu Ramrao Sakhare and Others v. State of Maharashtra reported as (1997) 5 SCC 341, the Supreme Court has held that the conviction of an accused on the sole evidence of a 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 Supreme 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 Singh², referring to

*State of Maharashtra v. Chandraprakash Kewalchand Jain*³ 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*⁴ 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.”

17. 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 by the Supreme Court:

“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.*⁵). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.”*

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

“20. 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.”

19. Coming back to the facts of the present case, it is worthwhile to note that at the time of her in-Court examination, the child victim was of tender age, i.e., about 10 years, yet she not only narrated the incident in terms of her previous statement, but also identified the appellant as the person who had committed the offence. The child victim has consistently stated in all of her statements, whether recorded during investigation or the trial, that the appellant had kissed her and tried to remove her underwear. She has truthfully stated that except her mother, no other person came there. Ms. ‘L’, on her part also claimed to be the witness of only that part of the incident where the appellant was trying to pull down the underwear of the child victim. She did not claim to have seen the appellant kissing the child victim. A suggestion was also given to the child victim that on the day of the incident, she had seen the appellant for the first time to which she replied in the affirmative. The appellant has not denied his presence at the spot on the day of the incident. In fact, he was caught at the spot. Even in his statement recorded under Section 313 Cr.P.C., it was stated by the appellant that he only asked for the child victim’s mobile phone and on that premise he was falsely implicated.

20. Learned counsel for the appellant contended that the testimony of the child victim is incredulous and ought not to be relied upon as the same is full of contradictions. It was submitted that while initially in her cross-examination, the child victim stated that on the day of the incident, she had seen the appellant for the first time, she later admitted that she had seen the appellant visiting the house of the neighbour *Sita Ram*. This aspect has to be seen in light of the suggestions given qua the neighbour *Sita Ram*. In cross-examination of the child

victim, it was suggested that the appellant was falsely implicated as the victim's family had a dispute with *Sita Ram*. The suggestion was denied. It has not come on record as to what dispute existed between *Sita Ram* and the victim's family and why would the appellant be implicated even if it is assumed that there existed a dispute with *Sita Ram*. Next, while cross-examining Ms. 'L' and Mr. 'A', the mother and the father of the child victim respectively, not even a single suggestion regarding any dispute with *Sita Ram* was given. On the contrary, an altogether new suggestion was given to Ms. 'L' that since the appellant was working as a waiter in marriage/functions, he had denied giving her the packed food on one occasion and for this reason he has been falsely implicated. Even this suggestion was completely vague as no specifics or details of such an incident were provided.

21. Learned counsel for the appellant also contended that it has come on record that on the day of the incident there were many public persons present at the time of appellant's apprehension at the spot, however, no public person was cited as a witness. It was also submitted that while DD No. 16A was recorded at 11.15 a.m., the time of arrest mentioned in the arrest memo is 9 p.m. As noted above, the appellant was apprehended at the spot itself by the parents of the child victim. DD No. 16A (Ex. PW4/A) mentions that a person who had misbehaved with a 10-year-old child has been apprehended. The factum of appellant's arrest from the spot is also supported by the testimony of the Investigating Officer/ASI *Ram Avtar*. Further, the appellant himself has not denied his presence at the spot. In view of the above discussion, this Court finds the contentions meritless and the same are rejected.

22. It was next contended that the younger brother of the child victim who had immediately reached the spot, was not examined. It is well settled that it is

the quality of the evidence and not the quantity which is required to be judged by the Court to place credence on the statement [Refer: Harbeer Singh v. Sheeshpal and Others reported as **(2016) 16 SCC 418** and Shanker & Ors. v. State of Madhya Pradesh reported as **(2018) 15 SCC 725**.

23. This Court on appreciation of the testimony of the child victim is of the firm opinion that the same is consistent, truthful and reliable. Being a competent witness, her testimony is admissible in evidence against the appellant. Further, the testimony of the child victim is duly supported in part by the testimony of her mother.

24. Under Section 29 of the POCSO Act, there is also a presumption regarding the guilt of an accused. As a result, the prosecution has to lay down and prove the fundamental facts regarding the guilt of the accused but the burden of proof on the prosecution is not of 'beyond reasonable doubt'. Once the facts are proved, the onus is on the accused to lead evidence to rebut the presumption raised under Section 29 of the POCSO Act. It is noted that in the present case, the appellant has failed to dislodge this statutory presumption.

25. Consequently, the appellant's conviction and the sentence awarded to him for the offence punishable under Section 10 of the POCSO Act, is maintained and the present appeal is dismissed. As noted above, the appellant has already served the entire sentence awarded to him including the default sentence for non-payment of fine.

26. The Trial Court while passing the order on sentence has noted that the child victim was awarded interim compensation and also directed DLSA, North District, Delhi that the remaining amount of compensation be disbursed to the child victim within a period of one month from the receipt of the order.

27. A copy of the judgment be communicated to the Member Secretary, Delhi State Legal Services Authority, who shall award appropriate compensation to the child victim in accordance with the Delhi Victims Compensation Scheme, 2018, if not already provided.

28. A certified copy of this judgment be immediately supplied to the appellant free of cost.

(MANOJ KUMAR OHRI)
JUDGE

SEPTEMBER 15, 2021
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Click here to check corrigendum, if any

