

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

CRL.A. 454/2020

Reserved on: 23.07.2021

Date of Decision: 10.08.2021

IN THE MATTER OF:

RAKESH @ DIWAN

..... Appellant

Through: Mr. Sulaiman Mohd. Khan,
Advocate

Versus

THE STATE (GNCT OF DELHI)

..... Respondent

Through: Mr. Ashok Kr. Garg, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. The present appeal is preferred under Section 374(2) read with Section 383 of Cr.P.C. on behalf of the appellant *Rakesh @ Diwan* challenging the judgment on conviction dated 19.12.2019 and order on sentence dated 18.01.2020 passed by the learned ASJ-07/Special Court (POCSO Act), South East District, Saket Courts, New Delhi, in SC No. 2065/2016 arising out of FIR No. 513/2013 registered under Section 6 of the POCSO Act at Police Station Okhla, whereby the appellant was convicted for the offence punishable under Section 6 of the POCSO Act. Further, vide order on sentence dated 18.01.2020, the appellant has been sentenced to undergo rigorous imprisonment for a period of 14 years for

the offence punishable under Section 6 of the POCSO Act along with payment of fine of Rs.10,000/- in default whereof to further undergo SI for a period of six months. The appellant was granted the benefit of Section 428 Cr.P.C.

2. For the sake of felicity, the facts as noted by the Trial Court are as under:-

“2 The facts disclosed in the charge-sheet reveals that at the time of alleged incident, PW-1/Victim and accused were residing in the jhuggi cluster of Sanjay Colony, Okhla Industrial Area Phase-II, New Delhi. The FIR bearing No.513/2013 under Section 376 IPC & Section 6 of the POCSO Act came to be registered on the complaint of PW-2/'CD' (mother of the victim). The mother of the victim was a widow, who was supporting his family by doing odd jobs at various houses. It has been alleged that on 20.09.2013, at around 02.00 PM, the victim went outside her jhuggi and after a while, the mother of the victim started looking for her as she was not traceable. She made inquiries from the neighborers and came to know from PW-4/Sangam (age around 6 years) that accused had taken her daughter to his jhuggi. On gaining this information, she went along with PW-4 to the jhuggi of accused and knocked on the entrance door. The accused opened the door and ran away from there. The mother of the victim entered the jhuggi and saw her daughter lying naked on a cot with discharged semen on her mouth. The victim disclosed her mother that accused had committed penetrative sexual assault upon her by inserting his penis in her mouth. The mother of the victim wiped the mouth of her daughter and took her home. On reaching home, she informed her husband. On gaining this information, the father of the victim called his relatives and spoke with the father of the accused. He requested him to produce the accused but the father of the accused kept avoiding it. Finally, on the next day, at around 10.08PM, the mother of the victim made a call at 100 number and reported the matter to the police. On receiving this information, police officials

arrived at the spot and recorded the statement of the mother of the victim and FIR was registered.

3. On registration of FIR, necessary investigation was carried out and accused was arrested. Medical examination of the victim and the potency test of the accused were done at AIIMS Hospital. Samples including the vaginal swab of the victim & the semen of accused were collected by the doctors during the examination of the accused and the victim. The clothes of the accused & the victim were seized. Samples and the seized clothes were sent for analysis to the FSL. Statement of the victim was recorded under Section 164 Cr.P.C. Site plan was prepared and the statement of other witnesses were recorded. The investigation concluded and the charge-sheet was put to the court Subsequently, the Investigating Officer collected the FSL report but the same remained inconclusive. The report was submitted in the court with the supplementary charge-sheet under Section 173(8) Cr.P.C.”

3. The appellant was charged under Section 6 of the POCSO Act to which he pleaded not guilty and claimed trial. In the trial, the prosecution examined total of 9 witnesses. Baby ‘K’, the child victim was examined as PW-1. Smt. ‘CD’, the complainant and mother of the child victim was examined as PW-2 and Baby ‘S’ was examined as PW-4.

4. On behalf of the appellant, a statement was made before the Trial Court on 28.02.2019, whereby it was stated that the accused was not disputing the FIR as well as his own MLC.

5. I have heard learned counsels for the parties and gone through the case record.

Age of the Child Victim

6. As per the prosecution case, the child victim was 3½ years of age at the time when the offence was committed. It has been noted in the impugned judgment that the appellant had not disputed or challenged the

age of the child victim. The child victim was examined in trial after about one year of the incident and at the time of her examination, her age was mentioned as 4½ years. The mother of the child victim also appeared and deposed that her daughter was 3½ years at the time of the incident.

Analysis

7. The child victim Baby 'K' during her examination initially could not identify the appellant however, on being put leading questions by the prosecutor if the accused has done some wrong act with her, she nodded in affirmative and stated that "*Haa Kiya tha*". She further stated that the appellant had removed her underwear as well as his own underwear and thereafter closed the door. She further stated that the appellant was giving money to her and removed her vest; and that he put his penis in her mouth. In cross examination, suggestion of tutoring was given, to which the child victim replied that her parents had neither stated anything to her nor tutored her. Again, on a specific question, that her mother had told her to depose that the appellant closed the door of the room, to which the child victim replied that her mother had not told her to depose in this manner. She had further described the room, where incident had taken place that there was only one door in the room and there was no ceiling fan. The child victim, on seeing the appellant's face on the screen, identified him as *Diwan* and stated that he had removed her underwear. She also stated that when the appellant was trying to give her money neither any child nor any other person was present. She denied that no such incident took place on that day and that she was deposing at the instance of her mother.

8. Baby 'S', a child witness aged about 9 years, deposed that she informed her family members that the father of *Arun* had taken Baby 'K'

on his shoulders to his room. She saw the child victim weeping. The child witness also identified the appellant. She further stated that his name is *Karan* and is also known as *Diwan* and he was doing *Gandi Baat* with Baby 'K', the child victim. In cross examination, she replied that the name of father of the appellant was *Rakesh*.

9. Smt. 'CD', mother of the child victim, deposed that on the day of the incident at about 2.00 PM when her daughter went out, she did not return home, she started searching in the house and in the neighborhood. At that time Baby 'S' informed her that the accused had taken her daughter to his house. She, along with the Baby 'S', went to the *Jhuggi* of appellant and when the appellant opened the door, she went inside and saw her daughter lying on the bed, her lower was removed; and she also saw semen in her daughter's mouth. The child victim told her that the appellant had inserted his penis into her mouth. She cleaned the mouth of her daughter and informed her husband of the incident. Initially, they asked the father of the accused to produce him, but when he did not, the Police was informed.

10. In cross examination, a suggestion was given that the witness was having physical relations with the accused, and on coming to know that the appellant was going to marry after one month, he was implicated in this false case. This suggestion was denied.

11. *SI Kamlesh*, deposed that he had reached the place of incident after being assigned DD No. 28 relating to quarrel. He along with *Inspector Kusum Dangi*, had visited the place of incident and recorded the statement whereafter, the child victim was taken for medical examination.

12. The appellant in his statement recorded under Section 313 Cr.P.C., while answering Question No. 52, took a plea of *alibi* and stated that on 28.09.2013 he was not present in Delhi and was driving a truck from Delhi to Bangalore. While answering Question No. 53, he stated that prior to the alleged incident, the mother of the victim had a fight with him over the issue of water.

13. Learned counsel for the appellant has contended that there are contradictions in the statement of the child victim and her mother. While the child victim, during her cross examination, stated that when the appellant had removed her clothes, no other person was present; and when he was trying to give money, no other child was present. Further, the child victim stated that her mother had not come to the room to take her. However, the mother of the child victim deposed that when she knocked at the door of the appellant's *Jhuggi*, the appellant came out and she found her daughter lying in the bed with her lower removed and she also saw semen in her mouth.

14. The contention is to be seen in the light of the statements of three witnesses who are relevant to the incident i.e., Baby 'K' (the child victim), Baby 'S' and Smt. CD (mother of the child victim). Baby 'K' had narrated the incident and also identified the appellant as the accused person who committed the incident. She had stated that no one was present at the time of the incident. She had not stated that her mother had come inside the appellant's room or wiped out any semen. In fact, she had not stated anything about presence of semen in her mouth. Rather, in her cross examination, she stated her mother had not come to the appellant's room to take her. Baby 'S' during her examination had initially identified the appellant as *Arun* but also stated that he was

known by the name of *Karan & Diwan*. She further stated that Baby 'K' was weeping and the appellant was doing *Gandi Baat* with Baby 'K'. She further stated that she told the fact to her own mother. Baby 'S' has not stated that she had pointed out the appellant's room to Baby K's mother on accompanying her. She was an unrelated independent witness. From a perusal of the statements of Baby 'K' and Baby 'S', this Court is of the opinion that Smt. 'CD' (mother of the child victim), is not a witness to the fact that she had gone to the appellant's room or had seen her daughter lying on the bed with her lower removed or that she wiped the semen from her daughter's mouth. This part of the testimony of Smt. 'CD' being contrary to the statements of Baby 'K' and Baby 'S' is rejected. This conclusion is fortified by the fact that in the FSL report, no semen was detected on the exhibits including 'lip swab' or 'cheek swab' of the child victim. Now, it has to be seen whether the testimony of the child victim is sufficient for the conviction of the appellant.

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 Dattu Ramrao Sakhare 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."

17. While accepting the testimony of a child witness, the Courts have also sounded a word of caution that the testimony has to be evaluated even more carefully as the same is susceptible to tutoring. In State of Madhya Pradesh v. Ramesh & Another reported as (2011) 4 SCC 786, the Supreme Court held as under:-

"14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with grater circumspection because he is susceptible to tutoring. Only in case there is evidence or record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

18. Similarly, in Ranjeet Kumar Ram @ Ranjeet Kumar Das v. State of Bihar reported as **2015 SCC OnLine SC 500**, it was observed as under:-

"14....Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one..."

19. Prior to the recording of the statement of the child victim, the Trial Court had put preliminary questions to her and recorded its satisfaction as to her intelligence and competency for understanding the questions and giving the answers. This Court, in absence of any submissions to the contrary, concurs with the opinion of the Trial Court that the child victim was competent to stand as a witness.

20. During cross examination of the child victim, a suggestion of tutoring was given to her, which was denied. The child victim specifically stated that her mother had not tutored her on what to say in the Court.

21. The truthfulness and credibility of the child victim is also apparent from the fact that she had stated that her mother had not come in the room of the appellant. If the child witness had been tutored, she would have not stated so.

22. It was next contended that there was considerable delay in reporting the incident. While as per the testimony of Smt. 'CD', the incident occurred after 2:00 p.m. on 28.09.2013, the FIR was registered at about 02:35 a.m. on 30.09.2013. A perusal of the case records would

show that DD No. 28 was recorded at 10.08 p.m. on 29.09.2013. As per testimonies of *SI Kamlesh* and *Insp. Kusum*, they had visited the spot and enquired into allegations of rape. The child victim was taken to *AIIMS* where her MLC was conducted and exhibits were seized. The MLC of the child victim was prepared at about 12:21 a.m. on 30.09.2013. Smt. 'CD' in her testimony stated that she had informed her husband of the incident and also called their relatives. Thereafter, they went and met appellant's father, *Sh. Narayan*; and asked him to call the appellant but he did not call. This Court is of the opinion that the delay in the present case, when seen in light of the statement of the child victim, is not unexplained and the explanation given is plausible. Accordingly, the contention is rejected.

23. It was also contended that initial DD was with respect to only a quarrel and did not contain the particulars of the offence. Again, the contention is meritless as the child victim in her statement clearly spelt out that the appellant had committed the offence. The testimony of the child victim is truthful as well as reliable.

24. It was further contended that the MLC and the FSL report do not support the prosecution case as neither any external injuries were noted nor any semen was found on the exhibits. As discussed earlier, the child victim in her testimony had stated that the appellant had put his penis in her mouth. The child victim did not state about presence of semen on her mouth or anywhere else. It is not expected that a child of 3½ years of age would put up a struggle with a grownup man. Accordingly, the contention is rejected.

25. Lastly, it was contented that during her examination in Court, the child victim had not identified the appellant at the first instance. In this regard, it is noted that the child victim aged about 3½ years was examined nearly after one year of the incident, she had not identified the appellant in her examination-in-chief but on a question put by learned APP, she not only identified the appellant but also gave details of the incident.

Conclusion

26. A perusal of the statements of the child victim recorded during investigation as well as in trial would show that she had consistently stated that the appellant had removed her underwear as well as his own underwear and thereafter, put his penis in her mouth. This Court, in view of the analysis done hereinabove, is of the opinion that the testimony of the child victim is trustworthy, reliable and admissible.

27. As per Section 29 of the POCSO Act, there is a presumption regarding guilt of the accused. The burden of proof on the prosecution is not of beyond reasonable doubt. The prosecution has to lay down and prove the fundamental facts regarding the guilt of the accused. Once such facts are proved, the onus is upon the accused to lead evidence to rebut the presumption. The appellant has failed to dislodge the statutory presumption under Section 29 of the POCSO Act.

28. Consequently, the impugned judgment on conviction and order of sentence passed by the Trial Court, are upheld and the present appeal is dismissed.

29. Coming now to the aspect of award of compensation to the child victim. The Supreme Court in Nipun Saxena and Another v. Union of India and Others reported as (2019) 13 SCC 715 took note of the fact that for victims of sexual abuse under the provisions of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act), no scheme was existing. The Court took notice of Sections 33 and 45 of the POCSO Act, Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 (which is *pari materia* with Rule 9 of the POCSO Rules, 2020) as well as the Guidelines under the heading of NALSA's Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes, 2018. It was held that the Special Court may, in appropriate cases, on its own or on an application having been filed, pass an order for interim compensation for the immediate needs of the child. It was also observed that Rule 7 is a gender-neutral provision. The Court further observed that NALSA's Compensation Scheme would function as a guideline to the Special Court for the award of compensation to victims of child sexual abuse under Rule 7 until the Rules are finalised by the Central Government. It was also directed that the Special Judge will, take the provisions of the POCSO Act into consideration as well as any circumstances that are special to the victim while passing an appropriate order.

30. It is also noted that in exercise of powers conferred under Section 357A Cr.P.C., the Lieutenant Governor of NCT of Delhi in coordination with the Government has approved the Delhi Victim Compensation Scheme, 2018, which is brought in force with retrospective effect from 02.10.2018, for providing funds for the purpose of compensation to the

victim or her dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

31. In the present case, the order on sentence passed by the Trial Court records that the child victim and her family members could not be traced, for them to approach DLSA seeking compensation under the Delhi Victim Compensation Scheme.

32. The concerned I.O./SHO is directed to make efforts to trace out the child victim and/or her family members; apprise them of the Victim Compensation Scheme; and also facilitate them to approach DLSA for seeking compensation under Victim Compensation Scheme.

33. The State, through the Delhi State Legal Services Authority, is directed to provide requisite compensation to the child victim in accordance with the aforesaid Scheme within a period of four weeks from their approaching DLSA.

34. A certified copy of this judgment be immediately supplied to the appellant free of cost through the concerned Jail Superintendent.

35. A copy of the same shall also be communicated to the concerned Trial Court as well as to the Member Secretary, Delhi State Legal Services Authority.

(MANOJ KUMAR OHRI)
JUDGE

AUGUST 10, 2021
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