

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 06.01.2021

+ **CRL. A. 313/2017**

KALICHARAN @ KALKA PRASAD

.....Appellant

Versus

THE STATE (G.N.C.T. OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Inderjeet Sidhu, Advocate (DHCLSC).
For the Respondent : Mr Amit Gupta, APP for State.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 07.10.2016, whereby he was convicted of an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act'). He also impugns an order dated 08.10.2016, whereby he was sentenced to serve rigorous imprisonment for a period of ten years with a fine of ₹2,000/- for committing an offence punishable under Section 6 of the POCSO Act – an aggravated penetrative sexual assault. It was further directed that on failure to pay the fine, he would go simple imprisonment for a period of fifteen days.

2. The appellant was prosecuted pursuant to registration of an FIR bearing no. 150/2013, under Section 376 of the Indian Penal Code, 1860 (IPC) registered with PS Karawal Nagar. The said FIR was registered at the instance of the victim's mother (hereinafter referred to as 'the complainant'). On completion of investigation, the chargesheet was filed against the accused Kalicharan for offences punishable under Section 376(1) of the IPC and Section 4 of the POCSO Act. By an order dated 03.12.2013, the Trial Court framed a charge against the accused Kalicharan for committing an offence punishable under Section 6 of the POCSO Act. The accused Kalicharan pleaded guilty and was tried for committing the said offence.

3. It is the case of the prosecution that the complainant's sister had made a PCR call at about 11:45 a.m. on 13.03.2013 for reporting the offence. The said call was received and entered as DD No.14A at PS Karawal Nagar. She had reported that at the given address, one man had done a wrong act with a two year old child. At the material time, HC Ramesh Kumar (who was examined as PW2) was on duty as a Duty Officer at PS Karawal Nagar. He testified that he had received the call regarding sexual assault on a two year old girl and had recorded the same as DD No.14A. He further testified that he had handed over the said DD to ASI Yogesh Tyagi for taking the necessary action. ASI Yogesh Tyagi was examined as PW4. He confirmed that he had received DD No.14A (Ex.PW2/A) on 13.03.2013. He further testified that on receipt of the said DD, he

along with Ct. Rohtash went to the spot (H No. B-187, Gali No. 6, Shiv Vihar, Ambika Vihar, Delhi) and on reaching the spot, he found that the victim had already been taken to GTB Hospital by the PCR. He stated that he along with Ct. Rohtash went to GTB Hospital and found that the victim (a two year old girl) was admitted there. He stated that he met the parents of the victim at the hospital and collected the MLC. Thereafter, he gave information to the Duty Officer. He collected a sealed parcel from GTB Hospital containing the victim's samples and thereafter, he along with the victim and her parents came back to the spot. He testified that he met SI Monika at the spot and handed over the parcel to her and thereafter, SI Monika recorded the complainant's statement (Ex.PW1/A).

4. In her statement (Ex.PW1/A), the complainant stated that she along with her husband and family reside at the given address. She stated that she has two children, a boy aged seven years and a girl aged two years (the victim in this case). She stated that her husband works at a hotel in Kalkaji. She alleged that on 13.03.2013 at about 07:30 a.m., she was in her room making tea. Her husband was also present in the room and her daughter was playing outside. When she did not return for about thirty/forty five minutes (*aadhe pone ghante*), she went out to fetch her but did not find her anywhere outside. Thereafter, she went to the terrace to look for her and there she found that her landlord's son (who was aged about four to five years) was standing facing the latrine. She stated that she went towards the latrine and found that the landlord's paternal uncle (the appellant herein) was

inside without any clothes and he had inserted his penis in her daughter's (the victim's) mouth. Her daughter was struggling (*chat pata rahi thi*) and tears were rolling down her eyes. She stated that on seeing her, the accused was taken aback (*chonk gaya*) and he got up. Resultantly, the victim who was in his lap fell down. She stated that she picked up the child and then raised an alarm. Hearing the same, her husband also came up to the terrace and she told him about the incident. In the meanwhile, the accused fled from the spot. She stated that the clothes worn by her daughter were soiled so she took them off and bathed her. She said thereafter, she went to her younger sister's place (who lived a few lanes away) and informed her about the incident. Her sister called the PCR. The police arrived and took her and the victim to GTB Hospital for a medical examination.

5. The prosecution's case rests mainly on the testimony of the complainant. She was examined as PW1 and her testimony is consistent in all material aspects with her statement recorded on the date of the incident.

6. She was cross-examined. In her cross-examination, she stated that she lived in the house as a tenant and had been residing there for two to three years prior to the incident. She stated that initially the monthly rent was about ₹800/- per month, which was raised to ₹1,100/- per month. She stated that she had vacated the premises after about a month of the incident. She denied the suggestion that she did not pay the rent on time and affirmed that she always paid the rent on time. She also denied the suggestion that the accused had been falsely

implicated for not paying the rent. She stated that the room rented to her was on the ground floor and there was a toilet and a bathroom located at the ground floor as well as the first floor. She stated that there was no door to the bathroom and the toilet and there were only jute bags that were hung, which functioned as a door. She was shown the photographs of the bathroom by the learned counsel for the accused (appellant) and she identified the same.

7. In her cross-examination, she stated that she had gone to her sister's place at about 07:30 a.m. on the date of the incident. She stated that her house was two lanes away and it takes about five to ten minutes to reach her sister's house from her house. She further stated that the police had arrived at the spot within thirty minutes of making the call.

8. SI Monika (who was the Investigating Officer) was examined as PW11. She also affirmed that she had recorded the statement of a child eyewitness aged about 5 years. The said child witness had also stated that the accused had taken the victim to the terrace for taking her to the toilet. He had stated that the accused wanted to defecate and he had taken off his clothes. He further stated that he was doing something with the mouth of the victim and she was crying. The child was also called for recording his testimony before the court but the court found that he was unable to understand the questions put to him or give any rational answers. The court noted that by that time, two years had elapsed and the child eyewitness was now seven years old. His memory regarding the incident was not clear. Accordingly, he was

dropped from the list of witnesses. Thus, although the incident was also witnessed by a child, he could not be examined.

9. The medical examination of the victim is of no assistance to the prosecution as there were no injuries found on the child. Her oral swabs were taken and were examined for forensic evidence. However, no traces of semen could be found and the sample did not yield any DNA of the accused. After the incident, the child was bathed and the fact that her oral swab did not yield any positive result for semen or any biological traces of the accused, is of little assistance, to the appellant as the same does not overrule the commission of such an offence.

10. As stated above, the prosecution's case rests mainly on the testimony of the complainant (the victim's mother). Her testimony is unequivocal. It is consistent with her statement recorded at the material time. Her testimony is also supported by the testimony of her husband as well as that of her younger sister. There is a minor discrepancy regarding the time of the incident. In her complaint, she had stated that she was in her room at about 07.30 a.m. on the date of the incident and was preparing tea. She stated that she had stepped out to look for her daughter who was playing outside but could not find her. She had then gone up to the terrace to look for her and had witnessed the accused in the act of committing the said offence. Thereafter, she had picked up the victim and in the meanwhile the accused had fled. She had given the victim a bath and thereafter, she had gone to her sister's residence, which was two lanes away. Thus,

she would have gone to her sister's residence at least after about thirty minutes, that is, about 08.00 am. However, in her cross-examination, she stated that she had gone to her sister's place at about 7.30 a.m. The Trial Court had found that the said minor inconsistency was of no relevance. There is no doubt that the prosecutrix had gone to her sister's place after the incident. Her sister had also testified to the aforesaid effect. The complainant had also stated that her sister had made a call to the PCR. This is also affirmed by her sister. The call was received at 11.25 a.m., which was entered as DD No.14A at PS Karawal Nagar (Ex.PW2/A).

11. Keeping in view the timelines, the inconsistency in the complainant's statement and her response in her cross-examination regarding the time when she had gone to her sister's residence, would not be of much relevance. The Trial Court has rightly ignored the same.

12. In view of Section 29 of the POCSO Act, the onus to prove his innocence rests with the accused. The appellant had examined three witnesses in his defence. His nephew (who was the landlord of the premises in which the complainant and her family resided) was examined as DW1. He had testified that he had sent the accused to the complainant to collect rent, but she had made a false accusation against him. His testimony does not absolve the accused of committing the alleged offence as DW1 was not present at the occasion. Secondly, DW1 did not testify that the complainant was not regular in paying rent or there were any issues in collection of rent.

Thus, his testimony does not further the defence that the complainant had falsely implicated the accused to avoid paying rent. The complainant had, on the other hand, unequivocally stated that she was always regular in paying rent and there was no dispute regarding the same. Further, she and her family had left the premises after a month of the incident.

13. Wife of DW1 was examined as DW2. She testified that on 13.03.2013, she had asked the accused to collect rent from the complainant as three to four months' rent was due from her. Her testimony also does not inspire any confidence. Admittedly, DW1 was the landlord of the premises. He had testified that he had asked the accused to go and collect rent. Thus, there was no occasion for DW2 to send the appellant to the complainant and collect rent. Further, DW2 was also not sure whether at the material time, rent was overdue for two months, three month or four months. She was cross-examined and in her cross-examination, she admitted that she had not informed the police about asking the accused to go and collect rent at the material time.

14. One Khem Chand, who was the immediate neighbour of the complainant, testified as DW3. He stated that the accused had gone to the residence of the complainant to collect rent and there was a quarrel between them. There is no dispute that the complainant had raised an alarm.

15. It is also relevant to state that no suggestion was put to the complainant that there was any quarrel between her and the appellant.

16. In view of the above, this Court concurs with the view of the Trial Court that the evidence led on behalf of the defence, does not, inspire any confidence. On the other hand, the testimony of the complainant is fully supported by the testimony of her sister (PW8). The testimony of the official witnesses does not in any manner raise any doubts.

17. In view of the above, this Court finds the appeal unmerited and the same is, accordingly, dismissed.

JANUARY 06, 2021
RK

VIBHU BAKHRU, J