



* IN THE HIGH COURT OF DELHI AT NEW DELHI

NEUTRAL CITATION NO: 2022/DHC/003387

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Reserved on: 25th July, 2022
Pronounced on: 01st September, 2022

CRL.A. 1189/2019

OMKAR DUBEY

..... Appellant

Represented by: Mr. Sumeet Verma, Mr. Mahinder
Pratap Singh, Advs.

versus

STATE

..... Respondent

Represented by: Mr. Prithu Garg, APP for State

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE ANISH DAYAL

JUDGMENT

ANISH DAYAL, J.

1. By this appeal, the appellant assails the judgment dated 01st May, 2019 convicting him for offence punishable under Section 6 POCSO (Prevention of Children from Sexual Offences) Act and order on sentence dated 16th May, 2019 sentencing the appellant to rigorous imprisonment for life along with a fine of Rs.50,000/- (one year simple imprisonment in default of payment).

The Incident:

2. The case of the prosecution is that as per the allegations of the complainant, the appellant had committed penetrative sexual assault upon the prosecutrix (a minor aged about seven years) at a jhuggi, Kirti Nagar, Delhi. As per the prosecution, the mother of the prosecutrix accompanied the prosecutrix to PS Kirti Nagar to make a



complaint on 25th August, 2013 that on a previous date at about 9:00 pm while giving a bath to the minor daughter she found that the breast of the prosecutrix was swollen. The mother asked her as to what had happened but the daughter did not say anything initially, however, on her mother's persuasion finally told her that their neighbor whom she called 'dada' had called her inside his jhuggi and did "galat kaam" with her and when she started crying, he sent her outside the jhuggi and threatened her that if she disclosed to anyone else he would kill her. SI Surinder Kaur made the endorsement on the complaint and FIR No.289/2013 was registered. Upon the said jhuggi being shown by the prosecutrix and her mother, the appellant who was present at the jhuggi was duly identified and arrested by the Investigating Officer. The IO obtained the school certificate of the prosecutrix which mentioned her date of birth as 01st August, 2006. The investigation was later transferred to SI Vandana in September, 2013 who later collected the FSL Report. Charges were framed against the appellant, prosecution examined five witnesses, statement of the appellant was recorded under Section 313 Cr.P.C and he led no evidence in defence.

Submissions by the Appellant:

3. The appellant contended that he had been falsely implicated since he had denied electricity connection to the mother of the prosecutrix who was the neighbour of the jhuggi complex. The appellant further contended through the appeal and arguments led on his behalf by counsel that no other material public witness had identified the appellant nor any public witness was involved at the time of arrest of the appellant. Statement of the mother of the prosecutrix was



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contradictory since the prosecutrix had stated that the appellant had not pressed her chest. MLC of the prosecutrix showed that there was no fresh external injury seen over the body at the time of the examination. While the prosecutrix had stated that she was aware that electricity connection was taken in their house from the house of the appellant, the mother had denied the same and, therefore, was an unreliable witness. The appellant contended that the prosecution had failed to prove the age of the prosecutrix since the school principal testified that the age had been entered on the basis of the affidavit given by the complainant and since no birth certificate was submitted, the learned Trial Court should have given the benefit of doubt to the appellant. It was further contended that since the brothers of the victim were present in the house when the appellant allegedly visited the house of the prosecutrix to take her, prosecution had not examined these material witnesses. Nor was the wife of the appellant examined who was allegedly present when the appellant took the prosecutrix to his house. It was further contended that the medical report of the victim did not corroborate the prosecution's case since it reported that the hymen of the child victim was partially torn and no fresh injuries were seen indicating that the hymen was torn recently but could have been due to some physical activities prior in time. The doctor who prepared the MLC was never called in court and, therefore, the MLC could not be relied upon. As per the IO, the complainant had come to the police station on 25th August, 2013 at about 7:00 pm whereas the complainant had testified that she had gone in the morning to the police on that day. Moreover, the victim's statement recorded under Section 164 Cr.P.C. mentions that there was no rectal insertion and as regards the vaginal penetration, the



MLC did not indicate such. ^{NEUTRAL CITATION NO: 2022/DHC/003387} Since no semen was detected in the vaginal swab, the rectal swab and the underwear (Ex. 1, 2 and 3) the prosecution's case was only based on the sole testimony of the prosecutrix.

Submissions by the Prosecution:

4. The learned Additional Public Prosecutor on behalf of the State countered the submissions of the appellant and submitted that as per prosecutrix statement, there was vaginal penetration, even if anal penetration was in doubt. Her statement was consistent throughout including those recorded under Section 161 and Section 164 Cr.P.C and the MLC report noting that the hymen was partially torn and that was enough to indicate that there was penetrative sexual assault. The appellant's contention that there was a quarrel with the mother of the prosecutrix regarding electricity connection is not corroborated by any detail or any other evidence. As regards the absence of swelling, the learned APP stated that it could be normal for the swelling to subside in 24 hours and, therefore, the doubt raised by the appellant would be untenable. The prosecution stressed that the testimony of PW-3, the prosecutrix, was enough and sufficient to prove the foundational facts for establishing a case of penetrative sexual assault on a minor victim by the appellant.

Evidence:

The evidence as gleaned from the record, which is material for this Court's assessment is as under:

5. The prosecutrix PW-3 stated in her testimony that she was studying in class 4th on the date of the incident and was present at her



house at night time after dinner. Her younger brother was also at home. At that time, the appellant (whom she identified in Court) who was her neighbor and whom she addressed affectionately as 'dada', came to her house and took her to his own house. He then removed her clothes and his own clothes and did dirty acts with her (*Gandi Gandi Harkat*). She stated that he inserted his penis in her vagina (*susu karne wali jagah*) and she had lot of pain but no bleeding. She further testified that he did not put his private part in her anus. She stated that when he did the dirty acts with her he had closed her mouth with cloth and then told her not to disclose. She then came back to her house and when her mother was giving her bath she saw her condition and then she disclosed the incident to her mother. The next morning, her mother took her to the police station and she narrated the incident to a woman Police Officer. On being shown her statement recorded under Section 164 Cr.P.C., she later stated that the appellant had put his private parts in her rectum and she has told this to the lady Judge earlier. In her cross-examination she stated that she was aware that there was an electricity connection taken in her house from the house of the appellant but it was incorrect to suggest that her mother used to give money to the appellant for electricity on a monthly basis. She did not know whether her mother and appellant had a fight for the money for the electricity connection. She further stated in her cross examination that the wife of the appellant was in the house when he had taken her there but had gone somewhere later and it was then that the appellant did the wrong act with her.

6. PW-1, mother of the prosecutrix, testified that on 24th August, 2013 at about 9.00 PM when she was giving a bath to the prosecutrix she found that the breast of the prosecutrix was swollen. Upon



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inquiring as to what had happened, the prosecutrix initially did not disclose anything but later disclosed to her that the appellant had taken her to his jhuggi, removed her clothes and did dirty acts with her from the anal side, vaginal side and pressed her breast. PW-1 upon herein this account from her daughter went to the house of the appellant and confronted him but he refuted the allegation. He stated that she went with the prosecutrix on the next morning and made a complaint and based on her identification the appellant was arrested, whom she also identified in court. In her cross-examination she stated that she was residing in a rented jhuggi and the owner of the jhuggi was one Mr. Rakesh Pandey who was also president of the jhuggi cluster. She denied that she had taken an electricity connection from the appellant or that she used to pay any monthly charges to him or that there was a quarrel that took place between them.

7. As regards the age of the prosecutrix, PW- 2 (the Principal of M.C Primary School Chuna Bhatti, Kirti Nagar, Delhi) brought the summoned record relating to the age of the prosecutrix who was admitted in the School in class 1 on 18th April, 2012 and testified that her date of birth as per school record is 01st August, 2006. The records of the school were duly exhibited by PW-2.

8. PW- 4 (SI Surinder Kaur), the Investigating Officer (IO) testified that on 25th August, 2013 at about 7:00 pm the mother of the prosecutrix came to the police station and complained about the appellant and his act of rape upon her daughter. Subsequently, she sent the prosecutrix for the medical examination and thereafter on the identification of the mother PW-1 apprehended the appellant at his jhuggi. A rukka was endorsed and FIR No. 289/2013 under Section 376/342 IPC and Sections 5,6,9,10 POCSO Act was registered



subsequently at 9:30 p.m. ^{NEUTRAL CITATION NO. 2022/DHC/003387} The *rukka* would also indicate that the complainant had specifically mentioned that it was the appellant who had committed the sexual acts/rape.

9. Ex. PW-4/A is the report from the Forensic Science Laboratory (FSL). As per the report, no male DNA profile was generated from the swab taken around the hymen, the swab from the rectum and the underwear of the prosecutrix.

10.Ex. PW-4/A is also the copy of the prosecutrix MLC wherein it is stated that the prosecutrix was brought for medical examination and no fresh external injury was seen. However, the gynaecologist recorded that the prosecutrix had been taken from the house of the appellant (who was named) and he had fondled with her nipples then did insertion in the rectum. It was also noted that the prosecutrix had taken a bath after the incident and changed her clothes. The MLC further recorded that the hymen was partially torn but there was no fresh APV present.

11.The Learned Trial Court on examination of the evidence on record concluded that the prosecutrix was a minor and that the appellant had been duly identified by PW-1, the mother and PW- 4 the prosecutrix. The Learned Trial Court noted that the delay in filing of the FIR was because the incident was reported to the mother at night on 24th August by the prosecutrix where thereafter she had confronted the appellant but decided to go to the police station on the next day. The Learned Trial Court relied upon the testimony of the prosecutrix was 8 years old at the time of the incident, and ignored the contradiction in her testimony which the Learned Trial Court observed that they were “bound to occur” and in fact “indicate that the prosecutrix was not tutored by a mother or anyone else” .



Analysis

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12. The fact there was nothing incriminating in the FSL report has to be ignored since the statement of the prosecutrix that she had been given a bath by her mother was corroborated by the mother and therefore any evidence would have been washed off. The contradiction in the statement of the mother in that she went to the police station in the morning on 25th August, 2013 while the IO stated she came at 7:00 p.m. will not discredit the testimony of the prosecutrix and the mother since the *rukka* and the FIR state that it was evening time on 25th August, 2013 that the complaint was recorded. Nothing material would turn on the recollection of time of the visit to the police station in light of the other evidence on record. Also PW-1 was not confronted with the *rukka*, FIR or her statement recorded earlier. Also even if there was a doubt regarding anal penetration, there was clearly a credible testimony of the prosecutrix of vaginal penetration.

13. Further this Court finds that apart from minor contradictions, the testimonies of PW- 1 and PW- 3 are consistent and the accused has failed to rebut the presumption which impinges on him under Section 29 of the POCSO Act. As per catena of judgments, *inter alia State of Himachal Pradesh v. Manga Singh* (2019) 16 SCC 739 (though this was a pre-POCSO Act case under Section 376 IPC) and *Ganesan v. State* (2020) 10 SCC 573, the testimony of the prosecutrix can be solely considered for the conviction of an accused for the crime of rape and considering the age of the prosecutrix and the fact the fundamental factual foundation of her testimony not being refuted by any other evidence on record, this Court is of the considered view



that the prosecution has been able to prove its case against the appellant beyond reasonable doubt.

Conclusion:

14. In light of the above discussion and analysis, this Court is of the considered view that the case of prosecution is duly supported by ocular and medical evidence and proves beyond reasonable doubt that the offence was committed by the appellant. Consequently, this Court finds no error in the impugned judgment of conviction. This Court also finds no ground to interfere with the sentence awarded by the learned Trial Court.

15. Appeal is accordingly dismissed.

16. Copy of this order be uploaded on the website of this Court and be also sent to Superintendent, Jail for intimation to the appellant and updation of records.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

SEPTEMBER 01, 2022/mk