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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on : 10th December, 2021Pronounced on : 4th July, 2022

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CRL.A. 1141/2018**KHURSHID ALAM**

..... Appellant

Represented by: Mr. Aditya Vikram, Advocate/
DHCLSC.

versus

STATE

..... Respondent

Represented by: Mr. G.M. Farooqui, APP for the State
with SI Vijay Kumar, PS Sadar
Bazar.**CORAM:****HON'BLE MS. JUSTICE MUKTA GUPTA****MUKTA GUPTA, J.**

1. By the present appeal, the appellant challenges the impugned judgment dated 31st July, 2018 convicting the appellant for offence punishable under Section 376(2) IPC and Section 6 of the Protection of Children from Sexual Offences Act, (in short, 'POCSO Act') and the order on sentence dated 6th August, 2018, whereby the appellant is directed to undergo rigorous imprisonment for a period of ten years and to pay fine of ₹5,000/- in default whereof to undergo simple imprisonment for a period of six months for the aggravated penetrative sexual assault under Section 6 of the POCSO Act, and no separate sentence was awarded for the offence punishable under Section 376(2)(i) IPC.

2. Learned counsel for the appellant submits that the version of the



victim who was aged 5 years at the time of alleged incident is not corroborated by the MLC for the reason the MLC only shows slight inflammation around hymen, whereas the victim stated that she was raped three times by the appellant. It is highly unnatural that despite being raped for three times no injuries were caused on the vagina of the minor victim. The slight inflammation around hymen could be for various reasons including infection and allergy. There was no basis for the learned Trial Court to come to the conclusion that there was penetration to some extent. The FSL report shows that no semen was detected on the clothes worn by the victim even on the day when the complaint was made. The finding of the learned Trial Court that the Investigating Agency recovered the clothes worn on that day and not on the day of incident goes to show that no proper investigation was carried out and the same cannot be taken adverse to the appellant. Though in the statement recorded under Section 164 Cr.P.C. the victim stated that she was at the house of her friend 'S', however, in her deposition she stated that she did not know who 'S' was. Though in her statement under Section 164 Cr.P.C. the victim stated that the appellant inserted his penis in the vagina as well as in her anus, however, in her deposition she denied commission of sodomy. There are further contradictions in the testimony of victim herself. Even the version of the mother of the victim is inconsistent. From the perusal of the statement of the mother of the victim it would be evident that at best it was a case of attempt to rape and not a case of rape. The appellant showed that he was implicated falsely due to enmity, however, his defence was not considered and he has been wrongly convicted and sentenced.

3. Mr. G.M. Farooqui, learned APP for the State has taken this Court to



the testimony of the prosecutrix and her mother to contend that there are no contradictions in their testimony. He further states that the findings of the learned Trial Court that there were sufficient corroboration even after the delayed medical examination is based on the evidence on record. Thus, the MLC duly corroborates the version of the victim and her mother and the appeal be dismissed.

4. FIR No.9/2014 was registered under Section 376 IPC and Section 6 of the POCSO Act on the complaint of the mother of the victim who gave a written complaint stating that her daughter aged 5 years was raped three times on three different dates by Khurshid Alam, who was working in their factory for the last one year by taking their daughter on the terrace of the third floor and on the last time he committed this offence on 5th January, 2014 which fact was told by her daughter today after two days. Her daughter told her that Khurshid took her on the terrace, opened her clothes as well as his clothes and put his penis in vagina, was also touching the same and thereafter got her chocolate. On that date when her daughter went to the terrace she told this fact to the other children in the building who told to her mother-in-law who informed her and then she asked her daughter. When she confronted Khurshid Alam, he denied any such incident. She brought Khurshid to her house and confronted him before her daughter when her daughter reiterated the same fact and Khurshid Alam accepted this fact.

5. Mother of the victim was examined as PW-1 before the learned Trial Court where she deposed that on 7th January, 2014 her daughter told her that the appellant used to take her on the roof of the house and removed his pant and her pant thereafter he touched his penis with her vagina and had slightly inserted his penis in the vagina. She told that Khurshid did this thrice to her.



She reiterated that this fact was told to the other children in the building who told the same to her mother-in-law who informed her.

6. The minor victim was examined as PW-2. On question put by the Court, she explained that on the first instance her mother had gone to Karol Bagh and on the second and third time her mother was sleeping at home when Khurshid took her on the terrace. The victim stated that Khurshid was working in the factory of her father and used to visit their home. Lastly he visited the home on Sunday. She did not remember the date. He told her that she had to buy chocolate. Khurshid took her to the roof of her house on reaching at the roof Khurshid put off his pant and removed her pant and thereafter inserted his penis in her vagina. On a question being asked as to how many times he did the same, the victim stated thrice, firstly at the roof and two times in the stairs on three different dates. The victim was extensively cross-examined. She was also put if there was any quarrel that had taken place between Khurshid and her parents, which she denied and that Khurshid was asking money from her parents which they refused to give, which also she denied.

7. Age of the victim was proved by the testimony of Ashok Kumar (PW-7) who was working as UDC in the school where the victim was studying and as per the original Admission Register produced in the Court the date of birth of the victim was 5th September, 2008 and she was admitted in the school 10th February, 2012 in LKG.

8. Dr. Rajni Mittal appeared as PW-9 who exhibited the MLC vide Ex.PW-9/A, which was prepared and signed by Dr. Anjali Kumari, who had left the services of the hospital. As Dr. Rajni Mittal had seen Dr. Ajanli Kumari writing and signing while working in the hospital in the ordinary



discharge of duty in the said hospital and thus identified her handwriting and signatures.

9. Explanation of the appellant in his statement under Section 313 Cr.P.C. was that a false and fabricated case has been registered by the testimony of the interested witnesses. He stated that he was on visiting terms with the family of the victim for the last five years and started working with them for the last about 1½ years prior to the alleged incident. He had demanded his wages from the parents of the victim who in turn got him falsely implicated in this case. They had also tried to implicate him about 1½ months prior to the alleged incident with the help of a female co-worker, aged 30-35 years, however, she did not agree to support the parents of the victim. The said co-worker was not examined as a defence witness by the appellant.

10. In the history recorded in the MLC of the victim by the doctor it was stated that Khurshid took her to the terrace. He took off his pant and her pant he made lie down on the floor and bent over her. He fondled his penis and started shaking his penis. His penis was touching her thigh and genitalia. He then put on his pant and her pant and took her downstairs and bought her chocolate.

11. As noted above, even in the FIR on the written complaint lodged by the mother, the version was that Khurshid took her daughter to the terrace, opened his clothes and her clothes, touched his penis with the vagina after laying her down on the terrace and bending on her.

12. As per the version of the mother in the Court the appellant touched her penis with the vagina and slightly inserted the same whereas as per the victim he inserted the penis in her vagina. Even in her statement under



Section 164 Cr.P.C. the victim categorically stated that first the appellant touched his penis with her vagina and then inserted the same.

13. Testimony of the victim which is consistent cannot be discarded merely because as per the FSL report, no semen was detected in the swabs and clothes of the minor victim. As noted above, the victim did not tell her mother about the incident on the 5th or 6th and her mother came to know only on the 7th through her mother-in-law who got to know from the other children. In such a situation, there was no likelihood of the clothes of the victim on the date of alleged incident being available for seizure. Further, even the case of the victim is that it was not a case of full penetration but slight penetration which is corroborated by the MLC for the reason even after two days of the alleged incident there was slight inflammation around the hymen.

14. Learned counsel for the appellant has relied upon the decision of this Court in the case of CrI. Appeal No.968/2015, titled Abhay Singh vs. State, decided on 26th July, 2017 wherein this Court held that if there was penetration by a full-grown man to a girl of tender age of about 15 years, old she would have suffered some injury on the private part, however, there was no mark of violence.

15. Even in *Abhay Singh (supra)* relied upon by the learned counsel for the appellant, this Court in para 34 noted as under:-

“34. In Taylor's Principles & Practice of Medical Jurisprudence Volume II 12th Edition page 60, it is mentioned that it is impossible to conceive that forcible intercourse should take place in childhood without bruising, effusion of blood, or a laceration of the private parts. The size of the male organ must necessarily cause some local injury in the attempt to enter the vagina of a child. If the



violation has taken place within two or three days, appearance as presented by the parts may be as follows: (1) Reddening or frank inflammation with abrasion or tearing of the lining-membrane, introitus or of the vagina. (2) Muco-purulent discharge from the vagina of a yellowish or greenish- yellow color. staining the clothing; the urethra may possibly share in the inflammation; (3) In recent cases blood may be oozing from the injured parts or clots of blood may be found in the vulva. (4) The hymen may be entirely destroyed, or may show lacerations ”.

16. It is thus apparent that inflammation is a sign of partial penetration/slight penetration and thus, it cannot be said that the version of the victim child is not corroborated by medical evidence.

17. As noted in the statements above, it is the case of the prosecution that the appellant fondled and touched his penis with her vagina, touched her thigh and genitalia and there was slight penetration. The factum that there was slight penetration is corroborated by the presence of inflammation even after two days of the alleged incident. Hence, the decision of this Court relied upon by the learned counsel for the appellant supports the case of the prosecution.

18. In view of the discussion aforesaid, this Court finds no error in the impugned judgment of conviction, convicting the appellant for offence punishable under Section 376(2)(i) IPC and Section 6 of the POCSO Act as also in the sentence of imprisonment for a period of ten years being the minimum sentence that can be awarded.

19. Consequently, the appeal is dismissed.



20. Order be uploaded on the website of this Court and intimation be sent to the appellant through the concerned Superintendent Jail.

