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

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

+ **CRIMINAL APPEAL No. 967 of 2017**

Between:-

**DHARMENDER S/O SHRI KALI CHARAN
(PRESENTLY CONFINED IN CENTRAL
JAIL NO.3, TIHAR, NEW DELHI)**

.....APPELLANT

(Through: Shri Biswajit Kumar Patra, Advocate)

AND

STATE (NCT OF DELHI)

..... RESPONDENT

(Through: Mr. Utkarsh, APP for State)

% Pronounced on : 01.11.2022

J U D G M E N T

1. The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') against the judgment of conviction dated 29.04.2017 and order on sentence dated 01.05.2017 passed by the learned, ASJ-01, (North-East), Karkardooma Courts, New Delhi, in case SC No. 45014/2015 convicting the appellant for the offence under Section 376(2)(i) & 506 of Indian Penal Code, 1860 (in short 'IPC') sentencing him to rigorous imprisonment for ten years with a fine of Rs. 10,000/- in default of payment further simple imprisonment for 01 month.

2. Learned counsel for the appellant submits that the impugned judgment passed by the learned Trial Court is bad in law and deserves to be set aside. He submits that the learned trial court did not appreciate the evidence in the right perspective, and there are material contradictions and omissions in the evidence of the prosecution witnesses. There is no direct evidence against the present appellant, and the benefit of doubt ought to have been given to the appellant.

3. He further submits that there was a delay in the filing of the FIR No. 349/2015. The learned Trial Court has failed to record whether the child witness had the requisite intelligence to depose. There is no corroboration to the testimony of the child witness. The MLC does not corroborate the statement of the child witness. The doctor who examined the child witness was not examined. The CFSL report was deliberately not exhibited as it was in favour of the present appellant and that the statement of PW6/ father of the child victim support the innocence of the appellant.

4. On the other hand, Learned APP, on behalf of the respondent-state, vehemently opposed the submissions, and he submits that the offences committed by the appellant/accused are heinous in nature and, therefore, the learned Trial Court has rightly convicted him. He submits that the learned Trial Court has considered all the arguments made by the appellant, and there is sufficient evidence to prove his guilt beyond a reasonable doubt. The learned APP has placed reliance on a decision of the Hon'ble Supreme Court in the matter of *Phool Singh v. State of Madhya Pradesh*¹ and a decision of this court in *Vijay v. State*².

¹ 2021 SCC OnLine SC 1153

² 2019 SCC OnLine Del 10485

5. I have heard learned counsel for the parties and perused the record.

6. The case of the prosecution is that on 05.07.2015, on receipt of DD No. 28-D regarding an incident of rape, superintendent Narender Singh from police station Sonia Vihar along with constable Deepak Kumar and lady constable Sumitra reached the spot where caller/complainant Om Prakash met them along with his daughter, the victim aged six years and his wife, *Bimlesh*. The complainant/ father of the victim, in his statement, stated that he resides with his family and does embroidery work. He has three children, out of whom the elder two are sons, and the third one is a daughter, aged about six years. On 05.07.2015, when he returned home from work, his daughter/ victim told him that on 03.07.2015 at about 1:00 PM, *Dharmender*/accused, who resides in the neighborhood, called her on the pretext of getting an Aadhaar Card prepared and took her to his house where he put off her *nicker* and his own *nicker* too and committed a wrongful act with her. *Dharmender* had threatened the victim and told her not to tell anyone about it. The victim told her mother about the incident on 04.07.2015 and further told that *Dharmender* had earlier also committed such acts with his urinating organ and finger. Thereafter, the complainant was informed of the same by his wife, and he then made a call at number 100. On the basis of the above complaint, a case for offences punishable under Section 376/506 of the Indian Penal Code and Section 6 of the Prevention of Children from Sexual Offences Act, 2012 (in short, 'POCSO Act') was registered on 06.07.2015. The medical examination of the victim and the accused was conducted. The accused was subsequently arrested and the statement of the victim under Section 164 Cr.P.C. was recorded. After completion of the investigation, a chargesheet was

filed in the court for offences punishable under Section 376/506 IPC and Section 6 of the POCSO Act, to which he pleaded not guilty and claimed trial.

7. Before the learned Trial Court, the prosecution examined 15 witnesses in support of the charges, namely- the father of the child victim, Om Prakash (PW6), the child victim (PW2), the mother of the child victim, *Bimlesh* (PW-8), Principal *Bhupender Singh* (PW-1), Constable *Wasim Akram* (PW-3), Superintendent *Mahesh Singh* (PW-4), Head Constable *Rakesh Kumar* (PW-5), Constable *Amardeep* (PW-7), Head Constable *Battu Singh* (PW9), Constable *Deepak* (PW10), *Dr Niyaz Alam* (PW-11), Lady Constable *Sumitra* (PW-12), Superintendent *Narender Singh* (PW-13), Women Superintendent *Veena* (PW-14) and *Dr Namita Singh* (PW-15). Thereafter, the appellant made his statement under Section 313 of Cr.P.C, wherein he denied the evidence and claimed innocence. He took the defence that he had not done any alleged act and that the father of the victim had borrowed money and, in order to avoid payment, had lodged the present case against him by tutoring the victim.

8. After evaluating all the evidences adduced by the parties, the learned Trial Court found the appellant/accused guilty of offences under Section 376(2)(i) & 506 IPC and accordingly, the appellant has been convicted and sentenced as mentioned above.

9. The learned Trial Court examined the various statements given by the victim recorded at different stages.

a. First Statement recorded during MLC/ Ex. PW15/A in the form of alleged history was that “*history of sexual assault by a man named Dharmender, living in the neighborhood. According to the victim,*

Dharmender had already inserted his penis into her vagina many a time previously and had also done fingering. He used to threaten the victim that if she will tell anybody, then he would beat her. He used to take the victim to his home.”

b. In her statement under Section 161 Cr.P.C. before the police, it was recorded that accused *Dharmender*, who performs work of POP, took her on the pretext of preparing an Aadhaar Card to his house at about 01:00 PM, where he took off her underwear as also his underwear and then inserted a finger into her urinating organ and laid over her. She also stated that the accused had earlier also done such acts with her two/three times, and sometimes he used to put his urinating organ into her organ and sometimes his finger and also used to kiss her and used to ask her to kiss him and further that he used to threaten to kill her.

c. Before the Ld MM, in her statement under Section 164 Cr.P.C., Ex.PW2/A. the victim again stated that the accused took off her underwear, whilst he himself also became naked. He then inserted his finger into her urinating organ and also inserted his urinating organ into her urinating organ.

d. The victim was then examined in court as (PW-2), wherein she deposed that on the date of the incident, the accused took her to his house, where, he took off her clothes and his clothes and put his urinating organ into her urinating organ. When she cried, the accused closed her mouth, and he did the act with her many times. She deposed that the accused used to take her up on his lap and, when she cried, would beat and threaten her.

10. The learned Trial Court on the basis of the fact that the child victim maintained her version throughout the proceedings and was consistent, convicted the appellant on the sole testimony of the child victim and with there being a lack of any evidence to prove the defence of the appellant.

11. It is a settled law cemented with a catena of judgments that conviction can be on the basis of sole testimony of the prosecutrix. The Hon'ble Supreme Court in the case of ***Krishna Kumar Malik v. the State of Haryana***³, with the same being reiterated in a recent decision of the Hon'ble Supreme court in ***Ganesan v. State Represented by its Inspector of Police***⁴, has observed that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient, provided that the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality.

12. The Hon'ble Supreme Court, in the case of ***Rai Sandeep alias Deepu v. State (NCT of Delhi)***,⁵ enumerated what is considered a “sterling witness”. In paragraph 22, it was held as under:-

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial

³ (2011) 7 SCC 130

⁴ (2020) 10 SCC 573

⁵ (2012) 8 SCC 21.

statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all 12 other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

13. In this matter, the only testimony that can be examined is that of the child victim (PW-2), as there are no witnesses to the incident and the testimony of the mother of the victim (PW8) and the father of the victim (PW-6) is based upon what the child victim had informed them.

14. The first statement recorded by the child victim during MLC stated that the accused-appellant had a history of sexually assaulting

the victim. The statement of the child victim stating repeated occurrence of the alleged offence has not been made either in the recording of statement under Section 161 Cr.P.C, or under Section 164 Cr.P.C or before examination in court. No supposed time, event, or place has been provided by the child victim of where and when the appellant had committed the same offence.

15. The MLC/Ex. 15-A provides that the victim has no bruises, injury, or bleeding. It is further provided that the hymen of the victim was torn, which is an old occurrence that cannot be attributed to the present appellant in the absence of any specific allegations of the same. Further, the cross-examination of the medical professional who conducted the MLC of the child victim and was in a position to shed light on questions such as (i) the reason for his opinion of “Hymen Torn (old)” despite having no injury/bleeding/bruise (ii) how old is the hymen torn in the present case (iii) considering the then condition of the child and based on the documents on record is there any possibility of past sexual assault, was not done.

16. Another discrepancy arises regarding the vagueness of how the accused-appellant took her to his house. In her statement under Section 161 of the Cr.P.C. before the police, the child victim deposed that she was called by the appellant on the pretext of getting an Aadhar card. The other comments made at different stages have not been consistent in this aspect.

17. The father of the victim (PW-6) had, in his statement deposed that he had not seen the accused indulging in any such act with the victim, and the information regarding the incident had been hearsay from the mother of the victim (PW-8). Further, the father of the victim

has admitted that there has been a financial dispute between him and the appellant-accused

18. The Hon'ble Supreme court, in its decision, ***Tameezuddin @ Tammu vs State of (NCT) Of Delhi***,⁶ provided that in a case of rape, the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. In the present matter, the discrepancies create doubt about the factum of occurrence, and the evidence by the child victim is not of sterling quality.

19. The Hon'ble Supreme Court, in its decision, ***Aman Kumar and Anr. v. The State Of Haryana***,⁷ enumerated that

“It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony.”

20. The sole testimony of the child witness does not inspire confidence. In the absence of any witnesses or medical evidence, reasonable doubt on the commission of the offence by the appellant-accused can therefore be inferred. This court is of the opinion that the

⁶ (2009) 15 SCC 566

⁷ (2004) 4 SCC 379

discrepancies in the testimonies of the witnesses and the deficiencies noted above, cast a shadow of doubt on the prosecution case, and the appellant's involvement is thus not proved beyond reasonable doubt. On the contrary, the defense of the appellant appears to be truthful as the father of the victim, Om Prakash/PW6 in his testimony has admitted of there being a monetary dispute between him and the accused.

21. On the basis of the aforesaid, the statement of the child victim does not inspire trust and confidence of this court, there are no other corroboratory evidence supporting the prosecution case and the accused has been able to bring reasonable doubt. This court finds it fit to set aside the conviction of the appellant.

22. Accordingly, the conviction is set aside and the impugned judgment of conviction dated 29.04.2017 and order on sentence dated 01.05.2017 passed by the learned, ASJ-01, (North-East), Karkardooma Courts, New Delhi, in case SC No. 45014/2015 convicting the appellant for the offence under Section 376(2)(i) & 506 of IPC and sentencing him to rigorous imprisonment for ten years with a fine of Rs. 10,000/- in default of payment, further simple imprisonment for 01 month is set aside. The appeal is allowed, and pending application(s), if any, are accordingly disposed of. The appellant is directed to be released from custody forthwith, if not, required in any other case.

23. This court appreciates the assistance provided by learned counsel for the parties.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

NOVEMBER 01, 2022/PG