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

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

+ **CRIMINAL APPEAL No. 1060 of 2017**

Between:-

**DIPENDER S/O SHRI GANGA BAHADUR
R/O H.NO. 531, SURAJ PARK,
SAMAY PUR BADLI, DELHI AND
PRESENTLY CONFINED IN CENTRAL JAIL
NO.3, TIHAR, NEW DELHI**

.....APPELLANT

(Through: Shri Ankur Sood & Ms. Bheeni Goyal, Advocates)

AND

THE STATE (GNCT OF DELHI) RESPONDENT

(Through: Shri Utkarsh, APP for the 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 judgement of conviction dated 28.03.2017 and order on sentence dated 30.03.2017 passed by the learned, ASJ-01, (North), Rohini Courts, New Delhi, in case SC No.58469/2014 convicting the appellant for the offence under section 6 of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO') sentencing him to rigorous imprisonment for ten years with a fine of Rs.5000/- in default of payment of fine further simple imprisonment for 30 days

and under section 363 of the Indian Penal Code, 1860 (in short ‘IPC’) convicting the appellant for a period of three years and fine of Rs 5000/- in default of payment of fine further simple imprisonment for 30 days with direction to run both the sentences concurrently.

2. Learned counsel for the appellant submits that the 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. It is also submitted that there is no direct evidence against the present appellant, and the benefit of doubt ought to have been given to the appellant. He further submits that the medical evidence does not support the case of the prosecution. The defence evidence was ignored and not given due weight. The appellant was denied the opportunity to effectively cross-examine the alleged victim. The witness statements are replete with contradictions, and the case of the prosecution is inherently improbable.

3. On the other hand, learned APP appearing on behalf of the respondent-State vehemently opposes the submissions and 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 Additional Sessions Judge has considered all the submission made by the appellant, and there is sufficient evidence to prove his guilt beyond a reasonable doubt. The learned APP has placed reliance on the decision of the Hon’ble Supreme Court in the case of *Phool Singh v. State of Madhya Pradesh*¹ and a decision of this court in the case of *Vijay v. State*².

¹ 2021 SCC OnLine SC 1153

² 2019 SCC OnLine Del 10485

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

5. The case of the prosecution is that on 14.03.2014 at about 7:30 PM, when the victim, a girl aged between 11-12 years, was going to a public toilet, the accused met her on the way and caught her hand. Thereafter, he took her in a *jhuggi*, gagged her mouth, removed her jeans and committed a wrongful act with her. She got unconscious, and when she gained consciousness, she found herself in a hospital with her parents. On the basis of the above, the FIR No.259/14 in question came to be registered. The accused was arrested and charge sheeted. Charges for the offences punishable under Section 363 of the IPC and Section 6 of the POCSO Act were framed against the accused, to which he pleaded not guilty and claimed trial.

6. Before the trial court, the prosecution examined 20 witnesses in support of the charges, namely, the father of the child victim, H (PW6), the child victim (PW2), the mother of the child victim, N (PW3), Mukesh Kumar(PW1), Dr Vidya Rani (PW4), Head constable (PW5), Sita (PW7), Constable Umesh (PW8), Laxman (PW9), Dr. Brijesh Narayan (PW10), Constable Kalpana (PW11), Head Constable Ved Prakash (PW12), Head Constable Gordhan Lal(PW13), Ms Rajni Ranga (PW14), Inspector Vipnesh (PW15), Dr Mukesh (PW16), Constable Prashant (PW17), Superintendent Anita Sharma (PW18), Naresh Kumar (PW19) and Superintendent Neetu (PW20). Thereafter, the appellant made his statement under Section 313 of the Cr.P.C, wherein, he denied the evidence and claimed innocence. He took the defence that the mother of the victim was asking for Rs.2 lacs from him to purchase a plot. When he and his family showed inability to pay the amount, the mother of the victim threatened him of implication in a false case. The accused claimed

that on the date of the incident, he came from his shop at about 11 PM and at that time, the beat officer came and apprehended him. The accused examined four witnesses in his defence, namely, Dr. Bhim Singh (DW1), Sumitra (DW2), Ramesh (DW3) and Pappu Gupta (DW4).

7. After evaluating all the evidences adduced by the parties, the trial court found the appellant/accused guilty for offences under Section 6 of the POCSO Act and under Section 363 of the IPC and accordingly, the appellant has been convicted and sentenced as mentioned above.

8. The trial court, on the basis of evidence on record, found that on the date of the incident the victim was a "child" less than 12 years old. The accused after taking the victim in a *jhuggi*, committed penetrative sexual assault on her in that *jhuggi*. The testimony of the victim is found to be truthful and consistent in material particulars. The parents of the victim corroborated the version of the victim. The incident was promptly reported to the police. The forensic evidence establishes penetrative sexual assault and accused failed to establish any defense.

9. Upon perusal of the records and evaluation of the statement given by PW1/the child witness at different stages of the trial, it is seen that:-

a. The child victim, in the FIR/Ex.PW5/A, stated that on 14.03.2014, at about 7:30 PM, when she went to the toilet, the accused caught her hand and took her to a *jhuggi* and gagged her mouth with his hand and removed her jeans, He then committed a wrong act with her and thereafter she became unconscious.

- b. The victim, in her statement under Section 164 of the Cr.P.C. /Ex.PW2/B, deposed that on the evening of 14th March at about 07:30 PM, when the victim went out of her *jhuggi* for toilet, on the way, the accused caught hold of her hand, he forcibly took her to a house and bolted the door from inside. He forcibly took off her pant and started forcing her. When she raised alarm, he gagged her mouth with his hand and then committed a wrongful act with her.
- c. In her testimony before the court, she stated that on 14.03.2014, at about 7:30 PM, when she was going for *Sauchalaya*, the accused held her hand and took her to the *jhuggi* of some person. Thereafter, he closed the door of the said *jhuggi* and switched off the light of the *jhuggi* and raped her. By rape, she meant that he took off his clothes, and also took off her clothes and inserted his urinating part in her urinating part. Thereafter, she became unconscious in the *jhuggi*, and when she regained consciousness, she found herself in the hospital with her parents.
10. The Hon'ble Supreme Court in the case of ***Rai Sandeep alias Deepu v. State (NCT of Delhi)***,³ enumerated what is considered a “sterling witness”. In paragraph 22, it was stated that :-

“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

³ (2012) 8 SCC 21.

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 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.”

11. The Hon’ble Supreme Court in the case of ***Phool Singh (supra)***, discussed a case, wherein the appellant was convicted and the ground for defence raised was that the medical evidence did not support the prosecution and the entire case of the prosecution rests on

the sole deposition of the prosecutrix. The Hon'ble Supreme Court, while relying on multiple judgments, observed that as a general rule, if credible, the conviction of the accused can be based on the sole testimony, without corroboration and that the sole testimony of prosecutrix should not be doubted by court merely based on the assumptions and surmises. Further, this court in the case of **Vijay v. State**⁴, also dismissed the appeal against conviction on the ground that the child victim's testimony had been consistent and no contradictions were found in the victim's testimony.

12. A similar stance was taken by High Court of Calcutta in **Prabir Bhuian alias Prabir Bhuinyan vs State of West Bengal**⁵, wherein the appeal of the accused, who was the stepfather of the victim, against conviction under Section 8 of POCSO was being heard and it was observed that minor contradictions in the testimony of the witness are no ground to reject the whole of the testimony of the witness-

“Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of human conduct would be that while narrating the particular incident, there may occur minor discrepancies, such discrepancies may render credential to the depositions. Parrot like statements are disfavoured by the Courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and the environment in which such witness was making the statement.”

13. The testimony of the child victim in relation to the incident is consistent throughout in describing what the accused had done to her

⁴ 2019 SCC OnLine Del 10485

⁵ 2021 SCC OnLine Cal 3063

as well as the place of occurrence. The same is corroborated with the testimony of PW3/mother of the child victim and PW6/ father of the child victim, who saw the accused standing outside the said *jhuggi* while they were out looking for the child victim. They, in their statements, deposed that on seeing them, the accused fled, the *jhuggi* was bolted from inside, and after opening the door, they found the child victim lying unconscious on the floor of the *jhuggi*. The matter was reported to the police, and the victim was taken to BSA hospital in a PCR van. Form, Ex. PW11/A, mentions that the information was also received from the PCR van that the victim was found in an unconscious condition and she was being taken to the hospital along with her parents, further cementing the testimony by the witnesses.

14. The learned counsel for the appellant raised the ground that the MLC Ex.PW4/A provided that the victim had no injuries in Labia Majora and Minora or bleeding, the torn hymen of the victim was old, and therefore, the same establishes that the victim was not sexually assaulted and thus, the testimony of the victim cannot be relied on to hold the accused guilty for commission of a sexual assault.

15. The Hon'ble Supreme Court in the matter of ***B.C. Deva @ Dyava v. the State of Karnataka***⁶ had observed that the plea that no marks of injuries were found either on the person of the accused or on the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynaecologist does not disclose any evidence of sexual intercourse yet, in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, when found to be cogent and convincing, has to be accepted.

16. In the present matter, the mere absence of any medical evidence in the MLC, showing signs of sexual assault, injuries either externally or internally, does not lead to the automatic inference that the accused has not committed forcible sexual intercourse.

17. The defence taken by the accused is that the mother of the victim was asking for Rs.2 lakhs from him to purchase a plot, and on his inability to pay the same, she threatened that she would implicate him. He further claimed that on the date of the incident, he came from his shop at about 11 PM.

18. The accused did not lead any evidence to prove his defence of there being any kind of monetary transaction. The accused, in his defence of *alibi* examined DW2 and DW3. DW2, a friend of the victim, testified that the child victim was with her till 10 PM. This court finds this deposition unconvincing and unreliable in view of the fact that D.D. No.56A, informing the police that the victim was missing, was recorded at 6 PM, and the same also stands recorded in the PCR form Ex. PW11/A. DW3 Ramesh, who worked along with the accused, deposed that the accused was present in the stall with him from 4 PM to 11 PM, but despite his claim, he did not approach any police authority to say so.

19. The Hon'ble Supreme Court in the matter of ***State of M.P. v. Dayal Sahu***⁷ has held that while acquitting the accused on the benefit of doubt, the court should be cautious to see that the doubt should be a reasonable doubt and it should not reverse the findings of the guilt on the basis of irrelevant circumstances or mere technicalities.

20. Further, careful scrutiny of the FSL report/Ex. F-1 shows that the ensuing exhibits were collected from the victim, and on biological examination, the following was detected: -

Exhibits	Detected
Exhibit 1n1- blood collection of victim	Blood
Exhibit 1d- breast swab of the victim	Saliva
Exhibit 1h- cotton swab of cervical of victim	Blood and semen
Exhibit 1i1- cotton swab of vagina of victim	semen
Exhibit 1k- washing from vagina of victim	semen
Exhibit 1l1- rectal examination of victim	semen
Exhibit 2a- one jean pants of victim	Blood and semen
Exhibit 4a- one bed sheet	semen
Exhibit 4b- one cloth piece having stiffy stains	Blood and semen
Exhibit 5- gauze cloth piece with brown stains of the accused	Blood

On the above exhibits being subjected to DNA examination, DNA from exhibit B (blood of the accused) was accounted in the source of exhibits above indicating that the DNA Profile of the accused is matching with the breast swab, vaginal secretion, washing of vagina and jeans pant of the victim. DNA of the accused is also found on the bedsheet and cloth pieces seized from the place of occurrence.

21. The learned counsel for the appellant has submitted that the FSL report cannot be relied on as the semen sample was not preserved as per the procedure. Further, the learned counsel examined DW1/ Dr.

Bhim Singh, who testified that the FSL result seemed to be copied and pasted and no proper method seemed to have been followed in arriving at the result. The allegation that the semen sample was not preserved as per the procedure or that it has been tampered with, does not hold ground as there is nothing on record to indicate any motive or manipulation of the samples in any manner. Further, if the semen sample was rendered unusable due to improper preservation, a conclusive finding, as can be seen from the FSL report, would not have been possible. Additionally, on cross-examination, DW1 himself admitted that he does not have any expertise in DNA examination and had only conducted it once or twice throughout his professional career.

22. In the case of *Mahipal @ Lala v. The State (Govt of the NCT) of Delhi*, CRL.A.8 43/2017 decided on 08.10.2020, this court was dealing with an appeal against conviction of the accused under Section 6 of the POCSO Act and Section 506 of the IPC. The accused was the stepfather of the prosecutrix, who was aged about thirteen years at the time of the incident. The prosecutrix, in her statement under Section 164 of the Cr.P.C., became hostile and stated that she had made a false complaint and wanted her stepfather to be released. The accused was convicted on the basis of the FSL report. This court observed that the prosecutrix was not a sterling witness whose testimony could be relied upon without any corroboration. The conviction of the accused was upheld solely on the basis of the FSL report, which corroborated the allegations made by the prosecutrix, wherein, the allelic data of the DNA profiles generated from the blood sample of the prosecutrix and the blood gauze of the accused, was accounted in the allelic data profile generated from the aborted foetus of the prosecutrix.

23. The FSL Report/Ex. F-1, in the present matter, fully corroborates the allegations made by the child victim. The FSL Report leaves no room of doubt that the appellant had committed the offence for which he was charged. Besides the FSL report, the prosecutrix supports the prosecution case in her statement under Section 164 of the Cr.P.C. and in her evidence before the court. As has been noted above, there are minor contradictions; they, though, do not suggest that the prosecution story is false. The prosecution has been successful in proving the case beyond a reasonable doubt.

24. On the basis of the aforesaid analysis, there are no major inconsistencies between the witness testimonies of the prosecution being the mother of the victim, the father of the victim and the victim herself and the prosecution case is further strengthened by virtue of the medical evidence. The prosecution has successfully proved its case beyond reasonable doubt, and therefore, this court does not find any ground to interfere with the impugned judgment of conviction and sentence.

25. The conviction is upheld. The appeal is dismissed, and pending application(s), if any, are accordingly disposed of.

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

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

NOVEMBER 01, 2022

p'ma/pg