

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

% Reserved on: 16th January, 2023
Decided on: 9th February, 2023

+ **CRL.A. 1371/2019**

SUDHIR SAHNI

..... Appellant

Represented by: Mr. Anwesh Madhukar, Adv.
(DHCLSC) with Mr.Yaseen Siddiqui,
Ms.Prachi Nirwan and Mr.Pranjal
Shekhar, Advs.

versus

STATE

..... Respondent

Represented by: Ms.Shubhi Gupta, APP for the State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

MUKTA GUPTA, J.

1. By this appeal, the appellant challenges the judgment of Trial Court dated 15th July, 2019 and also the order on sentence dated 21st August, 2019, whereby the appellant was convicted for offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO") and directed to undergo rigorous imprisonment for life along with fine of ₹50,000/- in default whereof simple imprisonment for one year, as also rigorous imprisonment for one year alongwith fine of ₹1,000/- in default whereof simple imprisonment for one month for offence punishable under Section 342 of the Indian Penal Code, 1860 ("IPC").
2. Briefly the case of the prosecution was that the appellant was the neighbor of the prosecutrix. On the pretext of getting prosecutrix a job and

getting her married to his friend, appellant took ₹13,000/- from the prosecutrix. After sometime, when the prosecutrix went to get her money back, the appellant refused to return the money and committed sexual assault on her on three different occasions i.e. 10th April, 13th/14th April and 1st May, 2014. The prosecutrix disclosed to her cousin 'A' that the appellant was not returning the money on which 'A' went to appellant's house and a quarrel ensued between 'A' and the appellant after which, the mother of the prosecutrix and 'A' went to the police station. The statement of the prosecutrix was got recorded at the police station (Ex.PW-2/A) pursuant to which the prosecutrix was sent for medical examination.

3. MLC of the prosecutrix (Ex.PW-7/A) dated 02nd May, 2014 was prepared by Dr. Ajay Sharma, wherein it was recorded

“Pattern bruises present Lt. side of forearm.

1. Size of horizontally 2.5 cm x 0.5 cm.

On asking, H/o above injury first answer H/o assault by Police again voluntary answered hit by brother.

Ref. to Gynae for Expert Examination with Opinion.

Nature of Injuries – Simple

Kind of Weapon – Blunt by Wooden Stick

Bruise present on R thigh dorsal aspect 5 x 4 cm.

No other external injury, hymen torn, no bleeding.”

4. Thereafter, IO/SI Vandana went to the spot and arrested the appellant from his *jhuggi* vide arrest memo Ex.PW-2/C and his disclosure statement (Ex.PW-7/E) was recorded, and his medical examination (Ex.PW-7/G) was got conducted. After completion of investigation, the charge-sheet was filed and the appellant was charged for offences punishable under Section 6 POCSO Act and Section 342 IPC. To prove its case, prosecution examined 8 witnesses.

5. Learned counsel for the appellant assails the impugned judgment on the ground that the present matter involves false implication of the appellant because of monetary dispute between the appellant and the brother of the prosecutrix. It was contended that the conduct of the prosecutrix is doubtful as it is highly unlikely as to why would a girl who has been raped thrice would be willing to go with that man as recorded in the prosecutrix's statement under Section 164 of the Code of Criminal Procedure, 1973 ("CrPC") and the FIR (Ex.PX-1/A). It was further contended that the MLC of the prosecutrix clearly establishes that she was beaten by a wooden stick as also stated by her that it was first the police and then her brother who had beaten her. Further, the MLC does not mention whether the hymen tear was fresh or old, and in totality the MLC suggests that no such incident ever took place. Neither the doctor who prepared the MLC was examined, nor was the MLC ever admitted by or on behalf of the appellant during trial. It was further contended that in order to tally the DNA, semen sample of the appellant was not required and that the blood sample was enough, and therefore, the fact that the semen sample was collected at the instance of the IO leads to the probable conclusion that the same was collected only to plant evidence against him. Further, the only incriminating evidence against the appellant in the FSL Report, however, the same is unreliable as possibility of planting semen on the clothes of the prosecutrix cannot be ruled out and also that the said report returned the finding that the DNA found on the *pyjama* was "similar" with that of the appellant. Although PW-8 in her examination stated that the accuracy of DNA profiling is 100%, thus, the fact that the tallying was opined to be "similar" does not support the case of the prosecution, and in this regard, reliance was placed on the decision of

Punjab & Haryana High Court in CR No. 5090/2012 Rajli @ Rajjo v. Kapoor Singh & Ors. It was further contended that the age of the prosecutrix was also not proved by the prosecution and that the Trial Court wrongly placed reliance on the testimony of the School Principal PW-3. No valid document to prove the age of the prosecutrix was brought on record and reliance was placed on the decision reported as AIR 1988 SC 1796 Birad Mal Singhvi v. Anand Purohit.

6. Per contra, learned APP for the State relies upon the following facts:

- i. That the prosecutrix (PW-2) had categorically stated about the three incidents of forced sexual physical relation i.e. on 10th April, 13-14th April and 1st May in 2014 in her examination-in-chief and as also her statement to police (Ex.PW-2/A), MLC (Ex.PW-7/A) and statement under Section 164 CrPC (Ex.PW-2/E). Although there was a money dispute between the appellant and the brother of the prosecutrix, however, the same cannot impact the prosecution version when there are clear allegations of rape by the prosecutrix.
- ii. That the MLC (Ex.PW-7/A) records history of sexual assault by neighbor Sudhir and also records presence of bruises on right thigh and hymen being torn.
- iii. That as per the admission register pertaining to prosecutrix (Ex.PW-3/A), the victim, was admitted in the first standard of the school and the date of birth was 16th November, 2002, thus, the victim was a minor at the time of incident.

iv. As per the FSL result (Ex.PW-8/A), the DNA profile generated from the *pyjamas* of the prosecutrix is similar with that generated from the blood of the appellant.

7. Learned APP for the State thus submitted that in view of the fact that the age of the prosecutrix at the time of incident was about 16 years and that the DNA retrieved from the clothes of victim tallied with that of the appellant, therefore, the guilt of the appellant stands proved beyond reasonable doubt and consequently, the impugned judgment be upheld and the present appeal be dismissed.

8. Having heard the counsel for the appellant and APP for the State and perusing the record, the following evidence emerges.

9. Prosecutrix (PW-2) deposed that she knew the appellant as the appellant was residing in the house opposite to hers and that the appellant promised her a job and that he would get her married to his friend, and on this pretext she gave ₹13,000/- to the appellant by borrowing the amount from her *chachi*. On 10th April, 2014, she went to the house of the appellant to get her money back, but the appellant sent his wife out of the house and locked the door of the house by taking her in and committed the 'wrong act' inside his house. She stated that on 13th-14th April, 2014, she again went to the house of the appellant to take her money back, when he again established sexual relation with her forcibly; and third time again she went to the house of appellant for getting her money back, but again the appellant forcibly established sexual relations (At a later stage, on a leading question, she disclosed the third incident to be on 1st May, 2014). Thereafter, she disclosed to her cousin 'A' that the appellant had taken her money and was not returning the same, on which 'A' went to the house of the appellant

where a quarrel took place between the appellant and 'A', after which her mother and cousin 'A' went to the police and her statement (Ex.PW-2/A) was recorded, and she was taken to the DDU hospital for medical examination.

10. Ms. Y (PW-4) who is the mother of the prosecutrix stated that the date of birth of the prosecutrix was 16th November, 2002. She denied having known the date of the incident and stated that her sister-in-law (*devrani*) informed her that the prosecutrix had taken money from her house and on inquiry, the prosecutrix told her that she had given the money to the appellant. She stated that she asked the prosecutrix to get the money back from the appellant, for which she went to the house of the appellant, however, the appellant did not return the money and committed rape on the prosecutrix. She stated that the police was informed about the incident on which FIR was registered and the medical examination of the prosecutrix was got conducted. In her cross-examination, she stated that she did not witness the committing of the offence against the prosecutrix and also stated that there was a monetary dispute.

11. Ms. Z (PW-5) was the *chachi* of the prosecutrix who stated that she used to work as a maid in different houses and that around the time of incident, she had kept cash of ₹13,000/- in her *jhuggi* which was found missing after 3-4 days. She stated that her neighbor informed her that the prosecutrix came to her house in her absence. She made inquiries about the money from the prosecutrix who stated that she had given the money to the appellant. She stated that she had asked the prosecutrix to get the money back from the appellant and that she also informed the mother of the prosecutrix about this fact. In her cross-examination, she stated that there

was a monetary dispute between the appellant and the mother of the prosecutrix.

12. 'A' (PW-6) cousin brother of prosecutrix deposed that the incident took place in the month of 2014 when his paternal aunt came to his house and informed his mother that the prosecutrix had come to her *jhuggi* in her absence and took away ₹13,000/- and this fact was informed to him by his mother. On inquiry, the prosecutrix told him that she had given the money to the appellant, on which, he asked the prosecutrix to get the money back from the appellant, but on one pretext or the other, the appellant did not return the money and in this process about 15-20 days passed away. One day, he noticed bag lying outside the house of the appellant, and he got to know that the appellant was leaving the house and thereafter, a quarrel took place between him and the appellant. The appellant then went to the police station and the police came to the spot where the prosecutrix informed the I.O. that when she visited the house of the appellant to get the money back, the appellant established physical relationship with her. In his cross-examination, he stated that his sister used to go to the house of the appellant and that he did not talk to the appellant prior to the registration of this case. He further stated that initially the dispute was about the money, but later he came to know that the appellant had committed rape on the prosecutrix.

13. Ms. Poonam Sharma (PW-8) conducted the FSL examination and tendered her report (Ex. PW-8/A) and opined that the DNA generated from the *pyjama* of the victim (Ex. 1a) was found similar with the DNA profile generated from the blood of the accused (Ex. 15).

14. I.O./SI Vandana (PW-7) deposed that on 2nd May, 2014 at about 5 PM, the prosecutrix and her mother came to the police station where the

prosecutrix informed her that the appellant who was living in the neighbourhood committed rape on her on 10th April, 14th April and 1st May in 2014. The prosecutrix also informed her that she had given an amount of ₹13,000/- to the appellant. She sent the prosecutrix alongwith L/Ct. Seema to DDU Hospital for medical examination and the MLC (Ex. PW-7/A) was handed over to her. Ms. Kalyani from child helpline was present at the police station and counselling was provided to the prosecutrix and the statement of the prosecutrix (Ex. PW-2/A) was recorded on which the FIR No.294/2014 dated 2nd May, 2014 (Ex. 1/A) at P.S. Kirti Nagar, under Sections 376/342/506 of the IPC and Sections 5 & 6 of POCSO Act was got registered. Thereafter, she went to the spot and prepared the site plan (Ex. PW-2/B) at the instance of the prosecutrix. Thereafter, she was led to the *jhuggi* of the appellant, from where the appellant was arrested and was sent to DDU hospital for medical examination (Ex. PW-7/G). After completion of investigation, charge-sheet was filed. In her cross-examination, she stated that the prosecutrix told her that she had taken ₹13,000/- from her *chachi* without her *chachi*'s permission for giving it to the appellant.

15. In his statement under Section 313 Cr.P.C., the appellant denied having taken any cash from the prosecutrix as also the incident. He stated that the present FIR was falsely registered and that he was falsely implicated in the present matter because of a quarrel that took place between him and the brother of the prosecutrix regarding monetary dispute.

16. It is well known that the testimony/statements of prosecutrix need not be microscopically evaluated and conviction can be based solely on the testimony of the victim if the same inspires confidence. In the present case, the prosecutrix alleged that the appellant committed "*galat kaam*" on her on

three occasions, however, there are glaring infirmities in her statements. As per her first statement to the police i.e. *rukka* (Ex.PW-2/A), she stated that on 10th April, she went to the house of the appellant to take her money back, when the appellant locked his *jhuggi* from inside and asked her to remove her clothes and then established physical relation with her and the same thing happened on 14th April and 1st May, 2014. She further stated that she was going to run away with the appellant and had to meet the appellant at the Naraina station and that her brother got to know about the same, on which a quarrel ensued between her brother and the appellant and police arrived at the spot. In her statement under Section 164 CrPC (Ex.PW-2/D), it was recorded that at the instance of the appellant she stole ₹13,000/- from the house of her *chachi* as the appellant told her that he would get a job for her and would also get her married to his friend. She stated that the appellant had asked her to come with him at 8 PM on 01st May, 2014, and accordingly, she had packed her bag, when her brother 'A' arrived. On asking, she told everything to her brother at which, her brother asked the appellant to vacate the *jhuggi*, and on 02nd May, 2014 when her brother went to ask for money from the appellant, scuffle ensued between her brother and the appellant. She stated that at about 11 AM on 10th April, the appellant had called her to give her money back and after sending his wife out, the appellant established forced physical relation with her against her wishes. And the same thing happened on 14th April and also on 1st May. Even in her cross-examination, the prosecutrix stated that she had disclosed the fact of giving ₹13,000/- to the appellant to her brother one day prior to the date when she had gone to PS Kirti Nagar, however, at a later stage she stated to have gone to the house of the appellant for the first time after 15

days of giving the money to the appellant, after her brother had threatened her to get the money back. She further stated that after she told her brother about giving cash to the appellant, she along with her brother and mother went to the house of the appellant for getting the money back, where a quarrel took place between the appellant and her brother. She further stated that at the time of quarrel, a call had come from the police station and all of them were asked to come to the police station. From these statements of the prosecutrix as also her testimony before the Trial Court, it can be seen that she was sexually assaulted three times, however, on the rest of the count, prosecutrix has given different versions.

17. Further from the MLC of the prosecutrix dated 2nd May, 2014 (Ex. PW-7/A), it is evident that the prosecutrix disclosed that the injuries on her body were inflicted by the police and later, she stated that the injuries were caused by her brother. Even as per the opinion of the doctor, the injuries were caused by a wooden stick having blunt impact. It is thus apparent that before the statement of the prosecutrix was recorded on which FIR was registered, she was assaulted either by the police or by her brother and this certainly impacts the voluntariness of the statement of the prosecutrix.

18. Furthermore, the learned APP relied upon the FSL report (Ex. PW-8/A) which records that the DNA isolated from the semen stains on the *pyjama* of the prosecutrix tallied with the DNA generated from the blood of the appellant. A perusal of the evidence on record reveals that after the medical examination of the prosecutrix, her clothes were seized by the IO (Ex. PW-7/B). The appellant was also arrested and medically examined soon thereafter on the same day i.e. 2nd May, 2014. As per the MLC of the appellant (Ex. PW-7/G), the semen of the appellant was collected and

handed over to the IO along with appellant's blood, undergarment and pubic hair, however, the said semen sample was never sent for FSL examination, but only the blood sample of the appellant was sent. Thus, despite the semen sample having been seized, the same was not sent for FSL examination and the Investigating Officer has not explained the custody of the semen sample of the appellant collected by him, therefore, as contended by learned counsel for the appellant, the possibility of the semen having been planted on the *pyjama* of the prosecutrix cannot be ruled out.

19. Further it has been admitted by the prosecution witnesses that there was a monetary dispute between the appellant and the brother of the prosecutrix. In view of the fact the testimony of the prosecutrix does not inspire confidence due to the varying versions and there is no corroboration to her testimony, rather the evidence on record does not rule out planting of appellant's semen on the *pyjama* of the prosecutrix, the MLC of the prosecutrix shows that she was beaten before her statement was recorded, this Court finds that the prosecution has failed to prove its case beyond reasonable doubt, the benefit of which must go to the appellant. Thus, the impugned judgment of the conviction and order on sentence is set aside.

20. The appellant is directed to be released forthwith, if not required in any other case.

21. Appeal is accordingly disposed of.

22. Copy of the judgment be sent to the Superintendent, Jail for updation of record and intimation to the appellant.

23. Judgment be uploaded on the website of this Court.

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In view of the order passed in the appeal, the application is disposed of as infructuous.

**(MUKTA GUPTA)
JUDGE**

**(POONAM A. BAMBA)
JUDGE**

FEBRUARY 09, 2023
'vn'

