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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 17th October, 2023

Date of decision: 16th November, 2023

+ CRL.A. 779/2017 & CRL.M.A. 11181/2023 (Release the applicant on furnishing the Personal Bond)

FAIYAZ @ PAYAZI

..... Appellant

Through: Mr. Sumeet Verma, Mr. Mahinder Pratap Singh & Mr. Vinay Kumar, Advocates.

versus

STATE

..... Respondent

Through: Mr. Aman Usman, APP for the State with SI Sonu Kumar, P.S. Sultan Puri.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present appeal under Section 374 of the Code of Criminal Procedure, 1973 ('CrPC') challenges the judgment of conviction and order on sentence dated 20.01.2017 and 30.01.2017 respectively passed by the learned Additional Sessions Judge – 01 (North-West), Rohini District Courts, New Delhi, in Sessions Case No. 1/16 arising out of FIR No. 1043/15 under Section 376 of the Indian Penal Code, 1860 ('IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO') registered at PS Sultan Puri. The appellant has been convicted for offence under Section



6 of the POCSO and has been sentenced to undergo rigorous imprisonment of for 10 years alongwith a fine of Rs. 5,000/- and in default of payment of fine, further simple imprisonment for 03 months.

Background

2. Briefly stated, the facts of the present case are as under:

- i. At H.No. 1368, Lakhi Ram Chowk, Kartarwali Gali, Village Poth Kalan, Delhi, the victim, aged about 05 years, resided in one room and the appellant Faiyaz @ Payazi and one Bahadur Singh resided in the adjoining room. The mother of the victim worked at a bangle manufacturing factory located in the same street. The appellant and Bahadur Singh worked at another factory.
- ii. On 27.10.2015 at about 03:00 PM, the victim went to the factory where her mother was working and informed her that the appellant has inserted his finger into her vagina, which caused bleeding.
- iii. The victim's mother called the police. The Investigating Officer reached the spot and made preliminary enquiries from the victim. Thereafter, the statement of the victim's mother was recorded. The victim was medically examined and it was found that she was suffering from slight congestion at her hymenal area. The mother of the victim refused internal examination of the latter.
- iv. The statement of the victim under Section 164 of the CrPC was recorded and the appellant was arrested on 28.10.2015. On completion of investigation, chargesheet was filed.
- v. The prosecution examined 09 witnesses and statement of the appellant was recorded under Section 313 of the CrPC.



- vi. After considering the evidence lead by the parties and their rival contentions, the learned ASJ passed the impugned judgment of conviction and order on sentence.

Submissions on behalf of the Appellant/Faiyaz @ Payazi

3. Learned counsel appearing on behalf of the appellant submitted that the case of the prosecution is based on the allegation that the appellant inserted his finger into the victim's (PW-4) vagina. It was submitted that prior to the incident, the victim's mother had a quarrel with the appellant over the issue of filling water from a common public hydrant in the street.
4. Learned counsel for the appellant further submitted that the case of the prosecution rests primarily upon the sole testimony of the victim (PW-4), however, the same has not been sufficiently corroborated by medical or forensic evidence. It was submitted that the learned ASJ has based the conviction of the appellant solely on the uncorroborated testimony of the victim who may have easily been tutored by her mother who had a quarrel with the appellant in the recent past.
5. Learned counsel for the appellant drew the attention of this Court to the MLC of the victim (Ex. PW-6/A) which reflects that she had refused internal gynaecological examination by the doctor. It was submitted that the MLC further reflects that on a local examination of genitals of the victim, nothing abnormal was detected and the hymen was found intact with no injury, except for a slight congestion. It was submitted that Dr. Urmila, Senior Gynaecologist (PW-9) categorically stated that the slight congestion could be on account of insertion of finger into the vagina or on account of an infection, itching or scratching the vaginal area with a dirty finger. It was thus submitted



that this casts a doubt upon the case of the prosecution, inasmuch as it has come on record that the congestion could have been caused by something other than the appellant's alleged action of inserting his finger into the victim's vagina.

6. It was submitted that the mother of the victim (PW-6) testified that there was a water tap at their house which was used by tenants to draw water and since the water came for only a few hours, it sometimes used to result in a long queue of tenants. She further testified that she did not have any altercations with anyone on account of the said queue and that she did not know anyone named Bahadur living in her vicinity. Learned counsel for the appellant submitted that the said statement given by the victim's mother was materially contradicted by the victim herself who testified that her mother had a quarrel with the appellant over an issue related to filling water and that her mother even slapped him.

7. Learned counsel for the appellant further submitted that another material discrepancy in the case of the prosecution is that in her statement recorded under Section 164 of the CrPC (Ex. PW-3/B), the victim alleged that the appellant inserted his finger into her vagina on multiple occasions however, in the MLC (Ex. PW-6/A), the *rukka* (Ex. PW-6/B) as well as in the statement of the victim (PW-4), only one such incident has been described.

8. Lastly, it was submitted that though there is no quarrel with the position that conviction can be based solely on the testimony of a victim, however, it is also settled law that in such a case, the testimony of the victim should be unblemished, trustworthy and of a 'sterling quality', which, as demonstrated, is not the case herein. For the aforesaid reasons, it was submitted that the



conviction of the appellant ought to be set aside. In support of his submissions, learned counsel for the appellant placed reliance on the following judgments:

- i. Santosh Prashad @ Santosh Kumar v. State of Bihar (2020) 3 SCC 443.
- ii. Narra Peddi Raju v. State of Andhra Pradesh, Order dated 14.10.2019 passed by the Hon'ble Supreme Court in Criminal Appeal No. 1553/2019.
- iii. Atender Yadav v. State of Madhya Pradesh, 2013 (4) JCC 2962.
- iv. Radhu v. State of Madhya Pradesh AIR 2009 SC 858.
- v. Tameezuddin @ Tammu v. State (NCT of Delhi), (2009) 15 SCC 566.

Submissions on behalf of the State

9. Learned APP for the State opposed the present appeal. It was submitted that on the date of the incident, the victim was 05 years old and the allegations against the appellant are grave and serious in nature. It was submitted that the statement of the victim recorded under Section 164 of the CrPC and her testimony recorded before the learned Trial Court are consistent, inasmuch as the allegation of penetrative sexual assault against the appellant is concerned. On both occasions, the victim has stated that the appellant inserted his finger into her vagina. Learned APP submitted that in view of the consistent statement of the victim, the discrepancy as pointed out by learned counsel for the appellant with regard to the number of times the incident happened is not material.

10. Learned APP further submitted that the incident is dated 27.10.2015 and the FIR was registered on the same day, without any delay. The statement of the victim under Section 164 of the CrPC was recorded on the very next



day, on 28.10.2015, thereby ruling out any possibility of tutoring by her mother.

11. Learned APP further submitted that the testimony of Dr. Urmila (PW-9) to the effect that the slight congestion of the hymeneal area could have been caused by infection, itching, scratching etc. is not sufficient to cast a doubt on the case of the prosecution. It was submitted that be that as it may, the said witness also stated that the congestion could be caused by insertion of finger into the vagina.

12. As far as the alleged quarrel between the mother of the victim and the appellant is concerned, learned APP for the State submitted that the medical evidence and the consistent statements of the victim sufficiently corroborate the allegations against the appellant and the factum of the said quarrel has no bearing on the prosecution case. Without prejudice, it was submitted that it is possible that the quarrel between the mother of the victim and the appellant could have been a powerful motivation behind the commission of the offence.

13. Learned APP further submitted that the appellant was charged with 'aggravated penetrative sexual assault', defined in Section 5 of POCSO and punishable under Section 6 of the said Act. It was submitted that therefore, in terms of Section 29 of the POCSO, there is a presumption of guilt against the appellant, which he was unable to rebut at the stage of trial and therefore, he should not be given any benefit at the stage of an appeal against conviction.

Analysis and Findings

14. The contention raised on behalf of the appellant is that there is a contradiction between the statement made by the victim (PW-4) and her mother (PW-6) relating to the issue of a quarrel between the victim's mother



and the appellant. It was pointed out that the victim, in her cross-examination stated that the present appellant had quarreled with her mother on an issue of filling up of water from a water tap and that her mother had slapped the appellant. However, it is the case of the appellant that the mother of the victim, during her cross-examination denied any such quarrel. It was thus argued that the testimony of the victim is not free from doubt and cannot form the sole basis for convicting the present appellant.

15. A perusal of the record reflects that it is not the case of the appellant that he was falsely implicated in the present case on account of a quarrel that took place between victim's mother and himself. No suggestion has been given to victim's mother regarding the date and time of such a quarrel, if any. On the other hand, during her cross-examination the suggestion put to the mother of the victim is as under:

"It is wrong to suggest that the accused has been falsely implicated in this case at the instance of my then landlord as he wanted to evict Bahadur Singh from his tenanted room. It is wrong to suggest that the accused had not done any wrong act with my daughter and accused has been falsely implicated in the present case by me at the instance of my landlord."

16. The aforesaid defense has also been taken by the present appellant in the cross-examination of the Investigating Officer, ASI Sita Devi (PW-8) and in his statement under Section 313 of the CrPC, which is as under:

"0.23. Do you want to say anything else?

Ans. I am innocent. I have been falsely implicated in this case, by the , mother of the child victim at the instance of landlord, who wanted to vacate his room from Bahadur. Police obtained my thumb impression forcibly on some blanks papers and printed performa and those papers were later on used against me. This is a false case against me. No such incident ever took place."



17. Further, the landlord of the house, Rajiv Kumar (PW-5), in his cross examination, stated as under:

“Accused in not related to Bahadur in any manner. Vol., they were working in the same factory. I used to collect rent from Bahadur only. It is wrong to suggest that accused Faiyaz had never resided with Bahadur in the said tenanted room or that I am deposing falsely at the instance of the IO.”

The defense of the appellant was not put to this witness by way of any question or suggestion.

18. A perusal of the aforesaid cross-examination on behalf of the appellant reflects that the stand taken by him is clearly contradictory. Be that as it may, the defense of the appellant that he was falsely implicated in the present case at the instance of the landlord is not tenable. There is no reason for a victim aged 05 years to make such an allegation against anyone at the instance of a third person. Similarly, in the facts and circumstances of the case, this Court is of the opinion that the mother of the victim would not expose her 05 year old daughter to such a trauma at the instance of a third person.

19. Learned counsel for the appellant contended that there is a discrepancy in the statement of the victim recorded under Section 164 of the CrPC (Ex. PW-3/B) and her statement before the court. It is pointed out that the victim, in statement under Section 164 CrPC stated that the alleged incident had happened on multiple occasion as opposed to her testimony (PW-4), MLC (Ex. PW-6/A) and the *rukka* (Ex. PW-6/B) where only one such incident has been alleged. In that regard, it is noted that no questions were put to the victim with respect to the said alleged discrepancy during her cross-



examination and the same is not enough to doubt the testimony of the victim. The victim was not confronted with said statement under Section 164 CrPC.

20. So far as the contention of learned counsel for the appellant that the MLC does not support the statement of the victim is concerned, the same cannot be accepted in view of the material placed on record. Dr. Urmila (PW-9), in answer to a question put to her by the Court, stated as under:

Court question: What does congestion signify?

“Ans. It **may be on account of insertion of finger in the vagina**, infection, itching or scratching vaginal area with dirty finger.”
(emphasis supplied)

In view of the above, the contention of the learned counsel for the appellant that the congestion of the hymenal area could not be because of insertion of finger is completely misconstrued.

21. It is settled law that the testimony of a victim can be the sole basis of a conviction. In the present case, apart from the fact that the testimony of the victim could not be shaken despite Cross examination, it is also matter of record that the same was corroborated by the MLC (Ex. PW-6/A) which has been duly appreciated by the learned Trial Court.

22. The present appellant has been convicted for ‘aggravated penetrative sexual assault’ defined in Section 5 of POCSO, which provides as under:-

“5. Aggravated penetrative sexual assault –

(m) whoever commits penetrative sexual assault on a child below twelve years;

is said to have commit aggravated penetrative sexual assault.



23. Penetrative Sexual assault is defined in Section 3 B of the said act as under:-

“3. A person is said to commit “penetrative sexual assault” if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

(emphasis supplied)

24. In the present case, as discussed hereinabove, the appellant has been found to have inserted his finger into the vagina of the victim, aged about 5 years, thus, covered under Section 5(m) of the POCSO.

25. Section 6 of POCSO provides for punishment for aggravated penetrative sexual assault. Prior to the amendment by Act 25 of 2019, the said provision provided as under:

“6. Punishment for aggravated penetrative sexual assault.—

Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”

26. In the present case, the order of sentence was passed on 30.01.2017 and therefore, the case of the appellant is covered by the aforesaid provision as it stood prior to the 2019 amendment. The appellant has been awarded a



sentence of 10 years, which is the minimum prescribed sentence for the offence of aggravated penetrative sexual assault.

27. In view of the above discussion, this Court finds no reason to interfere with the impugned judgment of conviction and order on sentence dated 20.01.2017 and 30.01.2017, respectively, passed by the learned Additional Sessions Judge – 01 (North-West), Rohini District Courts, New Delhi, in Sessions Case No. 1/16 arising out of FIR No. 1043/15 under Section 376 of IPC and Section 6 of the POCSO registered at PS Sultan Puri, whereby the appellant has been convicted for offence under Section 6 of the POCSO and has been sentenced to undergo rigorous imprisonment of for 10 years alongwith a fine of Rs. 5,000/- and in default of payment of fine, further simple imprisonment for 03 months.

28. The impugned judgment of conviction and order on sentence dated 20.01.2017 and 30.01.2017, respectively, are accordingly upheld.

29. The appeal is accordingly dismissed and disposed of.

30. Pending applications, if any, also stand disposed of.

31. Copy of the judgment be sent to the concerned learned Trial Court for necessary information.

32. Copy of the judgment be sent to the concerned Jail Superintendent for necessary information.

33. Judgment be uploaded on the website of this Court, *forthwith*.

**AMIT SHARMA
JUDGE**

NOVEMBER 16, 2023/bsr