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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 07th December, 2023

Date of decision: 01st March, 2024

+ CRL.A. 830/2017 & CRL.M.(BAIL) 1486/2021, 423/2023

SUSHIL YADAV

..... Appellant

Through: Mr. Biswajit Patra, Mr. Raghav
Khanna & Mr. Robin Jaiswal,
Advocates.

versus

STATE (GOVT. OF NCT), DELHI

..... Respondent

Through: Mr. Aman Usman, APP for the State
with SI Seema, P.S. Najafgarh.
Mr. Amit Gupta & Mr. Shiv Verma,
Advocates for complainant.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present appeal under Section 374 (2) Code of Criminal Procedure, 1973 ('CrPC') has been filed assailing the judgment of conviction and order on sentence dated 24.12.2016 and 10.07.2017 respectively, passed by the learned ASJ-01, South West District, Dwarka Courts, New Delhi, in SC No. 85/2/13 arising out of FIR No. 66/2013 registered at P.S. Najafgarh. The appellant has been convicted for the commission of the offences punishable under Sections 366 of the Indian Penal Code, 1860 ('IPC') and 6 of the Protection of Children from Sexual Offences Act, 2012 ('POCSO Act'). The appellant was sentenced to undergo rigorous imprisonment for 6 years for the



offence punishable under Section 366 of the IPC alongwith a fine of ₹5,000/- and in default of payment of fine, further simple imprisonment for 01 month. The appellant has also been sentenced to undergo rigorous imprisonment for 12 years for the offence punishable under Section 6 read with Section 5(m) of the POCSO Act alongwith a fine of ₹10,000/- and in default of payment of fine, further simple imprisonment for 02 months.

2. The brief facts, necessary for the disposal of the present appeal, are as under:

- i. On 14.03.2013 at about 08:40 P.M., *vide* DD No. 69B information was received by police that rape was committed with a girl aged 2 years, and this information was assigned to SI Seema.
- ii. SI Seema alongwith Ct. Rajender went to the spot where they came to know that a person named Sushil, who is the neighbour of the child victim had done a wrong act with her. It was also stated that Sushil was beaten by public and he was taken to hospital alongwith child victim and her mother to RTRM hospital by a PCR van.
- iii. SI Seema thereafter, went to RTRM hospital and found that the convict Sushil Yadav and child victim was admitted there. She collected the MLC and recorded the statement of victim's mother.
- iv. The victim's mother stated that she is a permanent resident of Village Fatehpur Majaula, Tehsil Gannor, Distt. Badayun, U.P. however, residing as tenant at RZ-86, Dharampura Colony, Najafagarh for the past seven years with her husband and child victim.
- v. She stated that at around 08:45 A.M. in the morning on the date of incident she was cooking food and her daughter was playing outside in



the *gali* (street). After 10-15 minutes, she heard that her daughter was crying, so she came out of her house. Going down 2-3 houses she saw that the appellant Sushil, who is a neighbour, had caught hold of her daughter and had removed his pants was doing wrong act with her daughter.

- vi. She raised hue and cry and tried to take her daughter from the convict but the latter did not leave the victim. As she was holding *karchi* in her hand, so she gave a blow of it on the head of the convict. In the meanwhile, other people from colony gathered and started beating convict. She took her daughter from the convict however, there was blood over her thighs.
- vii. Some person informed the police regarding the said incident. Based on the statement made by the victim's mother, *rukka* (Ex. PW-10/C) was sent to the police station and the FIR was registered.
- viii. After that, an investigation was conducted by police and evidences were collected, statements of witnesses were recorded and the convict/appellant i.e., Sushil Yadav was arrested on 22.03.2013 *vide* arrest memo Ex. PW-2/B.
- ix. On completion of the investigation, police filed the chargesheet before the learned Trial Court and after hearing the appellant on charge, the learned Trial Court framed charges against him for the offences punishable under Section 366 of the IPC and Section 5(m) of the POCSO Act on 15.07.2013.
- x. The appellant pleaded not guilty and claimed trial to the charges framed against him. During the trial to substantiate the charges framed,



prosecution relied on as many as 11 witnesses however, only 10 witnesses were examined before the learned Trial Court.

- xi. After the completion of the trial, the learned Trial Court convicted the appellant for the offences punishable under Section 366 of IPC and Section 6 read with Section 5(m) of the POCSO Act and passed an order on sentence against him.
- xii. Therefore, feeling aggrieved by the judgment of conviction and order on sentence passed by the learned Trial Court this appeal was filed by the appellant-convict.

Submissions on behalf of the Appellant

3. Learned counsel appearing on behalf of the appellant submitted that the prosecution has not brought on record anything that could sufficiently prove that the child victim was kidnapped by the appellant thereby leading to conclusion that he had committed the offence punishable under Section 366 of the IPC. He further submitted that the appellant was not put any question during his examination under Section 313 of the Cr.P.C. as to the recovery of the child victim from his custody that could point out towards the complicity of the appellant for the commission of offence punishable under Section 366 of the IPC.

4. The learned counsel submitted that the impugned judgment of conviction passed by learned Trial Court was solely based on the medical and scientific evidences led before it by the prosecution during the course of the trial. He further submitted that the doctors who had examined the child victim and the appellant during the investigation, were not examined before the Trial Court during the course of the trial and no explanation has been rendered to



this effect by the prosecution and the same is fatal to the case of the prosecution as the appellant had not been provided with any opportunity to cross-examine them. It is pointed out that PW-1 who had been examined before the Trial Court is not the doctor who had examined the victim or prepared the MLC and he has only proved the handwriting and signature of the doctor who had prepared the MLCs of the appellant and child victim.

5. Learned counsel for the appellant further submitted that the key prosecution witness PW-2 had turned hostile during the course of trial and the material facts to prove the complicity of the appellant in the present case has not been proved beyond reasonable doubt before the Trial Court. He further submitted that PW-2 has resiled from the version of the incident which she had narrated to the police under Section 154 of the Cr.P.C. Therefore, no reliance can be placed on her testimony and the learned Trial Court has wrongly convicted the appellant based on the testimony of PW-2.

6. To support the case of the appellant, learned counsel for the appellant has placed reliance on following case laws:

- i. Suresh v. State of Maharashtra Through Police Station Marwad, 2023 SCC OnLine Bom 641 (Para 8, 9 and 11)
- ii. Magan Bihari Lai v. State of Punjab, (1977) 2 SCC 210 (Para 7)
- iii. Shambu Nath Mehra v. State of Ajmer, 1956 SCR 199 (para 9)
- iv. Satye Singh and Anr. v. State of Uttarakhand, 2022 SCC OnLine SC 183 (Para 17)
- v. Ram Niwas Vs. State of Haryana, 2022 SCC OnLine SC 1007 (Para 20)
- vi. Vikramjit Singh Vs. State of Punjab, (2006) 12 SCC 306 (Para 27)



Submissions on behalf of the State

7. Learned APP for State submitted that PW-1, doctor who was examined before the Trial Court has duly proved the MLC and also the fact that the thighs of the victim were stained in blood and that there was pain in her pelvic region. He further placed reliance on the testimony of PW-4 and submitted that the appellant used to reside in the house from where the victim was found. It is the case of the prosecution that the FSL report (Ex. PW-10/E) has proved presence of DNA of accused in the private parts of the victim.

8. Learned APP for State further submitted that even though PW-2, the mother of the victim, has resiled from her statement given to police and had not supported the case of the prosecution, she had confirmed the date and time of incident, the presence of the appellant on the spot of incident and the injuries inflicted on the private parts of the victim. He further submitted that the allegations as recorded in DD No. 69B were duly corroborated by the MLC as well as the FSL results tendered before the learned Trial Court. Moreover, it is pointed out that the presence of the appellant at the crime spot cannot be denied as he had sustained injuries on person when the public gave beatings to him and the same is also corroborated from his MLC.

Analysis and Findings

9. In the impugned judgment of conviction, the learned Trial Court noted that evidence of the prosecution consisted of three sets. Firstly, oral testimonies of PW-2 (Mother of the child victim) and PW-4 (Mr. Suresh Kumar); Secondly, medical evidence as given by Dr. S. Das, Dr. Shruti Dabral being PW-1 and PW-3 respectively; Thirdly, the statements of the police officials who had carried out investigation in the present case. The



learned Trial Court had placed reliance on the testimony of the mother of the child victim to prove the age of the latter and observed that as the testimony of PW-2 has remained unchallenged, unrebutted and uncontroverted to this effect that the child victim is only 2 years of age and therefore bring the case under Section 5(m) of the POCSO Act.

10. The learned Trial Court has observed that the key prosecution witness i.e., PW-2 who is mother of the child victim as well as the complainant in the present case, has resiled from her statement recorded before the police during investigation and had stated a different version of the incident before the Trial Court during the course of trial. The learned Trial Court has noted that prosecutor has tried to extract the material facts from PW-2 by cross-examining her however, he was unsuccessful in getting the whole facts out. The learned Trial Court, after having assessed the credibility of the statement of PW-2 as recorded before it and the medical as well as scientific evidence led by the prosecution, had concluded that evidence brought on record by the prosecution was sufficient enough to fill the gaps which were in the testimony of PW-2.

11. Therefore, the learned Trial Court had come to the conclusion that prosecution has been able to prove the guilt of the appellant beyond reasonable doubt and had convicted him for the offences punishable under Section 366 IPC and Section 6 read with Section 5(m) of POCSO Act by observing as under:-

“24. Now the testimony of the mother of the child victim has to be scrutinized on the above standard. Mother of the child victim deposed that on 13.03.2013 at about 9.00 P.M to 10.00 P.M, she was cooking meal inside her house and her daughter child victim aged about two years was



playing outside of the house in the street alongwith some other children. She heard noise of her daughter child victim screaming. She came outside of her house and saw that her daughter child victim was Erying, having injury on her forehead and on her back part. On seeing the injuries of her daughter, child victim, she also started weeping. Neighbours gathered there and police was called on on 100 number. The Police official took her daughter to RTRM Hospital and she also accompanied her daughter to the hospital. Police obtained her signature on some blank papers and on the same day, her daughter child victim was discharged from RTRM Hospital. She had identified the accused Sushil in the court.

25. Ld. Addl. PP for the State had tried to extract the material facts from the mouth of the child victim's mother but he had not succeeded in getting the whole facts. However, the testimony of the child victim's mother has to be seen in the light of medical evidence as well as scientific evidence and the fact and the fact that the accused was apprehended at the spot. Doctor had found blood on both the thighs when examined. Dr. Ritika had taken the valval swab, cotton pad, top of baby, blood sample and anal swab of the child victim. Dr. Hari Om who had also examined the accused on the same day had also taken the blood sample, semen sample, nail clipping, pubic hair and undergarment. His samples were sent to the FSL Rohini. FSL report Ex. PW 10/E leaves no doubt in the mind of the court about the credentials of the PW 2. Dr. Sarabjit Singh, Senior Scientific Officer (Biology), Forensic Science Laboratory, Delhi who had examined exhibits in the FSL found the alleles '2a1' (blood sample of the accused Sushil Yadav), are accounted in the alleles from the source of exhibits '1a1' (Volval swab), '1ab' (Anal swab) & '1d' (cotton pad). Ld. Counsel of the accused Sh. V.S. Chauhan had argued that the prosecution witness had not witnessed the incident and as such his testimony should be discarded and the accused be given the benefit of doubt. But his arguments stand nowhere particularly in view of the medical and scientific evidence brought on record. Accused has been arrested at the spot. He was beaten by the public. He was examined medically and the FSL expert had concluded the alleles of the accused are matching with the alleles found on the source of exhibits "1a1" (Volval swab), '1ab' (Anal swab) & '1d' (cotton pad). Circumstantial evidence brought by the prosecution filled the gap coming in the testimony of the PW 2, the mother of the child victim."

12. The primary issue is whether the appellant is entitled to benefit of doubt on account of the testimony of PW-2, i.e., mother of the victim which



exonerates in the present appellant with respect to the alleged act constituting offence under Section 6 read with Section 5 (m) of the POCSO Act.

13. The star witness of the prosecution was the mother of the victim (PW-2), who in the complaint/FIR (Ex. PW 7/A) had claimed to have witnessed the act being committed upon her daughter by the present appellant. The examination-in-chief of the said witness, as recorded before the learned Trial Court is as under:

“On 13.03.2013, at about 9.00p.m.-10.00p.m I was cooking meal inside my house and my daughter child victim aged about two years was playing outside of the house in the street alongwith some other children. I heard noise of my daughter child victim screaming. I came outside of my house and saw that my daughter child victim was crying, having injury on her forehead and on her back part. Accused Sushil was also present there. On seeing the injuries of my daughter, child victim, I also started weeping. Thereafter lot of neighbours gathered there and they had beaten up accused Sushil and someone made call on 100 number. Police reached at the spot. The police official took my daughter to RTRM hospital and I also accompanied my daughter to the hospital. Police obtained my signatures on some blank papers. On the same day, my daughter child victim was discharged from RTRM hospital. Accused Sushil present in the court today(witness correctly identified). Police did not record my statement. I do not want to say anything else in the present case.

At this stage, Ld.Addl.PP for state seeks permission to cross- examine the witness on the ground that witness is resiling from her previous statement.”

14. The Investigating Officer, SI Seema (PW-10), in her statement before the learned Trial Court, states as under:

“On 14.03.2013, I was posted at PS Najafgarh, On that day at around 08:45 pm, on receipt DD No.69B I along with Ct Rajender reached at the spot i.e. RZ-82, Dharampura, Najafgarh. On reaching there, I came to know that the child victim and accused had already been taken to RTRM hospital by PCR van. Thereafter, from the spot, I along with Ct Rajedner went to RTRM hospital where accused Sushil Yadav and child victim found admitted. The mother of child victim was also present in the hospital. I



made inquiries from mother of child victim and recorded her statement Ex. PW2/A bearing my signatures at point B. In the hospital, the doctor handed over me the exhibit of the child victim which was taken into possession vide seizure memo Ex. PW10/A bearing my signatures at point A. The exhibits of accused was handed over to me by the doctor after his medical examination on the same day which was taken into possession is Ex. PW10/B bearing my signatures at point A. Thereafter, I along with Ct Rajender, child victim, mother of child victim and accused Sushil returned to the police station Najafgarh. After returning to PS Najafgarh, I prepared rukka which is now Ex. PW10/C bearing my signatures at point A. Thereafter, I handed over the rukka to duty officer for getting the case registered. After registration of the case, the duty officer handed over me copy of FIR and original rukka. Thereafter on the same day in the night, I along with Ct Rajender, child victim and her mother reached to the spot where I prepared the site plan Ex. PW10/D bearing my signatures at point A. Thereafter, we returned to the spot at around 12:30 am in the night and I arrested accused Sushil Yadav vide arrest memo already Ex. PW2/B bearing my signatures at point B and his personal search was conducted vide memo Ex. PW2/C bearing my signatures at point B. Thereafter, accused was put in the lock-up and the exhibits were deposited in the malkhana.

On the next day i.e. 15.03.2013, accused was produced before the court and he was sent to JC.

On 22.03.2013, the exhibits were sent to FSL, Rohini through Ct Satish. I recorded the statement of witnesses and prepared the challan and fled in the court. Accused Sushil Yadav is present in the court today (witness correctly identified the accused)."

15. At this stage, the timeline of the investigation of the present case including the collection of sample till their examination in the FSL becomes relevant:

- i. The MLC of the victim (Ex. PW-1/A) dated 14.03.2013 at 9:15 PM records that "*no marks of injury all over body, L/E both thighs are stained with blood but no active bleeding at the time of examination, slight blood tinged discharge seen coming through os, hymen intact,*



small 1-2 mm tear over vulva present'. The MLC further records that samples were taken and sealed and handed over to the Investigating Officer. The samples included vulval swab, cotton pad, top of baby (grey coloured), blood sample and anal swab. The said samples were seized by the Investigating Officer *vide* seizure memo dated 14.03.2013.

- ii. The accused was examined on the same date, at about 10:30 PM *vide* MLC (Ex. PW-1/B). The MLC recorded that the present appellant had three clear lacerated wounds – '*2x2 cm parietooccipital region; 3x1 cm frontal region (Rt.); 2x1 cm (Rt frontal region)*'. The said MLC further records that blood sample, semen sample, nail clipping, pubic hair and undergarment of the appellant were handed over to the Investigating Officer. The same was seized by the Investigating Officer *vide* seizure memo (Ex. PW-10/B). The MLC also records that the appellant was brought by the police with history of committing sexual assault and being beaten by the public present at the spot.
- iii. The samples of the victim as well as the appellant were deposited in the concerned *malkhana* reflected in the entry Ex. PW-6/A on 14.03.2013 itself.
- iv. As per the records, the said samples were sent for examination to the FSL on 22.03.2013, which was received by the FSL on the same day *vide* Ex. PW-6/C.
- v. Finally the FSL report (Ex. PW-10/E) gives the following opinion:

“RESULTS OF DNA ANALYSIS

DNA profile of female origin has been generated from the source of exhibits 1c1 (Blood sample of victim) and 2e' (Underwear of accused).



Also female DNA profile has been generated from the exhibit. However, male DNA profile has been generated from the source of exhibits '1a1' (Vulval swab), '1a2' (Anal swab) & '1d' (Cotton pad). Allele from the source of exhibits '2a1' (Blood sample of accused Sushil Yadav), are accounted in the alleles from the source of exhibits '1a1' (Vulval swab), '1a2' (Anal swab) & '1d' (Cotton pad).

CONCLUSION

DNA profiling (STR analysis) performed on the exhibits '1a1' (Vulval swab), '1a2' (Anal swab), '1c1' (Blood sample of victim), '1d' (Cotton pad), '2a1' (Blood sample of accused) & '2e' (Underwear of accused) are sufficient to conclude that:

1. DNA profile of male origin has been generated from the source of exhibits '2a1' (Blood sample of accused Sushil Yadav) is matching with the DNA profile generated from the source of exhibits Vulval swab), '1a2' (Anal swab), '1d' (Cotton pad) of victim ****.
2. Female DNA profile has been generated from the source of exhibits '2e' (Underwear of accused) is matching with the DNA profile generated from the source of exhibit '1c1' (Blood sample of victim *****)."

(name of the child victim has been redacted to protect her identity)

16. From the aforesaid record, it is pertinent to note that the child victim was examined, as has been stated by her mother (PW-2). Though the said witness does not support the case of the prosecution with respect to the ingredients of Section 3 of the POCSO Act (penetrative sexual assault), however, the observations in the MLC of the victim and the findings of the FSL demonstrate otherwise. It is pertinent to note that though the mother of the victim (PW-2) admits that her daughter was injured but she does not give any details about the nature or the cause of such injuries.

17. The MLC clearly records small 1-2 mm tear over vulva and also records slight blood tinged discharge coming from the 'os', i.e., the vaginal opening. Similarly the MLC of the accused showing the external injuries at his body also corroborates the case of the prosecution with regard to the



beating being given to him by the public while he was apprehended. The aforesaid observation of the MLC coupled with the FSL report that show the presence of the DNA of the accused on the victim brings the case of the prosecution within the meaning of Section 3 of the POCSO Act, which defines penetrative sexual assault, as under:-

"3. Penetrative sexual assault.—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.

Since the victim was less than 12 years of age, the appellant has been convicted for committing aggravated penetrative sexual assault, defined in Section 5(m) of the POCSO Act as under:

"5. Aggravated penetrative sexual assault.—

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

18. The link evidence, i.e, the chain from the time the samples were seized till it is deposited with FSL is complete in all respects. The samples were deposited on the day it was seized, i.e., 14.03.2013 and was sent to the FSL within 8 days, i.e., 22.03.2013. The presence of DNA of the appellant on



vulval and anal swab of the victim brings the case of the prosecution under Sections 3 read with 5(m) of the POCSO Act.

19. The Hon'ble Supreme Court, in **Abdul Sayeed v. State of Madhya Pradesh, (2010) 10 SCC 259**, while appreciating variance between medical and ocular evidence has held as under:

“**34.** Drawing on *Bhagirath case* [(1999) 5 SCC 96 : 1999 SCC (Cri) 658] , this Court has held that where the medical evidence is at variance with ocular evidence,

“it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the ‘variable’ keeping the medical evidence as the ‘constant’ ”.

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

“**21.** ... The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the ‘credit’ of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.”

[Vide *Thaman Kumar v. State (UT of Chandigarh)* [(2003) 6 SCC 380 : 2003 SCC (Cri) 1362] and *Krishnan v. State* [(2003) 7 SCC 56 : 2003 SCC (Cri) 1577] at SCC pp. 62-63, para 21.]

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater



evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.”

20. In the present case the medical and other scientific evidence which has come on record completely rules out the testimony of PW-2 (mother of the victim) to the extent that the act was not committed by the present appellant.

21. This Court is of the considered view that the prosecution has been able to prove the guilt of the present appellant beyond reasonable doubt. The medical and scientific evidence brought on record by the prosecution is credit worthy and unimpeachable. The conviction of the appellant can therefore be sustained on the said evidence in spite of the absence of eye-witness account.

22. As far as the order on sentence is concerned, this Court is of the considered opinion that the learned Trial Court has duly considered the mitigating circumstances pleaded on behalf of the appellant at the time of sentencing. In view thereof, the order on sentence is also sustained.

23. The appeal is dismissed and disposed of accordingly.

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

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

26. Copy of the judgment be sent to the concerned jail superintendent for necessary information and compliance.

**AMIT SHARMA
JUDGE**

MARCH 01, 2024/sn