



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

%

Judgment reserved on : 27.02.2024

Judgment delivered on: 13.03.2024

CRL.A. 1056/2019

MANVIR @ MANISH

..... Appellant

Versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Anwesh Madhukar (DHCLSC), Ms. Prachi Nirwan
and Mr. Devesh Khanagwal, Advocates

For the Respondents: Ms. Manjeet Arya, APP with Insp. Ashutosh, PS Aman
Vihar

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J

1. The present appeal has been filed by the appellant under Section 374(2) Cr.P.C. challenging his conviction and consequent order on sentence.

2. The appellant/accused happens to be step-father of 'S' (name withheld) and has been convicted and sentenced for sexually assaulting and raping her.



3. Investigation took off on 03.11.2014 when 'S' came to police station Aman Vihar along with her maternal grandmother (nani) and her cousin. 'S' revealed that they were three sisters, she being the eldest one. Their biological father left them about 7 years ago and later on, her mother solemnized second marriage with the accused. Her step-father and mother started living in Mubarakpur whereas she continued to live with her maternal grandmother at Sultanpur. She claimed that three months back, when she had visited her native village with her mother and accused, the accused did '*chhed-chhad*' with her. She informed her mother who disregarded the same, citing the possibility that the accused might have done the same under influence of liquor. They returned from the village and later she came to Mubarakpur as her mother was not keeping well. One night, when she was at the house of Mubarakpur, accused raped her and threatened to kill her if she dared to report the incident to anyone. Consequently, she did not inform her mother about said incident of rape. When she returned to home of her nani, she informed her cousin about the incident and it was in the above backdrop that she, her maternal grandmother and cousin came to police station for initiation of legal action against the accused.

4. FIR was registered and 'S' was taken to SGM hospital for medical examination.

5. Accused was arrested and one cloth (piece of *dupatta*) was also seized with the help of which, the accused had allegedly wiped his male



organ after the sexual assault on the victim. Statement of 'S' was got recorded under section 164 Cr.P.C. wherein she supported her initial statement and reiterated the allegations.

6. The accused was charged for commission of offences punishable u/s 6 of Protection of Children from Sexual Offences Act, 2012 (in short POCSO Act) or in the alternate 376(2)(f)(i)(j) IPC and also under section 506 IPC on 18.02.2015. He pleaded not guilty and claimed trial.

7. To bring home the guilt of the accused, the prosecution examined 13 witnesses. These included cousin Mamta (PW8), Mother of S (PW9), 'S' herself (PW10) and her maternal grandmother (PW12).

8. Statement of accused was recorded u/s 313 Cr.P.C., in which he claimed that he had been falsely implicated. He also examined one Jagdish as DW-1 in his defense.

9. There is no dispute that 'S' was minor at the relevant time. Her date of birth is 26.10.2002 and the alleged incident is of 02.11.2014.

10. Though, the other material witnesses had turned hostile, keeping in mind the testimony of 'S' which was found to be consistent and reliable by the learned trial court, the accused was held guilty and sentenced.¹

¹ Sentenced to undergo life imprisonment with fine of Rs. 10,000 for offence u/s 6 of POCSO Act and 2 years RI and fine of Rs. 1000 u/s 506 IPC



11. Conviction has been assailed, *inter alia*, on the following grounds:

- a) *The material key witnesses have not supported the case of prosecution.*
- b) *The accused was admittedly an alcoholic and an attempt was made to put him behind the bars as his family members did not like his such habit of drinking.*
- c) *The accused did not have any fair trial as the defence counsel, though appreciated by the ld. Trial court, did not cross examine several witnesses and moreover, no material question was put to 'S' which eventually resulted in his conviction.*
- d) *As per the MLC of the victim, the Hymen has been opined as Old Torn with no swelling. The fact that there was no fresh injury, which was sufficient, in itself, to reject the whole story of prosecution.*

12. We may also note that appellant/accused had also moved application under Section 391 Cr.P.C. read with Section 482 Cr.P.C. seeking to record additional evidence by permitting the appellant to conduct cross-examination of 'S'.

13. According to learned counsel for appellant, though case of the prosecution already suffered from various inconsistencies and major improvements, fact remained that when prosecutrix had appeared for cross-examination, the then learned defence counsel did not ask any material question to her. It was contended that there was apparent denial of right to fair trial which was clearly in the teeth of the principle of Natural Justice.

14. Though such application was opposed, it was noticed that at the time of cross-examination of 'S', no question was put to her and except for the bald suggestions, her testimony, virtually, remained uncontroverted and unrebutted. Therefore, we were constrained to



exercise power under Section 391 Cr.P.C. in order to prevent failure of justice and allowed the application. To avoid any further delay in the matter, this Court instead of remanding the case, recorded such examination.

15. We may also emphasize, right here, that in such cross-examination, she claimed that whatever she had deposed earlier was at the behest of her nani(grandmother) who wanted accused to stop drinking. The relevant extract of her such cross-examination is as under:-

“It is correct that after having liquor, my father (accused present in Court) used to beat my mother and due to the above, my maternal grandmother was very unhappy. It is correct that my maternal grandmother wanted that he should leave the habit of taking liquor. It is correct that Ex. PW/A (rukka), it is not in my handwriting. It is correct that I did not read the contents of the same. It was not read over to me. It is correct that when I went to the Court, I was accompanied by my mother and maternal grandmother. It is correct that whatever I stated in the statement under Section 164 Cr.P.C. was at the behest of my mother and maternal grandmother so that my father would leave the drinking habit. I don't remember if any counselling was done before deposing second time before the trial court. It is correct that when my deposition was recorded, whatever I said was at the behest of my maternal grandmother as she wanted our father to leave alcohol. (Vol. We felt that if he remained in jail, he would stop drinking).”

16. She was re-examined by prosecution but remained adamant to her said stand and claimed that whatever had been deposed earlier by her was at the behest of her maternal grandmother only.

17. We may also mention, right here, that she herself admitted that she had been regularly going to jail to meet the accused after his arrest. It is



also worthwhile to mention here that the accused has already suffered incarceration for more than six years.

18. Admittedly, the other key witnesses have not supported the case of prosecution.

19. As already noted above, 'S' had been taken to police station by her cousin and grandmother and they both have not supported the case of prosecution.

20. Her such cousin has not said anything related to commission of any offence by the accused upon 'S'. On the other hand, she claimed that once accused had caught hold of her hand and for such act, he was warned to be careful. According to her, she did not know as to what had happened with 'S' as at that time she had gone to her matrimonial home in the village. She deposed that she never visited any police station with 'S' and her grandmother. So much so, she also claimed that police had not even recorded her statement. In the next breath, she also claimed that 'S' did not tell anything to the police in her presence. Since she was found resiling, she was cross-examined by the prosecution with the permission of the Court but in such cross-examination, she, again, disowned her alleged statement (Ex. PW8/A) made to the police.

21. Learned APP has contended that she had deposed under pressure as she, subsequently, married the brother of the accused and, therefore,



she did not want her own matrimonial life to be under any turmoil and, therefore, her hostility should not be taken against prosecution.

22. We are, however, not impressed with such argument. Even when, her statement was recorded by the police, she was already married to the brother of the accused. Though in her cross-examination conducted by the prosecution, she seems to have claimed that she wanted to save the accused, who was her relative, however, fact remains that in the cross-examination conducted by the defence, she, in no uncertain terms, deposed that she was testifying before the Court without any fear and pressure and, therefore, the aspect related to her making statement under any kind of pressure stands negated.

23. The deposition of grandmother also does not help much.

24. If her deposition is to be believed, 'S' did tell her that the accused had done *chhed-chhad* with her under the influence of liquor and she also admitted that she and Mamta had taken 'S' to PS Aman Vihar where her statement was recorded by the police but she claimed that she did not know as to why the accused had been arrested. She was also cross-examined by the prosecution with the permission of the Court and during such cross-examination, she denied her having made statement (Mark-X) to the police. Her exhaustive cross-examination did not yield any result in favour of the prosecution. She did claim that the accused was sole bread earner for the family and after his arrest, his daughters started



residing with her. She also revealed that mother of 'S' was suffering from epilepsy and was under continuous treatment and, therefore, she was feeling financial constraints. She also admitted that if accused was to remain behind the bars, it would affect the matrimonial life of cousin of 'S' also which she did not want but fact remains that she disowned her statement and did not mention anything related to rape or act of sexual assault by the accused upon 'S'. In her further cross-examination, she even claimed that no such thing of *chhed-chhad* was told to her by 'S'.

25. We have seen the testimony of mother of 'S' as well.

26. Learned APP submits that since she happens to be the wife of accused, for obvious reason, she has not supported the case of prosecution.

27. We understand that she might be in a kind of dilemma but, generally speaking, no mother would like to ignore or hide commission of such heinous act upon her daughter.

28. Before the Court, she merely deposed that one day, a quarrel had taken place between her and her husband (accused herein) which was seen by her daughters. After such quarrel, her daughters went to the house of their grandmother (nani) and thereafter she did not know as to what had happened. She was confronted with her previous statement which she denied having made to the police. She also deposed that



accused used to pick up quarrel with her under the influence of liquor which had been given a wrong colour.

29. Thus, all in all, the testimony of aforesaid three witnesses i.e. mother, cousin and grandmother of 'S', instead of supporting the case of prosecution, has rather caused immense damage to the foundation of its case.

30. Prosecution has also strongly relied upon one cloth piece described as '*multiple coloured dupatta type cloth*' which had been recovered from the house of accused by the police at the instance of 'S'.

31. If prosecution case is to be believed then said cloth was used by the accused for wiping his male organ after committing the sexual act upon 'S'. It is admitted fact semen was found on such cloth piece which is attributed to the accused. However, said piece of evidence also does not come to the rescue of prosecution for three reasons. Firstly, mother of 'S' has created flutter by deposing that such cloth had rather been used by the accused after making physical relation with her (mother of 'S') that day. Her such revelation was never controverted during the trial. Secondly, when 'S' entered into witness box, prosecution did not think it appropriate to show her such cloth-piece. Such fact was of immense importance as said cloth-piece had been recovered at her instance only. Thirdly and more importantly, semen was detected on said cloth-piece



only and could not be detected on other exhibits, including vaginal swab. Therefore, such report does not help the prosecution in any manner.

32. Be that as it may, it emerges out from the testimony on record that the maternal grandmother, in her attempt to put an end to the accused's addiction to alcohol, devised a plot. She thought that his confinement in prison for a longer duration might serve as a cure. Little did she realize that such idea was imminently dangerous and hazardous. She had no business to tutor her grand-daughter and make her depose about commission of sexual assault upon her, which perhaps never occurred.

33. Indubitably, in cases of sexual assault, testimony of a child witness can form the basis of a conviction. However, a crucial pre-requisite is that it must not be on account of any tutoring. Since child witness is susceptible to tutoring, the court should seek corroborating evidence, especially when signs of tutoring are evident in such testimony. A child has not enough of maturity and if tutored, such child can go to any extent of exaggeration and, therefore, it becomes unsafe to rely upon testimony of a child witness whose statement is found to be based on tutoring. Reference be made to *Pradeep vs. State of Haryana 2023 SCC OnLine SC 777*, *State of Madhya Pradesh v. Ramesh and Another (2011) 4 SCC 786* and *Pramila v. State of Uttar Pradesh (2021) 12 SCC 550*.

34. In view of our foregoing discussion, there are multiple reasons which compel us to grant benefit of doubt to the accused. Testimony of



‘S’ does not inspire much confidence as in her cross-examination conducted subsequently, she has categorically claimed that she had earlier deposed at the behest of her grandmother who was fed up with the alcoholic nature of the accused. Secondly, cousin, mother and grandmother of ‘S’ have not supported the prosecution case. DNA report is also of no avail to prosecution. We also cannot be unmindful of the fact that despite the fact that ‘S’ had been sexually assaulted as alleged by the prosecution, she kept on visiting accused frequently in the jail which has also not been explained by the prosecution. If at all such act had been committed by the accused, she would not have dared to visit her stepfather repeatedly in the jail.

35. Accused Manvir @ Manish accordingly stands acquitted of all the charges. He be set at liberty forthwith, if not required in any other case.

36. The appeal stands allowed in the aforesaid terms.

37. A certified copy of this judgment be transmitted to the appellant through the concerned Jail Superintendent.

(MANOJ JAIN)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

MARCH 13, 2024/dr