2024:DHC:53

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

% ***Judgment reserved on:15th December, 2023***
Judgment delivered on: 5th January, 2024

\+ **CRL.A. 32/2022**

PRADEEP KUMAR ..... Petitioner
Through: Mr.Banka Bihari Panda and Ms.Julie Sodhi, Advocates.

versus

STATE ..... Respondent
Through: Ms.Shubhi Gupta, APP for State with SI Surekha, PS. Fatehpur Beri.
Mr.Adit S. Pujari, Mr.Maitreya Subramanian and Ms.Mantika Vohra, Advocates for complainant.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

1. The present appeal has been filed for setting aside the judgment of conviction dated 28th January, 2021 and the order on sentence dated 27th August, 2021, passed by the learned Additional Sessions Judge (POCSO), South District, Saket Courts, New Delhi.

2. *Vide* judgment of conviction, the appellant was convicted for the offences punishable under Section 376(2)(i) of the Indian Penal Code, 1860 (IPC) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). *Vide* order on sentence, the appellant was sentenced to rigorous imprisonment for a period of twenty years for the conviction under Section 6 of the POCSO Act and to pay a fine of Rs.15,000/-. No sentence was awarded to the appellant under Section 376 of the IPC in view of Section

42 of the POCSO Act.

3. The brief facts of the case, as set up by the prosecution are as follows:-

I. On 9th September, 2014, a PCR call was received by the police from the father of the child victim, regarding sexual assault on his daughter, who was aged four and a half years at the time of incident. Information was recorded and the police proceeded to meet the child victim.

II. The police made inquiry with the child victim and she was taken to the All India Institute for Medical Sciences (AIIMS) Hospital, where her medical examination was conducted and the MLC was prepared.

III. Statement of the mother of the child victim/complainant was recorded on 9th September, 2014, who stated that her daughter was taking tuitions from her neighbour, Archana. On 8th September, her daughter went for tuitions, but returned early. On enquiring why she came early, the child victim stated that the appellant, who is the brother in law of the tuition teacher, removed her underwear and inserted his finger in her private parts. Archana entered the room, and seeing the incident, she beat up the appellant.

IV. After hearing about the incident, the mother of the child victim went to the house of the appellant and confronted Archana, who confirmed the incident committed by the appellant.

V. Based on the statement of the mother of the child victim, FIR No.486/2014 under Section 376 of the IPC and Section 6 of the POCSO Act was registered at Police Station Fatehpur Beri on 9th September, 2014.

VI. The appellant was arrested on 9th September, 2014 and subsequently, after investigation, the chargesheet was filed.

4. During trial, eleven witnesses were examined by the prosecution, including the child victim (PW-1), mother of the child victim (PW-3), the tuition teacher (PW-6). Statement of the appellant denying the evidence and claiming innocence was recorded under Section 313 of the Code of Criminal Procedure, 1973 (CrPC). Two witnesses were examined by the defence, being the neighbour of the appellant (DW-1) and the mother of the appellant (DW-2).

5. The Sessions Court after examining the witnesses, analysing the evidence and hearing the arguments convicted the appellant for the offence under Section 376 of the IPC and Section 6 of the POCSO Act.

6. Counsel appearing on behalf of the appellant has made the following submissions:-

I. The entire case of the prosecution rests on the statement of child victim (PW-1). The Trial Court did not appreciate the fact that the PW-1 was a child and her statements should have been thoroughly scrutinized and corroborated.

II. Archana, sister-in-law of the appellant (PW-6), who was the eyewitness to the incident, turned hostile and resiled from her earlier statements.

III. There are serious lapses in the investigation carried out in this case. Exhibits collected from the child victim were not sent for FSL examination and no exhibits were taken from the accused by the examining doctor. Additionally, no independent witness was examined by the prosecution.

IV. As per the testimony of the doctor examining the child victim and the MLC, the hymen of the child victim was found to be intact and there was no external injury found on the child victim.

V. The appellant has been falsely implicated in the present case due to ongoing dispute between the tuition teacher and the mother of the child victim with regard to payment of the tuition fees as well as dispute between the mother of the appellant and the mother of the child victim with regard to payment of electricity charges.

VI. The present case at best will amount to an attempt to rape, rather than the appellant having committed rape.

7. *Per contra*, the learned APP appearing on behalf of the State and the counsel for the complainant, have made the following observations:-

I. The child victim in all her statements, has supported the case of the prosecution and there are no inconsistencies in her statements. The child victim, in all her statements has consistently maintained that the accused removed her underwear and inserted his finger in her private parts.

II. The delay in filing the FIR has been duly explained by the mother of the child victim.

III. Merely because the hymen of the child victim was found intact during examination, and there were no external injuries indicating physical assault, it cannot be a ground to state that the child victim was not subjected to rape. Reliance has been placed on the judgment of the Supreme Court in ***Radhakrishna Nagesh* v. *State of Andhra Pradesh***, (2013) 11 SCC 688, and the judgment of a Coordinate Bench of this Court in ***Sher Alam* v. *State***, 2015 SCC OnLine Del 13539.

IV. In terms of Section 3(b) of the POCSO Act, penetrative sexual assault can occur if there is insertion, to any extent, of an object or body part of the accused into the vagina, urethra, or anus of the child.

8. I have heard the counsels for the parties and perused the material on record.

9. The child victim (PW-1), in her testimony before the Trial Court, has clearly stated that the appellant inserted his finger in her private parts. The victim further correctly identified the appellant through a video link. The testimony of the child victim has been consistent with her statement recorded by the police under Section 161 of the CrPC and her statement recorded under Section 164 of the CrPC.

10. The child victim has withstood the cross-examination conducted on behalf of the appellant and has throughout been consistent about the appellant having committed penetrative sexual assault on her.

11. The Supreme Court in ***Phool Singh* v. *State of Madhya Pradesh,*** (2022) 2 SCC 74, has held that the conviction can be on the basis of the sole testimony of the prosecutrix when the deposition is found to be trustworthy and credible and no independent corroboration is required for the same. In my considered view, the statement of the child victim is reliable and trustworthy and has also withstood cross examination on this aspect.

12. The aforesaid testimony of the child victim has been corroborated by the mother of the child victim (PW-3). She stated that the victim returned from her tuitions earlier than usual. Upon asking the victim about her early return, the victim narrated the incident to her. The mother then went to the house of the appellant and Archana, the tuition teacher and sister-in-law of the appellant (PW-6) and confronted PW-6 about the alleged incident, and received a response in the affirmative. The same night, the mother spoke to her husband who called the police and thereafter, the child victim was taken for medical examination. She also correctly identified the underwear worn by

the child victim at the time of incident. The statement of the mother becomes relevant and admissible as *res gestae* evidence under Section 6 of the Indian Evidence Act, 1872 (Evidence Act) since immediately after hearing about the incident, the mother spoke with Archana (PW-6) and eventually told her husband, who then informed the police.

13. The neighbour of the appellant, who appeared as a defence witness (DW-1), stated that she deposed in favour of the appellant since she was told by the mother of the appellant that the case pertained to "*ladai jhagra*". She stated that she would have had second thoughts about deposing before the court, had she been told the real facts of the present case. This shows that she was misled by the mother of the appellant, making her testimony unreliable.

14. In his statement under Section 313 of the CrPC, the appellant stated that a quarrel took place between the mother of the victim (PW-3) and Archana (PW-6) regarding non-payment of tuition fees.

15. The child victim at the time of her cross-examination has denied that any quarrel had taken place between her mother and Archana (PW-6). At the time of cross-examination of the mother of the victim (PW-3), it was put to her that there was a dispute between her and PW-6 over tuition fees, however, the mother denied any dispute and stated that Archana (PW-6) had not demanded any tuition fees from her. Further, Archana (PW-6) in her testimony did not mention about any quarrel about tuition fees with the mother of the victim.

16. It was further stated by the appellant in his statement under Section 313 of the CrPC that ten days before the date of the alleged incident, dispute arose between the mother of the appellant (DW-2) and the mother of the child victim regarding non-payment of electricity charges by the mother of the child

victim due to which the appellant disconnected the wire from which the family of the child victim was receiving electricity. However, no question regarding the electricity dispute was put to the mother of the child victim at the time of her cross-examination.

17. Archana (PW-6) turned hostile and resiled from her statements given to the police. However, there are material contradictions in her testimony and the statement of the defence made by the appellant under Section 313 of the CrPC. As per the appellant, the child victim did come to the house of the appellant to take tuitions from PW-6 on the date of the incident, however, PW-6 in her testimony stated that the child victim did not come to her house on the date of the incident.

18. The fact that PW-6, the sole eye-witness to the incident, turned hostile cannot be the ground to question the evidence of the prosecution. In the event that a witness turns hostile, the case of the prosecution shall sustain if there are other evidences to prove the case. Reliance is placed on the judgment of the Supreme Court in ***Jayantilal Verma* v. *State of M.P. (now Chhattisgarh)***, (2020) SCC OnLine SC 944. The Trial Court has rightly stated that just because the PW-6 turned hostile, the statements of the child victim cannot be ignored, especially when the PW-6 is related to the appellant.

19. The submission of the appellant that as per the MLC, there were no external injuries on the private parts of the child victim and the hymen was intact does not hold merit. Just because the hymen of the child victim is found to be intact, it does not mean that the victim was not subjected to penetrative sexual assault.

20. The learned APP and the counsel for the complainant have correctly relied on the judgments of the Supreme Court in ***Radhakrishna Nagesh***

(supra), and the judgment of this Court in ***Sher Alam*** (supra).

21. The Supreme Court in its judgment in ***Radhakrishna Nagesh*** (supra) has held as under:-

> *"25.* ***The mere fact that the hymen was intact and there was no actual wound on her private parts is not conclusive of the fact that she was not subjected to rape. According to PW9, there was a definite indication of attempt to rape the girl.*** *Also, later semen of human origin was traceable in the private parts of the girl, as indicated by the FSL Report. This would sufficiently indicate that she was subjected to rape. Penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape. The explanation to Section 375 IPC has been worded by the legislature so as to presume that is there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape.* ***Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case. The Court must examine the evidence of the prosecution in its entirety and then see its cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault or criminal assault outraging the modesty of a girl.*** *"*

22. The aforesaid judgment in ***Radhakrishna Nagesh*** (supra) was followed by a Coordinate Bench of this Court in ***Sher Alam*** (supra) which held as under:-

> *"8. 'X' was medically examined promptly at GTB hospital vide MLC Ex.PW-5/A where she informed the examining doctor about sexual assault committed by her neighbour. It is true that as per MLC (Ex.PW-5/A), hymen was found 'intact' and there was no tear and abrasion.* ***Merely because the hymen of the prosecutrix was found 'intact' and there was no actual wound on her private parts, it is not conclusive of the fact that she was not subjected to rape. The Trial Court has dealt with this aspect elaborately citing judgments to conclude that the absence of injuries or mark of***

> ***violence on the person of the prosecutrix does not lead to any inference that she consented for sexual intercourse with the accused.*** *In Madan Gopal Kakkad vs. Naval Dubey and Another (1192) 3 SCC 204, a minor girl aged about eight years was raped. It was held that even slight penetration of the penis into the vagina without rupture would constitute rape. In Radhakrishna Nagesh vs. State of Andhra Pradesh 2012 (12) SCALE 506, the Supreme Court held that being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. MLC (Ex.PW-5/A) does not state in so many words that it was not a case of sexual assault. PW-5 (Dr.Kanika Agarwal) was not cross-examined on this aspect and nothing was suggested to her if it was a case of 'attempt to rape'."*

23. It is pertinent to mention here that no cross examination of the doctor who prepared the MLC was done by the appellant. Additionally, no cross-examination of the police officials with regard to samples not being sent for FSL examination was done by the appellant.

24. The definition of 'penetrative sexual assault' is given under Section 3 of the POCSO Act and the same is set out below:-

> *"3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—*
> *(a) ….;*
> *(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;*
> *(c)…;*
> *(d)…."*

25. In terms of Section 3(b) of the POCSO Act, penetrative sexual assault can occur if there is insertion, to any extent, of an object or body part of the accused into the vagina, urethra, or anus of the child.

26. Reference may also be made to Section 5(m) of the POCSO Act, which is set out below:-

> *"5. Aggravated penetrative sexual assault.—*
> *(m) whoever commits penetrative sexual assault on a child below twelve years;*
> *…is said to commit aggravated penetrative sexual assault."*

27. It is also to be borne in mind that under Section 29 of the POCSO Act, there is a statutory presumption raised against the accused in respect of offences under Sections 3, 5, 7 and 9 of the POCSO Act. In the present case, the accused has failed to successfully rebut the aforesaid presumption by leading evidence or discrediting the evidence of the prosecution.

28. Now I shall deal with the aspect of sentencing. The Trial Court had sentenced the appellant for twenty years of rigorous imprisonment observing that the appellant had committed 'digital rape' on a child of four years at the time of incident.

29. There is no straight-jacket formula under criminal law for sentencing an accused. Objective of sentencing an accused should be that of deterrence and reformation. Restorative justice under criminal law aims at giving an opportunity to the convict to reform and become a useful contributor to the society, once released from jail. In the recent judgment delivered by the Supreme Court in ***Mohd. Firoz* v. *State of Madhya Pradesh***, (2022) 7 SCC 443, the Court has observed as under:-

> *"One of the basic principles of restorative justice as developed by this Court over the years, also is to give an opportunity to the offender to repair the damage caused, and to become a socially useful individual, when he is released from the jail. The maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche for the offender. Hence, while balancing the scales of retributive justice and restorative justice, we deem it appropriate to impose upon the appellant-accused, the sentence of imprisonment for a period of twenty years instead of*

imprisonment for the remainder of his natural life for the offence under Section 376-A IPC. The conviction and sentence recorded by the courts below for the other offences under IPC and POCSO Act are affirmed. It is needless to say that all the punishments imposed shall run concurrently."

30. *Vide* order dated 15th December, 2023, jail authorities were directed to file a report regarding the stay of the appellant in jail. Pursuant to this order, the jail authorities had filed a Status Report providing the overall conduct of the appellant.

31. A perusal of the aforesaid Status Report as well as the Nominal Roll on record would show that the appellant has undergone more than nine years out of the sentence of twenty years awarded to him. His conduct in jail has been satisfactory and during incarceration he has been working as a '*langar sahayak*'. He has also earned a remission of 6 months and no punishment has been awarded to him during his period of incarceration. Further, he has not been involved in any other offence.

32. It is also relevant to note that the appellant was a young man of around 28 years at the time of commission of the offence. As on date, he is around 38 years of age and has a substantial life ahead of him. He also has an aging mother to look after.

33. Considering the aforesaid, in my considered view, ends of justice will be met if the sentence of the appellant is reduced to twelve years. In this view of the matter, I deem it appropriate to reduce the sentence of the appellant from twenty to twelve years. The fine of Rs.15,000/- awarded by the Trial Court is retained.

34. Accordingly, conviction of the appellant under Section 6 of the POCSO Act is upheld, however, in the facts and circumstances of the case, the

sentence of the appellant is reduced from twenty years to twelve years of imprisonment.

35. The appeal is partially allowed in the aforesaid terms.

AMIT BANSAL, J.

JANUARY 5, 2024
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