

(2023) 08 DEL CK 0093

In the Delhi High Court

Case No : Criminal Appeal No. 50 Of 2022

Ranjeet Kumar Yadav

APPELLANT

Vs

State Of Nct Of Delhi

RESPONDENT

Date of Decision : 14-08-2023

Acts Referred:

Code of Criminal Procedure, 1973 — Section 161, 164

Indian Penal Code, 1860 — Section 342, 363, 376

Protection of Children from Sexual Offences Act, 2012 — Section 3, 4, 5, 6, 7, 8, 9, 10, 29

Citation : (2023) 08 DEL CK 0093

Hon'ble Judges : Amit Bansal, J

Bench : Single Bench

Advocate : Gautam Khazanchi, Vaibhav Dubey, Pradeep Gahalot

Final Decision : Dismissed

Judgement

Amit Bansal, J

1. The present appeal has been filed seeking setting aside the judgment dated 18th September, 2021 and the order on sentence dated 26th November, 2021, passed by the learned Additional Sessions Judge (FTSC) (POCSO Act) – 01, Central District, Tis Hazari Courts, Delhi, whereby the appellant was convicted for the offences punishable under Sections 342/363/376 of the Indian Penal Code, 1860 (IPC) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO).

2. The appellant was sentenced to rigorous imprisonment for a period of twelve years for the conviction under Section 6 of the POCSO Act and three years rigorous imprisonment under Section 363 of the IPC and six months rigorous imprisonment under Section 342 of the IPC.

3. The brief facts of the case as set up by the prosecution are as follows: 3.1 The victim, a girl child of four and a half years, was playing in the street outside her

house on 11th June, 2017. When the mother of the victim could not find the victim, she sent her husband, being the father of the victim, to look for her. The father of the victim reached the house of the appellant, who was their neighbour and knocked at the door which was locked from inside. He also called for the victim but there was no response. The father of the victim, after some time, again went to the house of the appellant and called for the victim and received her response from inside the door. After a couple of minutes, the appellant dressed in his underwear opened the door and the victim was found present inside the room.

3.2 The father of the victim brought the victim back to their house and told the mother of the victim about the incident. The victim then informed her mother that the appellant took the victim to his house, gave her 'Mango Frooti' and after removing her underwear, inserted his finger inside her private parts.

3.3 After hearing about the unfortunate incident that happened with their daughter, the parents informed the police. The police on the basis of the statement of the mother registered the FIR No. 72/17 under Section 376 of the IPC and Sections 4/6 of the POCSO Act at Police Station Gulabi Bagh. The statement of the victim under Section 161 of the Code of Criminal Procedure, 1973 (CrPC) was also recorded and the accused was sent for his medical examination.

3.4 The victim along with her parents and a police official went to the Hindu Rao Hospital, where her medical examination was conducted and the MLC [Exhibit PW4/B] was prepared by the concerned doctor.

3.5 The appellant was arrested on 12th June, 2017 and subsequently, the charge sheet was filed.

4. The Sessions Court after examining the witnesses, analysing the evidence and hearing the arguments convicted the appellant for the offences under Sections 342/363/376 of the IPC and Section 6 of the POCSO Act.

5. The counsel appearing for the appellant has made the following submissions:

I. There are material contradictions in the statement of the victim. Whereas the victim in her deposition before the Trial Court as well as in her statement under Section 161 of the CrPC has stated that the appellant had inserted his finger in her private parts, however, in her statement under Section 164 of the CrPC given to the Magistrate, she has stated that the appellant had only touched her private parts.

II. The mother of the victim in the FIR has only mentioned regarding the appellant touching the private parts of the victim and no mention of penetration has been made.

III. The entire case of the prosecution rests only on the sole testimony of the victim and has not been corroborated by the medical evidence on record. He

submits that the testimony of the victim cannot be relied upon without corroboration as the same suffers from material contradictions. In this regard, he has placed reliance on the judgment of this Court in *State (NCT of Delhi) v. Om Prakash*, 2019 SCC OnLine Del 11262.

IV. The MLC Report records that there was no redness, bite marks or sign of external injuries present on the private parts of the victim. Moreover, the hymen was found to be intact upon conducting internal examination. The absence of any external or internal injuries further shows that the present case is not of penetration but only of touching. Therefore, the present case would, at best, fall under Section 8/10 of the POCSO Act which prescribes a maximum punishment of imprisonment up to seven years and not under Section 6 of the POCSO Act.

6. Per contra, the learned APP appearing on behalf of the State has made the following submissions:

I. The victim in her various statements has supported the case of the prosecution and there are no inconsistencies in her statements. He further submits that the evidence of the victim has been duly corroborated by the evidence of the mother of the victim (PW-4).

II. The victim in her deposition during trial has in no uncertain terms mentioned that the appellant had inserted his finger inside the private parts of the victim and that she had also felt pain. This is consistent with her statement under Section 161 of the CrPC and the statement given to the doctor while preparing the MLC report.

III. A conviction under Section 376 of the IPC can be made on the sole testimony of the prosecutrix when the said testimony is found to be reliable and trustworthy and no further corroboration is needed to sustain conviction. In this regard, he has placed reliance on the judgment of the Supreme Court in *Phool Singh v. State of Madhya Pradesh*, (2022) 2 SCC 74.

IV. The absence of injuries on the private parts of the victim do not negate the commission of penetrative sexual assault, as injuries depend on various factors and it is not necessary for there to be injuries in every case. In this regard he has placed reliance on the judgment of this Court in *Vijay v. State*, 2019 SCC OnLine Del 10485.

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

8. In the statement of the victim recorded by the police under Section 161 of the CrPC and the statement given by the victim and her mother to the doctor before the MLC, the victim has clearly stated that the appellant had inserted his finger inside her private parts. In her deposition during trial, the victim deposed that the appellant took her to his house and took off her underwear and inserted his finger in her private parts. She further stated that she felt pain as well. The victim also identified the appellant in Court. The relevant part of the deposition is reproduced hereunder:

"Ql: Can you tell what happened with you?

Ans. One day I was playing. One uncle took me downstairs to his house and bolted the door of the room from inside. He took off my underwear and touched me here (witness has pointed out towards her private parts) and also inserted his finger there. 'mujhe dard bhi hua tha'."

9. As regards the inconsistency of the aforesaid statement with the statement under Section 164 of the CrPC, the victim has stated in her cross examination that she had stated before the Magistrate that the appellant has inserted his finger in her private parts. The relevant paragraph of the Cross-examination is set out below:

"I had stated to the learned MM that Accused had also inserted his finger inside my private part. (Confronted with statement Ex.PW-2/A where it is not so recorded)"

10. While examining the victim, the learned Trial Court came to the conclusion that the victim was able to understand the questions being put to her and was able to give rational answers.

11. The contention of the counsel for the appellant that the victim has not stated any fact regarding insertion of finger in her statement under Section 164 of the CrPC was made before the Trial Court as well. The Trial Court has elaborately dealt with this submission in the impugned judgment and the relevant findings are set out below:

"57. It cannot be forgotten that the victim 'A' was a child of 4 and half years of age at the time when her statement u/s 164 Cr. PC was recorded. Therefore, care is also required to be taken to read and understand the language used by the child with respect to her tender age. In her statement recorded u/s 164 Cr. PC i.e., Ex. PW2/A, the victim had stated that accused had removed her underwear and had touched her private parts. As mentioned earlier, it is not uncommon that the minor child of such tender age may not have been able to express herself at that time (on a single occasion). To say the least, the reading of statement of victim u/s 164 Cr. PC i.e., Ex PW2/A does not reflect any effort on the part of interviewer to make an observation regarding the comfort level of the child before recording her statement nor it discloses an endeavor to elicit more information from the child.

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59. Therefore, statement of the victim recorded u/s 164 Cr. PC cannot be read in isolation and over weight-age cannot be attached to it. Every trial is a quest for justice and it is the duty of every court to appreciate all the facts and statements in light of the facts and situations involved therein. Thus, the statement of victim u/s 164 Cr. PC has to be read and understood in totality of the facts.

60. Most importantly in her deposition as PW-2, besides stating that accused had

touched her at her private parts and had also inserted his finger, she further stated that "Mujhe dard bhi hua tha". The complete reading of examination of victim 'A' shows that her testimony was natural. It is also required to be borne in mind that the victim in her deposition in the court also stated that she had felt pain when accused committed the offence. The said statement of the victim also specifies the assertion that the accused had actually inserted his fingers in her private parts.

61. Thus, in my considered opinion in the facts of present case, the absence of allegation of insertion of finger in her private parts by accused in the statement u/s 164 Cr. PC of the victim cannot be termed as an improvement at the later stage or a contradiction which makes her testimony unreliable especially when her evidence recorded in court has remained consistent and unblemished."

12. In my considered view, the statement of the victim recorded under Section 164 of the CrPC cannot be read in isolation and has to be considered in totality of the given facts and circumstances and due weightage has to be given to the age of the victim, which was four and a half years at the time of the incident. There is no doubt that the victim has been consistent in all her other statements and has unequivocally stated that the appellant had inserted his finger in her private parts. In fact, in her testimony before the Court she went on to say that this act had caused her a lot of physical pain. Thus, the contradiction in her statement under Section 164 of the CrPC is of a minor character and does not make her testimony unreliable. The Trial Court has correctly observed that the victim was very young at the time of the incident and minor contradictions cannot be a ground to disbelieve her testimony.

13. The Supreme Court in Appabhai and Anr. v. State of Gujarat, 1988 Supp SCC 241, has held that the court while appreciating evidence must not attach undue importance to minor discrepancies. The relevant observations are set out below:

"13. ...The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."

14. The Supreme Court in Phool Singh (supra) 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 victim is reliable and trustworthy and has also withstood cross-examination on this aspect.

15. In any event, the aforesaid statement of the victim has been duly corroborated by the statement of her mother (PW-4). The mother of the victim in her deposition, has clearly stated that immediately after the victim came home, she asked the victim about the incident and the victim told her that the appellant had inserted his finger inside her private parts.

16. The judgment in Om Prakash (supra) relied on by the appellant is not of much help to the appellant as the facts in Om Prakash (supra) are materially different from the facts of the present case. In Om Prakash (supra), the Trial Court had acquitted the accused by observing that there were material contradictions in the testimony of the victim. However, in the present case, as has been observed above, the testimony of the victim is credible and trustworthy.

17. As regards the contention of the appellant that there were no injuries on the private parts of the victim, the Trial Court has dealt with the said contention and the relevant observations are reproduced hereunder:

"72. Though, as per said MLC there was no sign of any injury on the private parts of the victim, however, absence of injury in all cases does not lead to conclusion that the penetrative sexual assault did not take place. The presence of injury as well as the nature of injuries around the private parts of victims in cases of sexual assaults depends on numerous factors such as the depth of insertion etc.

73. The complete perusal of statements of the victim from time to time show that the victim consistently stated that accused touched her around her vaginal area and then inserted his finger. The combined perusal of statements of the victim and her mother i.e., PW-4 as well as MLC of victim shows that it has come on record that the accused had inserted his finger in the vagina of minor victim 'A', but it did not result into redness or any injury. It is settled proposition of law that insertion of finger or penis in the vagina constitutes the offence of penetrative sexual assault and depth of the insertion is immaterial. Hence, the absence of injury on the private part of the victim does not make the case of prosecution doubtful in any manner."

18. The trial court has correctly observed that injury on the private parts in cases of sexual offences depends on various factors such as depth of insertion, among others. It is not necessary that in every case there would be an injury caused. Therefore, mere absence of injuries cannot be a ground to hold that penetrative sexual assault did not take place.

19. It also has 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.

20. The appellant has not been able to shake the version of the prosecution and the prosecution has successfully proved its case beyond reasonable doubt.

21. In view of the discussion above, I find no infirmity in the impugned judgment convicting the appellant for the offences under Sections 342/363/376 of the IPC and Section 6 of the POCSO Act. In view of the above, there is no merit in the appeal and the same is dismissed.