

(2020) 10 DEL CK 0097
In the Delhi High Court
Case No : Criminal Appeal No. 86 Of 2019

Sanju Gharai

APPELLANT

Vs

State (Nct Of Delhi)

RESPONDENT

Date of Decision : 13-10-2020

Acts Referred:

Indian Penal Code, 1860 — Section 376, 376(2)(i), 376(2)(n), 506
Protection Of Children From Sexual Offences Act, 2012 — Section 3, 5, 5(l), 5(m), 6, 7
Code Of Criminal Procedure, 1973 — Section 164, 313, 357A

Citation : (2020) 10 DEL CK 0097

Hon'ble Judges : Manoj Kumar Ohri, J

Bench : Single Bench

Advocate : Rakhi Dubey, Radhika Kolluru

Final Decision : Dismissed

Judgement

Manoj Kumar Ohri, J

1. By way of the present appeal, the appellant has challenged his conviction recorded by the trial court vide judgment dated 10.12.2018 in FIR No. 82/2018 registered under Sections 376/506 IPC and Section 6 of the POCSO Act at P.S. Sector-23, Dwarka whereby the appellant was convicted for the offence punishable under Section 6 read with Section 5(m) of the POCSO Act.

2. Subsequently, vide order dated 14.12.2018, the appellant was sentenced to undergo rigorous imprisonment for a period of twelve years along with payment of fine of Rs.10,000/- for the commission of offence punishable under Section 6 read with Section 5(m) of the POCSO Act and in default of payment of fine, to further undergo simple imprisonment for a period of two months. The trial court also awarded compensation to the tune of Rs. 5,00,000/- to the child victim under Section 357A Cr.P.C.

3. Briefly, the trial court noted the following facts in the impugned judgment: -

"2. The case of the prosecution is that on receipt of DD No. 19A dated

20.03.2018, ASI Gajraj Singh alongwith HC Ramakant went to the house of the prosecutrix and was told by the mother of the prosecutrix that the prosecutrix had been subjected to sexual assault. The above information was conveyed by ASI Gajraj Singh to the police station vide DD No. 20A. Pursuant thereto, SI Saroj Bala (I0) along with Constable Manisha also reached the spot. SI Saroj Bala recorded the statement of the mother of the prosecutrix, wherein she stated that the prosecutrix, who appeared to be upset for 2-3 days, had told her that on 18.03.2018, when she had gone to the house of accused Sanju Gharai to call his son for playing, the accused took her to the bathroom, inserted his penis into her vagina and anus and threatened that if she would disclose about the incident to anyone, he would kill her. On the basis of the above statement, FIR under Sections 376/506 IPC and 6 POCSO Act was registered. The prosecutrix was medically examined and her vaginal and anal swabs and other samples were seized. The accused was arrested on 20.03.2018. He was also medically examined and his blood sample was seized. On 21.03.2018, the statement of the prosecutrix under Section 164 Cr.P.C. was recorded, wherein she reiterated the contents of the FIR. The samples of the prosecutrix and the accused were sent to the forensic laboratory for examination...."

4. After completion of the investigation, the charge-sheet was filed. The trial court, vide order dated 06.07.2018, framed charges against the appellant for commission of the offence punishable under Section 6 read with Section 5(l) and (m) of the POCSO Act and in the alternative, under Section 376(2)(i) and (n) IPC and Section 506 IPC. The accused pleaded not guilty and claimed trial.

5. The prosecution in support of its case examined a total of 9 witnesses. The child victim was examined as PW-4. The mother of the child victim was examined as PW-5. The age of the child victim was proved through the Vice Principal (PW-1) of the concerned school. Dr. Harsha Rajpal (PW-2) proved the MLC of the child victim. SI Saroj Bala who took the child victim to the hospital for her medical examination was examined as PW-7.

CONTENTIONS

6. Ms. Rakhi Dubey, learned counsel for the appellant contended that that the trial court committed an error while convicting the appellant on the basis of sole testimony of the child victim which neither inspired confidence nor was consistent with her MLC. Further, the FIR was registered after a delay of two days. Lastly, she contended that the appellant was falsely implicated as there was a prior quarrel between the mother of the child victim and the appellant's wife.

7. Per contra, Ms. Radhika Kolluru, learned APP for the State supported the impugned judgment. She submitted that the testimony of the child victim was consistent, cogent and reliable. She also submitted that the testimony of child victim stood corroborated by the scientific evidence on the record in the form of her MLC and the FSL Report.

8. I have heard learned counsels for the parties and gone through the trial court record as well as the written submissions placed on the record.

9. Section 6 of the POCSO Act prior to its substitution vide Act 25 of 2019 reads 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."

AGE OF THE CHILD VICTIM

10. As per the prosecution case, the incident occurred on 18.03.2018. The child victim deposed that she was 6 years of age. The prosecution also examined the Vice Principal from the school of the child victim. He proved the child victim's date of birth as 25.07.2012. During cross-examination, the witness also exhibited the certified copies of the Admission form (Ex. PW1/A), the Admission register (Ex. PW1/B), the Birth Certificate (Ex. PW1/C) and the Aadhar Card (Ex. PW1/D) of the child victim which were submitted in the school at the time of her admission. Even otherwise, learned counsel for the appellant did not dispute the age of the child victim during the course of the arguments. Accordingly, this Court concurs with the finding recorded by the trial court that on the date of the incident, the child victim was below 12 years of age.

MLC

11. On 20.03.2018, the child victim was taken to the Casualty Department, DDU Hospital by the I.O. where she was initially examined by Dr. Sandeep Kumar. On being referred, she was also examined by Dr. Harsha Rajpal, who proved the MLC of the child victim as Ex. PW2/A.

She also deposed that the samples were taken and handed over to the police. As per the MLC, the hymen of the child victim was found torn. During cross-examination, she stated that no opinion was possible as to when hymen was torn. She also stated that no fresh injury was noted in the genital area of the child victim.

FSL

12. The FSL Report (Ex. P-1) was proved on record by SI Saroj Bala.

13. In the FSL (DNA examination report), the following conclusion was noted:

"The DNA profiling (STR analysis) performed on the exhibits are sufficient to conclude that the DNA Profile from the source of exhibit '2' (blood gauze of accused) is similar with DNA Profile from the source of exhibits '1c'(microslide) & '1h' (Cotton wool swab)."

MATERIAL WITNESSES

14. The child victim deposed that though she did not remember the date of the incident but it was a Sunday. She further deposed as follows: -

"....On that day, I was calling my friend namely Sandeep. The accused, who is the father of my friend Sandeep, called me in his house. At his house, the accused had removed my clothes as well as his clothes and inserted his 'Susu' (male organ) into my 'Susu' (vagina). He had also taken my 'Chumma' (kiss). After committing the above acts with me, he had asked me not to disclose about the same to anyone. Thereafter, I returned back to my home....."

15. During her deposition, she correctly identified the appellant as the accused. In cross examination, a suggestion was given that one week prior to the date of the incident, a quarrel took place between her mother and the wife of the appellant. The child victim clarified that a quarrel took place between her mother and the appellant's wife only after she had disclosed about the acts of the accused to her mother. She denied the suggestion that the accused had not committed any wrong act with her.

16. The mother of the child victim deposed that at the time of the incident, the appellant was residing in her neighborhood. For two days prior to 20.03.2018, the child victim had not been feeling well. On 20.03.2018, when she asked the child victim to accompany her to visit the doctor, the child victim on assurance of not being reprimanded, disclosed the incident to her. The child victim told her that on 18.03.2018, the appellant took her to the bathroom and inserted his penis in her vagina and anus. During cross-examination, she denied the suggestion that on 13.03.2018, there was a quarrel between her and the appellant's wife regarding some money dispute.

17. SI Saroj Bala, the Investigation Officer, deposed that on 20.03.2018, the child victim was taken to DDU Hospital for her medical examination. Thereafter, she recorded the statement of the mother of the child victim (Ex. PW5/A) and got the case registered. In the hospital, she seized the pulandas along with the sample seal vide seizure memo exhibited as Ex. PW7/C. Subsequently, she also seized the sealed pulandas after the arrest of the accused vide seizure memo exhibited as Ex. PW7/E. On 04.04.2018, the sealed pulandas along with the sample seals were deposited in the FSL Rohini by Const. Amrik (PW-8).

ANALYSIS

18. Before recording the testimony of the child victim, the trial court recorded its satisfaction about the competency of the child victim to testify as a witness. The child victim, in consonance to her previous statements, narrated the entire incident during her deposition before the Court.

19. Before proceeding further, I deem it apposite to encapsulate the law on the evaluation of the testimony of a child victim. This Court had the occasion to deal with the issue at hand in the case of Sudarshan Mishra v. State reported as 2020

SCC OnLine Del 314 where the following decisions of the Apex Court were noted:

"17. In *Dattu Ramrao Sakhare v. State of Maharashtra* reported as (1997) 5 SCC 341, the Supreme Court held that conviction on the sole evidence of the child witness is permissible, if the witness is found competent and the testimony is trustworthy. Similarly, in *State of Rajasthan v. Om Prakash* reported as (2002) 5 SCC 745 while reversing the decision the High Court and upholding the conviction of the appellant held:-

"13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In *State of Punjab v. Gurmit Singh* reported as (1996) 2 SCC 384, referring to *State of Maharashtra v. Chandraprakash Kewalchand Jain* reported as (1990) 1 SCC 550 this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr. Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

14. In *State of H.P. v. Gian Chand* reported as (2001) 6 SCC 71 Justice Lahoti speaking for the Bench observed that the court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined".

18. Similarly, in *State of H.P. v. Sanjay Kumar* reported as (2017) 2 SCC 51, while relying on the testimony of a child witness to restore the conviction, the following observations were made:--

"31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the

prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove".

19. Recently, this Court in Mahinder v. State (NCT of Delhi) reported as (2019) SCC OnLine Del 9548 held as follow:-

"20 It is well settled that in a case of rape, the finding of guilt can be recorded even on the basis of uncorroborated testimony of the prosecutrix provided it is cogent and Court in Vijay @ Chinee v.State of Madhya Pradesh reported as (2010) 8 SCC 191 and Rajinder @ Raju v. State of H.P. reported as (2009) 16 SCC 69".

20. Although the child victim was medically examined two days after the incident and no fresh injuries were noted in her genital area however, at the same time her hymen was found torn. As noted above, the DNA examination report also lends credence to the testimony of the child victim. In these circumstances, the contentions that no fresh injuries were noticed at the time of medical examination, is meritless and rejected.

21. The next contention raised by the learned counsel for the appellant was that the appellant was falsely implicated as a quarrel took place between the mother of the child victim and the appellant's wife, prior to the incident. In this regard, I deem it appropriate to refer to the cross examination of the child victim, her mother as well as the statement of the appellant recorded under Section 313 Cr.P.C. A suggestion was given to the child victim about a previous quarrel but neither any time nor any reason for such quarrel was mentioned. A suggestion of quarrel on 13.03.2018 was given to the mother of the child victim for some money dispute. The appellant, at the time of recording of his statement under Section 313 Cr.P.C., while answering Question no. 19, for the first time introduced the story of a loan amounting to Rs. 10,000/- that was borrowed from him by the mother of the child victim which, when demanded, resulted in the quarrel. The aforementioned suggestions given to the child victim and her mother were denied by them. Rather, the child victim clarified that the quarrel took place only after her mother confronted the appellant's wife on coming to

know about the incident. The appellant did not lead any evidence to prove any monetary transaction between him and the mother of the child victim.

22. The child victim was only 6 years of age at the time of the incident. She deposed that immediately after the incident, she was threatened by the appellant to not to disclose about the same to anyone else. The mother of the child victim stated that the child victim was not well for two days when she asked her to accompany her to the doctor. At that time, the child victim narrated the entire incident to her mother. In these circumstances, the delay of two days in reporting the incident is of no consequence.

23. A perusal of child victim's statements recorded during investigation as well as her testimony before the Court reveals that her narration about the incident is consistent. Each time, she unequivocally stated that on the day of the incident, when she was calling her friend Sandeep, the appellant (who is Sandeep's father) called her inside his house and after removing her clothes, removed his own clothes and thereafter inserted his male organ in her vagina. Accordingly, this Court finds that the testimony of the child victim, duly corroborated by her MLC and the DNA examination report, is both admissible and reliable.

24. Learned counsel for the appellant also alternatively contended that the trial court ought to have recorded the conviction under Section 7 of the POCSO Act and not under Section 5 of the POCSO Act. In this regard, it is noted that while Section 7 of the POCSO Act defines "Sexual Assault", Section 3 defines "Penetrative Sexual Assault" and the same reads 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) ...
- (c) ...
- (d) ..."

25. In terms of Section 5(m) of the POCSO Act, if the "penetrative sexual assault" is committed upon a child who is below 12 years of age, the same is classified as a case of "aggravated penetrative sexual assault". This Court has already concluded that in the present case, the testimony of the child victim is both credible and reliable. The age of the child victim is not disputed. Consequently, the submission has no merit.

26. In my considered opinion, I find no ground to interfere with the conclusion reached by the trial court. Resultantly, the appeal is dismissed.

27. A certified copy of this judgment be communicated to the trial court as well as the appellant through the concerned Jail Superintendent.