

(2021) 10 DEL CK 0001
In the Delhi High Court
Case No : Criminal Appeal No. 597 Of 2020

Soni

APPELLANT

Vs

State (Govt. Of Nct) Of Delhi

RESPONDENT

Date of Decision : 01-10-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 313, 374, 428, 482

Indian Penal Code, 1860 — Section 376, 376(2), 376(2)(f)(i), 506

Protection of Children from Sexual Offences Act, 2012 — Section 5, 5(m), 5(n), 6, 29

Citation : (2021) 10 DEL CK 0001

Hon'ble Judges : Manoj Kumar Ohri, J

Bench : Single Bench

Advocate : Sulaiman Mohd. Khan, Panna Lal Sharma

Final Decision : Dismissed

Judgement

Manoj Kumar Ohri, J

1. The present appeal has been instituted under Section 374 Cr.P.C. read with Section 482 Cr.P.C. against the impugned judgment and order on sentence dated 04.10.2019 and 10.10.2019 respectively passed by the learned Addl. Sessions Judge-1 (POCSO), Shahdara District, Karkardooma Courts, Delhi in SC No. 114/16 arising out of FIR No. 247/2016 registered under Sections 376(2)/506 IPC and Sections 5/6 of the POCSO Act at Police Station Harsh Vihar, Delhi, whereby the appellant was convicted for the offence punishable under Sections 376/506 IPC and Section 6 of the POCSO Act and sentenced to undergo Rigorous Imprisonment for 15 years with fine of Rs.20,000/- in default whereof to undergo Simple Imprisonment for 6 months for the offence punishable under Section 376(2)(f)(i) IPC. He was also sentenced to undergo Rigorous Imprisonment for 6 months with fine of Rs.3,000/- in default whereof to undergo Simple Imprisonment for 1 month for the offence punishable under Section 506 IPC. All the sentences were directed to run concurrently. The benefit of Section 428 Cr.P.C. was also directed to be provided to the appellant.

2. The facts of the present case, as noted by the Trial Court, are as under:-

"In brief the prosecution case is that on 20.07.2014, complainant alongwith her minor daughter aged about 8 years (names withheld) came to police station and informed IO regarding rape committed by her husband upon his own said daughter. On this, victim was got counselled from NGO and was got medically examined where Doctor observed 'hymen torn old tear'. Statement of complainant was got recorded wherein she alleged that accused, who is her husband, has committed rape upon her daughter ?K" more than once in her absence as she has gone to her native village and subsequently victim informed her about the same. Thereafter FIR was got registered and investigation was taken up. Accused was arrested. Site plan was prepared. Statements of victim and her mother was got recorded under S. 164 Cr.P.C. from learned metropolitan magistrate. Statement of younger sister of victim was also got recorded under S. 164 Cr.P.C. Documents regarding age proof of victim and her younger sister were obtained. After completion of the investigation, chargesheet is filed."

3. The charges were framed against the appellant by the Trial Court for the offence punishable under Sections 376(2)(f)(i)/506 IPC and Sections 5(m)(n)/6 of the POCSO Act, to which he pleaded not guilty and claimed trial. In trial, the prosecution examined total eight witnesses. The child victim was examined as PW1. Baby 'K' (younger sister of the child victim) was examined as PW4. 'A' (mother of the child victim) was examined as PW6. Dr. Pooja Singh, who proved the MLC of the child victim, was examined as PW5. Dr. Shivesh Pandey, who proved the MLC of the appellant, was examined as PW2. SI Reena, the Investigating Officer, was examined as PW8, who stated that no exhibits were sent for FSL examination as the incident was old.

4. On 12.09.2017, the Trial Court noted the submission of learned counsel for the appellant that she was not disputing the genuineness of documents i.e., FIR, the statements of the child victim, the child witness and their mother recorded under Section 164 Cr.P.C. and documents regarding the age of the child victim i.e., the admission and withdrawal register, the admission form and the certificate (which were collectively exhibited as Ex. A-4).

5. Mr. Sulaiman Mohd. Khan, learned counsel for the appellant, contended that:

- i) the child victim has been tutored by her mother, who was having an affair with one Sumit,
- ii) the testimony of the child victim does not inspire confidence; on the day of the incident, she was not in Delhi as she had gone with her mother to their native village.
- iii) the specific dates of alleged incidents are not mentioned in the complaint,
- iv) the independent witness who was living in the room adjacent to the place of occurrence was not examined,

v) the delay in lodging of the FIR is fatal; and

vi) no scientific evidence supports the case of the prosecution.

6. Per contra, Mr. Panna Lal Sharma, learned APP for the State, has defended the impugned judgments. He submitted that the testimony of the child victim has remained unimpeachable and it has been duly supported by the testimony of her younger sister.

7. I have heard learned counsels for the parties and have also gone through the case records.

AGE OF THE CHILD VICTIM

8. As per the prosecution case, the child victim's date of birth is 19.06.2008. The child victim during her examination stated that at the time of the incident, she was studying in Class III and was eight years old. As noted above, the appellant, who is the father of the child victim, has not disputed her age. Even in the present appeal, the age of the child victim is not contested. Consequently, this Court concurs with the finding of the Trial Court that the child victim was about eight years of age at the time of the incident.

MLC

9. The MLC of the child victim (Ex. PW5/A) was recorded on 20.07.2016 at about 4:10 p.m. The MLC was proved on the record by Dr. Pooja Singh i.e., PW5. She deposed that on local examination, the child victim's hymen was found torn, which tear was old, and there was no bleeding.

10. The child victim during her examination stated that she has one brother and two sisters, and the accused is her father. On the occasion of Holi, her mother i.e. 'A' had gone to her native place, while she, her younger sister Baby 'K' and her father had stayed back in Delhi. On the night of Holi, her father had come home after consuming liquor. While she was sleeping, he woke her up and removed her clothes. On being questioned, he asked her to keep quiet. When she tried to resist by saying that she would disclose the incident to her mother, she was given beatings. The appellant also threatened her by saying that he would kill her as well as her mother. The child victim further stated as under:-

"Then, my father inserted his toilet (the child explains by toilet she means from where he urinate i.e., penis) into my toilet (the child explains by toilet she means from where she urinate i.e., vagina). I was feeling pain so I screamed by saying Papa leave me but he did not leave me. Then my father threatened me that if I disclosed the said incident to anyone then he would kill me and my mother.

After few days my mother came to our house then I did not tell her about the said incident due to fear of my father.

Thereafter, my mother was pregnant and she again went to the village for the purpose of delivery. At that time when my mother was going to her native place,

I requested my mother to take me with her then my father told her that she should leave me in Delhi. On that occasion my another sister was also with me in Delhi. When my mother went to the village at that time in the same night, my father again inserted his toilet (penis) into my toilet (vagina). At that time, my younger sister woke up and she asked me that why I was sleeping near my father then my father made her silent and asked her to sleep. My father used to beat me. When my mother came back to our house then my sister told to my sister that I was sleeping naked near my father and my father was also not wearing clothes. Then my mother asked me and I narrated the entire incident to my mother."

11. In her cross-examination, the child victim stated that there was one more room in their premises which was occupied by a tenant. She denied the suggestion that her father had gone to the house of her uncle. She volunteered to state that her father had returned the next morning and was searching for her. On a Court question, as to whether her father was present in the house on the day of Holi, she replied that her father had not returned on the day of Holi which is burnt but, on the day, when Holi is played with colors; and on that night he committed wrong act with her. A suggestion was given to the child victim that the appellant had not returned for two days from the day of Holi, which was denied. She admitted that on the day of Holi, the person in the adjoining room was present with his family. She also stated that her father repeated the act on the next day after verifying on telephone that her mother had reached her native place. She clarified that the act was committed in the morning hours and at that time, neither her sister i.e., Baby 'K' nor the persons living in the adjoining room, were present. She further stated that she told the incident to her mother on the next day of her coming to Delhi after delivery. The child victim also stated that after narrating the incident to police, she had gone to the village with her grandmother. A suggestion was given that a day prior to the making of complaint, a quarrel had taken place between her mother and father on issue of strangers known to the mother coming to the house in absence of the father, which was denied. The suggestion that she had implicated the appellant at the instance of her mother was also denied.

12. Baby 'K' (younger sister of the child victim) during her examination stated that once her mother had gone to the village. At that time, she along with her elder sister and father were at home in Delhi. In the night, she woke up feeling thirsty and asked her sister for water, when she saw that her sister was lying naked (poore kapde utre huye they) and her father was also naked (poore kapde utre huye they). She stated that her father was lying over her sister. She further stated that when her mother came back from the village, she narrated the incident to her.

In cross-examination, she clarified that her mother had gone to village twice. The first time was on the occasion of Holi and later, when her younger sister was to be born. She stated that the incident narrated by her took place when her

mother had gone on the occasion of Holi. On a Court question as to whether the incident was before Holi, at the time of Holi or after Holi, she replied that it was before Holi and at that time, her mother alongwith her brother had gone to the village. She stated that she told the incident to her mother when she returned from the village before Holi. She further stated that they used to sleep inside the room and not outside. Her sister used to sleep with the father. She admitted that one day prior to the day when her father went to jail, there was a quarrel between her mother and father. Her father had beaten her mother. She also admitted that one uncle Nitin, an auto driver, was living at the ground floor, while they were living at first floor. She clarified that the name of uncle was Sumit and not Nitin.

The Trial Court made an observation that the child witness was intelligent and was promptly replying to questions.

13. 'A' (mother of the child victim and Baby 'K') deposed that in the year 2016, she had gone to her in-laws' house for the purpose of delivering her child. Her two daughters stayed at home with her husband in Delhi. At that time, she was having only two daughters and one son. Her son had accompanied her to the village. After the delivery of the child, she returned to Delhi along with her mother-in-law on 20-22 June, 2016 and found that her daughters were not in healthy condition. Her mother-in-law returned to her village, alongwith the child victim. Thereafter, Baby 'K' told 'A' that in her absence, the appellant had made the child victim sleep with him after making her naked. When she asked the appellant about the same, he denied and she trusted his version. On the return of the child victim, 'A' enquired her but she did not reveal anything. On the next day when she enquired again, the child victim narrated with a sense of fear that the appellant had committed act of sexual cohabitation with her on two occasions.

In cross-examination, she stated that at the time of Holi, she had gone to the village along with her younger daughter. When she was confronted with a photograph of one Sumit, she stated he was the son of her uncle. She denied that the suggestion that the person in the photograph was not her uncle's son but someone who lives near her house. She stated that she did not remember whether the night before lodging of FIR, she had a quarrel with the appellant.

14. The appellant, in his statement recorded under Section 313 Cr.P.C., while answering Question No. 1, stated that on the occasion of Holi, the child victim was not present in Delhi as she had gone with her mother to the village. It is noted that no such suggestion was given to either the child victim at the time of their cross-examination. While answering Question No. 19, the appellant stated that he was falsely implicated by his wife as she was having an affair with one Sumit. On 18.07.2016, he had seen Sumit having his hand around the waist of 'A' and caught them red-handed; when confronted, she had quarreled with the appellant. In his defence evidence, the appellant had examined Veerpal (DW1) and Fauzi (DW2). Both the witnesses were cousins of 'A' and when they were shown the same photograph that was earlier shown to 'A', they replied that the

person in the photograph was not a known person and they have no relation with him.

ANALYSIS

15. Before embarking upon the analysis of the evidence that has come on the record and dealing with the contentions, this Court deems it apposite to recapitulate the law on the sufficiency of the statement of child victim in convicting an accused.

16. It has been repeatedly held that if the testimony of the child victim inspires confidence and is reliable, it is sufficient to record the conviction. In *Dattu Ramrao Sakhare and Others v. State of Maharashtra* reported as (1997) 5 SCC 341, the Supreme Court held that conviction on the 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 of the High Court and upholding the conviction of the appellant, the Court 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*², referring to *State of Maharashtra v. Chandraprakash Kewalchand Jain*³ 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*⁴ 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."

17. Similarly, in *State of Himachal Pradesh v. Sanjay Kumar alias Sunny* 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.5). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

18. While accepting the testimony of a child witness however, the Courts have also sounded a word of caution that the testimony has to be evaluated more carefully as the same is susceptible to tutoring. In State of Madhya Pradesh v. Ramesh and Another reported as (2011) 4 SCC 786, the Supreme Court held as under:

"14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with grater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition."

19. Similarly, in Ranjeet Kumar Ram @ Ranjeet Kumar Das v. State of Bihar reported as 2015 SCC OnLine SC 500, it was observed as under:-

"14.... Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a

reliable one..."

20. Coming back to the present case, it is noted at the outset that the appellant is the father of the child victim. Both the child victim as well as Baby 'K' have deposed against their own father. The Trial Court before recording the statement of the child victim as well as Baby 'K', recorded its satisfaction as to their competency to depose. In respect of the child victim, it was further recorded that the answers were given promptly and with clarity. In view of the recording of satisfaction by the Trial Court, this Court has no hesitation to hold that the child victim and Baby 'K' were competent witnesses.

21. As per the prosecution case, the first incident took place at the time of Holi when 'A' had gone to her village. The child victim deposed that in the night time, the appellant came home drunk, wherefore, after waking her up, he removed the clothes of the child victim as well as his own and inserted his toilet (i.e., penis) into her toilet (i.e., vagina). When the child victim screamed, he did not pay heed and instead threatened that he would kill her. The testimony of the child victim is consistent with her previous statements recorded during investigation.

22. The second incident is stated to be of the time when the mother of the child victim had gone to the native village for delivery of her child and both the child victim as well as Baby 'K' had stayed back with their father. The child victim has deposed that on this occasion, the appellant again inserted his toilet (i.e., penis) into her toilet (i.e., vagina). She further deposed that, in the night, her sister i.e., Baby 'K' had woken up, who asked the child victim as to why she was sleeping naked with their father. However, the appellant asked her to keep quiet and go back to sleep. The testimony of the child victim finds support from the testimony of Baby 'K', who deposed that on the night of the incident, she had seen her sister and her father lying naked and further that her father was lying over her sister. On a reading of the testimonies of the child victim and Baby 'K', it is noted that the statement of the child victim regarding the second incident stands fully corroborated by the statement of Baby 'K'. Moreover, the child victim as well as Baby 'K' have given sufficient details of the second incident without any material contradiction.

23. Learned counsel for the appellant has raised an argument that there is inconsistency in the statements of the witnesses, including the manner in which 'A' came to know about the alleged incidents, i.e., whether the knowledge was derived as a result of witnessing a quarrel between the two daughters or as a result of Baby 'K' narrating the witnessed incident in absence of the child victim. However, it has come in the testimonies of the child victim, Baby 'K' and their mother 'A' that the incidents were narrated to the mother by Baby 'K' after she returned from the village and when the child victim was confronted, she disclosed the entire facts to the mother and thereafter the complaint was lodged. In view of the above, the question sought to be raised by the learned counsel for the appellant does not weigh with this Court. It bears mention that the stated lack of consistency between the statements of the three witnesses does not hit

the root aspect of the matter, as the statements are consistent on material aspects. The inconsistencies pointed out by learned counsel for the appellant between the testimonies of the child victim, Baby 'K' and their mother 'A' are minor and immaterial. The testimony of 'A' is admittedly not a first-hand account of events. 'A' has maintained that on all occasions, she had recounted the alleged incidents as told to her by the child victim or Baby 'K'. Considered in this light, the factum of minor inconsistency with regard to the manner in which 'A' came to know about the incidents does not incline this Court to accept the averment of the appellant, especially since the aforesaid statements align insofar as it is stated that 'A' came to know about the alleged incidents from Baby 'K' after she had come back from the native village. Whichever way the question sought to be raised is answered, it would not suggest that the prosecution story was cooked in order to falsely implicate the appellant. This Court also cannot ignore the fact that the case at hand is one where the alleged incidents came to light months after they had occurred. Further, the FIR was registered at the instance of the mother of the child victim who had narrated the incidents based on what the child victim had told her. One of the witnesses, i.e., Baby 'K' was aged 5 years at the time of the alleged incidents. To seek strict corroboration of statements made by material witnesses under these circumstances would be in defiance of well-established principles of law outlined above regarding testimonies in cases of sexual assault.

24. Learned counsel for the appellant laid great emphasis on the fact that the appellant in his statement recorded under Section 313 Cr.P.C has taken the defence that the child victim was not present in Delhi at the time of Holi and had gone to the native village. However, it has come in the testimony of the child victim, the Baby 'K' as well as their mother i.e. 'A' that the child victim had stayed back home in Delhi with the father at the time of Holi. It has also come in the testimonies of the child victim and the mother that she had not wanted to stay in Delhi at the time when the mother was going to the native village for delivery, however, she was prevented from accompanying the mother at the instance of the appellant.

25. A further contention raised by learned counsel for the appellant is that he has been falsely implicated at the instance of his wife, as she was caught red-handed with her paramour on 18.07.2016. A perusal of the record shows that during cross examination, 'A' was confronted with a photograph of Sumit (Ex. PW6/X) who she stated was her Tau's (uncle's) son. She denied the suggestion that the person in the photograph was not her Tau's son and that he lived near her house. On this aspect, two defence witnesses namely Veerpal and Fauzi who are cousins of 'A' were examined by the appellant. Both of them deposed that 'A' was their cousin and that the person in the photograph was not their relative. Keeping in view the fact that the MLC of the victim indicated an old hymen tear, the contention raised does not find favor with this Court. The appellant seeks to establish that he was implicated by his wife as a result of the discovery of her illicit affair with another man, but the argument is falsified by the testimony and

the MLC of the child victim.

26. Another contention has been raised on behalf of the appellant that the child victim was a tutored witness at the instance of her mother who has falsely implicated the appellant as she was having an affair with one Sumit. In connection therewith, it is noted that a suggestion to the effect that strangers used to come to the house was given to the child victim during trial but it was denied by her. It is worthwhile to mention that nothing has been brought on record by the appellant to support the allegation that the child victim was tutored. Thus, there is absolutely no sanctity in the argument that the child victim was a tutored witness. It is noted that a suggestion of tutoring was also given to Baby 'K', which stood denied. She rather stated that she was not told by anyone as to what had to be stated in the Court.

27. Lastly, learned counsel for the appellant also contended that there was a considerable delay in the registration of the FIR and no independent witness and/or specific date was cited to support the allegations levelled. These averments as well do not incline this Court to take a view in favor of the appellant. The child victim has provided sufficient details of the incidents. She has deposed that the first incident took place on the night of Holi and the second when her mother had gone to her native place for the purpose of delivery. Any insistence on further particulars would not be in consonance with the settled principles of law. Considering the fact that the appellant is the father of the child victim and that 'A' came to know about the incidents within days of her arrival from the native village leading her to file the complaint, the allegation of delay in lodging of FIR does not make any dent in the prosecution case either.

28. Coming to the question of reliability of the child victim's testimony, it is noted that in the FIR registered on the statement of the complainant, it was stated that the child victim had told her about the appellant having committed acts of sexual cohabitation with her on two occasions. These incidents are recounted in the testimony of the child victim. As noted earlier, on a perusal of the statements of the child victim made during investigation and in trial, this Court is of the opinion that there are no material contradictions therein. In consideration of the same as well as the foregoing discussion, the child victim's testimony is found consistent and cogent and hence reliable.

29. Under Section 29 of the POCSO Act, there is also a presumption regarding the guilt of an accused. As a result, the prosecution has to lay down and prove the fundamental facts regarding the guilt of the accused but the burden of proof on the prosecution is not of 'beyond reasonable doubt'. Once the facts are proved, the onus is on the accused to lead evidence to rebut the presumption raised under Section 29 of the POCSO Act. It is noted that in the present case, the appellant has failed to dislodge this statutory presumption.

30. In view of the discussion and the exposition of law as outlined hereinabove, I do not find merit in the appeal and the same is dismissed. The Trial Court

judgment on conviction as well as order on sentence are upheld.

31. The Trial Court while passing the order on sentence had directed that the child victim be provided a compensation amount of Rs.7,50,000/- by DLSA, after adjusting for interim compensation, if already paid.

32. A copy of this judgment be communicated to the Member Secretary, Delhi State Legal Services Authority, who shall provide appropriate compensation to the child victim in accordance with the Delhi Victims Compensation Scheme, 2018, if the same has not already been done.

33. A certified copy of this judgment be also immediately supplied to the appellant free of cost.