

(2015) 08 DEL CK 0224

In the Delhi High Court

Case No : CRL.L.P. 469 of 2014 & Criminal L.P. 469 of 2014

State NCT of Delhi

APPELLANT

Vs

Laxmi Kant Tiwari

RESPONDENT

Date of Decision : 19-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 428

Protection of Children from Sexual Offences Act, 2012 — Section 11, 12, 17, 24, 25

Citation : (2015) 08 DEL CK 0224

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Meenakshi Dahiya, APP, for the Appellant; Raj Kumar Rajput and Ravinder Singh, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Indermeet Kaur, J.

CRL.L.P. 469/2014

Leave is granted to the State. The Registry is directed to register the appeal.

Petition disposed of.

Crl Appeal No. ../2015 (to be numbered)

1. The State has filed the present appeal impugning the judgment dated 22.05.2014 vide which the respondent Laxmi Kant Tiwari had been acquitted. He had been charge sheeted under Sections 8 and 12 of the Protection from Sexual Offences Act, 2012 (hereinafter referred to as the said Act) but the learned Sessions Judge was of the view that there are inherent contradictions in the versions of the witnesses and accordingly granting him the benefit of doubt, he had been acquitted.

2. This judgment has been assailed before this Court.

3. Learned Public Prosecutor submits that the discrepancies as noted in the versions of Anil Kant Gupta (PW-3) and the victim "C" (PW-4) are not made out; these inconsistencies were minor and would not make out a case of acquittal. There was also no reason for the false implication of the accused. Testimonies of Prem Lata (PW-1) and Lalit (PW-2) have also been ignored illegally by the trial Judge.

4. Learned counsel for the respondent has filed a reply and addressed his submissions. His submission is that the impugned judgment in no manner suffers from any infirmity. It is pointed out that this is a clear case where the accused has been falsely roped because of an incident which had occurred 4-5 days ago where the cycle of PW-4 got damaged and to satisfy his ego, PW-4 has planted this false case upon the respondent which is only at the behest of his father.

5. Arguments have been heard and Record has been perused.

6. The first version of the prosecution was recorded in DD no. 29-A (Ex. PW-10/A); information had been received in the local police station Pahar Ganj on 22.05.2013 at about 7.20 pm to the effect that one Pandit Ji was doing "galat kaam" with the children at 4889, Laddo Ghati Chowk. SI Vishnu Dutt (PW-10) along with constable Bhupender (PW-9) reached at the spot. On the statement made by the complainant (PW-4) (Ex. PW-4/B) the investigation was set into motion. PW-4 in his complaint had stated that a Pandit Ji known to him had asked him questions relating to his puberty and made inquiry from him and stated that your moustaches were growing and asked him whether hair was also growing on his private part or whether any white liquid comes out. Again after two days the Pandit Ji touched his penis by his hand and asked him (PW-4) to suck it. PW-4 managed to run away. Further allegation is that on 22.05.2013 at about 7.00 pm when the victim/PW-3 was standing outside his house, the same person passed indecent gestures and stated aaja lele and pointed out towards his penis. PW-4 informed his father. Accused was accordingly apprehended. Meanwhile, one lady Prem Lata (PW-1) also came there and made a complaint against the same accused alleging a similar nature of sexual assault by the accused upon her son. Her son Lalit (PW-2) also reached the spot and on inquiry he got his statement recorded which was also to the same effect as the allegations contained in the complaint made by PW-4 (PW- 4/B). The pointing out place of occurrence memo Ex PW-9/B was prepared. The statement of the father of PW-4 (PW-3) was also recorded. In the course of investigation, birth certificates of PW-4 and PW-2 were obtained and it was found that they were both minors. PW-2 was aged around 15 years and PW-4 was aged around 13 years. Challan was filed under Sections 8 and 12 of the POCSO Act.

7. In the statement of the accused recorded under Section 313 of the Cr.P.C., the version of the respondent was that he is innocent and this is a false case which has been registered against him.

DW-1 SI Prem Singh was examined in defence; he had brought the record from

the PCR wherein on 22.05.2013 (the date of incident) at 7.18 pm it was recorded that kuan wala mandir, laddoo ghati pahar ganj, mere bhai ke sath maar peet kar rahe hain; pandit ji ko public ne peet rakha hai, mauka hawale local police, galatkaam wali koi baat nahi hai. It is this evidence which has been vehemently relied upon by the learned counsel for the respondent to support his submission that the PCR although had initially recorded that there was a galatkaam going on in the vicinity by the panditji but later on pointed out that no such galatkaam was going on.

8. PW-4 was the victim. He was 13 years of age. A preliminary round of questions were put to him before he was put into the witness box. He had deposed that galatkaam was committed upon him by the panditji Laxmi Kant Tiwari for the first time at the railway colony, Pahar Ganj. His testimony was recorded on the question-answer form. On a specific query put to him, he had answered that the accused asked him whether hair has grown at his private part or whether any white liquid comes out or not. This was repeated after 10-15 days and again the accused had touched his (PW-4) shushu (penis) and also had taken his (PW-4) hand and got touched his penis. On the third occasion the respondent again met PW-4 in the gali outside his house. He made indecent gestures from his eyes. He came near him. Public persons apprehended him. PW-4 informed his father. His father reached the spot. Public persons at that time were already beating the accused. The accused was taken to the police station. The statement of PW-4 was recorded.

9. PW-4 was subjected to a lengthy cross examination. He had stated that on 22.05.2013 his cycle which was of Atlas make was not in a working condition; it was not in working condition for the last 10-15 days and he did not get it repaired. He had met the accused for the first time about 2-1/2 years ago. He had done badtamizi with him 2-3 times before. PW-4 told this to his friend Lalit (PW-2) about 1-1/2 years ago. He had also told this to his brother Deepak. He denied the suggestion that he has lodged a false complaint at the behest of his father and Lalit (PW-2) had also made a similar statement only for this reason.

10. The father of PW-4 was examined as PW-3. He has deposed that he has two sons and PW-4 at the relevant time was studying in 8th standard and was about 14 years. In May 2013 his son had made a complaint against one Pandit Ji that he was being harassed by him. On the following day his son had gone to market to buy some articles at that time PW-3 received a call from his son (PW-4) informing him that the same Pandit Ji was again harassing him and making indecent gestures towards him. PW-4 asked his son to reach the place where he would also reach directly. When he reached the spot he saw that public persons had already apprehended the respondent and they were beating him. His statement was recorded. Lalit (PW-2) and his mother Prem Lata (PW-1) also reached the spot and they also got their statements recorded which was to the effect that PW-2 was also harassed by the Pandit Ji in a similar fashion.

11. In his cross examination PW4 admitted that he had signed documents

prepared by the police and the police had made inquiries from him. He denied the suggestion that he had implicated the accused falsely.

12. The versions of PW-3 and PW-4 have been heavily relied upon by the Sessions Judge to grant an acquittal to the respondent. The alleged inconsistencies as noted by the Sessions Judge were wholly trivial and to the mind of this Court have appeared to have been illegally dealt with by the Session Judge to grant an order in favour of the respondent. Whether the statements of PW-3 and PW-4 were recorded at the spot or whether they were recorded later on at the police station would not effect the gist of the statement which was as so stated in the aforementioned versions of the said witnesses. The trial Judge had noted that under the provisions of the POCSO Act, the statement of the child victim cannot be recorded in the police station and police officer should not be in police uniform which is a mandatory provision and violation of this would by itself meant that investigation is tainted. This is another argument of the respondent which has been noted by the Sessions Judge to grant an acquittal to the respondent.

13. The Protection of Children from Sexual Offences Act, 2012 has been legislated as an act to protect children from offences from sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto. Chapter VI contains the procedure for recording the statement of the child. The language of section 24 and 25 itself suggests as far as practicable the statement of the child shall be recorded at his residence or at a place where he usually resides or at the place of his choice. This is to facilitate and to make the child comfortable and that is the whole purpose of the procedure contains in Sections 24 and 25 of the said Act. Special Courts have to be created under Section 28 which is contained in Chapter VII.

14. In this context the testimony of PW-10 is relevant. He had recorded the statement of PW-4. In his cross examination he has stated that the father of PW-4 was present at the time when his statement was recorded. Before sending the rukka, he had recorded the statement of PW-4. He has categorically stated that this statement was recorded in an isolated road; at that time he was in police uniform. PW-10 was accompanied by constable Bhupender (PW-9) who has also deposed that the statement of the victim was recorded after the Investigating Officer had made inquiries from him. PW-9 had then taken the rukka to the police station.

15. These versions clearly show that the statement of the victim was not recorded in the police station but on an isolated road at the place where the incident had occurred. At the cost of repetition the purpose of engrafting the POCSO was to protect children from sexual assault and sexual harassment and as far as may be to facilitate investigations of such offences so that the victim is more comfortable in getting her/his version recorded. Sections 24 and 25 of the said Act provide that as far as practicable the police officer should not be in a

police uniform at the time when he records the statement of the victim. However, it does not mean that if the statement of the victim is recorded by a police officer when he was in uniform that the statement would be a ground for rejection from the otherwise cogent and coherent testimony of the victim. The Sessions Judge holding this as a ground to grant an acquittal to the respondent has committed a grave illegality.

16. The heavy reliance by the Sessions Judge on the PCR investigation is also a perversity which the Court notes with pain. The Session Judge should be aware of the fact that the PCR is not the investigating agency; even presuming that at the first time a call was recorded by the PCR that a "galatkaam" was done by the Pandit Ji and it was later on changed to state that "no galatkaam" was being done; this can in no manner be said to be a taint in the investigation which investigation had been marked (after DD no. 29A had been recorded) to PW-10. Heavy reliance upon this PCR information was wholly unwarranted.

17. This Court is conscious of the fact that to set aside an order of acquittal; only if there is patent illegality or perversity noted that this Court may interfere. This Court is of the considered view that there is a grave illegality committed by the Court below. There are glaring errors in the judgment passed by the Sessions Judge. His reliance on the aforementioned discrepancies of PW3 to PW4 (as discussed supra) did not make out a case for grant of an acquittal. This Court also notes that PW- 2, the second victim was also sexually harassed by the respondent. PW-2 had given his statement to the police in the presence of PW-3. His allegation in the statement (Ex. PW-2/A) was almost identical to the allegations made by PW-4. Testimony on oath of PW-2 has not been discussed at all.

18. PW-2 also being a child aged 14 years was put a preliminary round of questions before he was put into the witness box. PW2 deposed that he knew the accused who was residing in his neighbourhood; he had also been put a question whether hairs had grown around his private parts. He was accosted with his version which has been recorded before the Magistrate under Section 164 of Cr.P.C. (Ex. PW-2/A). In his cross examination by learned Public Prosecutor he admitted the entire version as detailed in Ex. PW-2/A was correct. He deposed that accused had asked him whether his moustache has grown; he also asked "yahan ki nahi neeche ki"; tumhare neeche safed kuch nikalta hai.

19. In his cross examination PW-2 had also not deterred from his stand. He had stuck to it.

20. In view of these categorical versions which have come on record which were in whole conformity with the statements recorded under Section 164 of the Cr.P.C. (Ex. PW-4/A), (Ex. PW-2/A) and the Sessions Judge rejecting this version for reasons wholly unexplained is again a cause of concern to this Court. There was no reason whatsoever not to believe the version of PW-2. He was also a victim of the same category as that of PW-4. The statement of mother of PW-2 namely Prem Lata (PW-1) was also to the effect that on the date of the incident

she saw that several persons were beating the accused.

21. The version of the prosecution all along was that PW-2 and PW-4 had been subjected to sexual harassment by the accused and whereas PW-3 has detailed three different times of the occurrence, the version of PW-2 is also on the sexual harassment suffered by him at the hands of the respondent. They are fully corroborative of one another.

22. The respondent has been charge sheeted under Section 8 & 12 of the POCSO Act. Section 8 lays down the punishment for sexual assault and Section 12 lays down the punishment for sexual harassment.

23. Sexual assault has been defined under Section 7 of the said Act which reads herein as under:

"Sexual Assault.-Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault"

24. Sexual harassment has been defined under Section 11 and reads herein as under:

"Sexual harassment.-A person is said to commit sexual harassment upon a child when such person with sexual intent,-

(i) Utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) Makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) Shows any object to a child in any form or media for pornographic purposes; or

(iv) Repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means, or

(v) Threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) Entices a child for pornographic purposes or gives gratification therefor"

25. The version of PW-4 and PW-2 coupled with the corroborating version of the PW-3 establishes the offence to the hilt. The findings written by the Sessions Judge calls for an interference.

26. The defence of the accused that he has been falsely implicated and the arguments before this Court that it was for the reason that the cycle of PW-4 got

damaged by the respondent was a reason for his false implication was not the defence set up by the respondent while getting his statement recorded under Section 313 of the Cr.P.C. In this version his defence was that this is a case of false implication and he had been taken to the police station on a false pretext. There was no defence of the cycle whatsoever and this was obviously for the reason that this was a false defence and the earlier defence sought to be projected by the respondent was probably forgotten by him at the time when his statement under Section 313 of the Cr.P.C. was recorded. The falsehood of the respondent is evident.

27. The impugned judgment is set aside. The respondent stands convicted under Sections 8 and 12 of the POCSO Act. Section 8 provides a minimum punishment of 3 years which may extend up to 10 years. Under Section 5 there is no minimum which is prescribed by the legislation, the term of the imprisonment may extend to 3 years.

28. The respondent is sentenced to undergo RI for a period of 3 years and to pay a fine of Rs. 10,000/- and in default of payment of fine to undergo SI for 6 months for his conviction under Section 8 of the said Act. For his conviction under Section 17 of the said Act, he is sentenced to undergo RI for a period of 3 years and to pay a fine of Rs. 10,000/- and in default of payment of fine to undergo SI for 6 months. The sentences will run concurrently. Benefit of Section 428 of the Cr.P.C. be granted in favour of the respondent. The respondent be taken into custody forthwith.

29. Appeal disposed of.