

Delhi High Court

Sunil Kumar vs State Of Nct Of Delhi on 25 May, 2021

* IN THE HIGH COURT OF DELHI AT NEW DELHI
CRL.A. 71/2021 & CRL.M.(BAIL) 150/2021

Reserved on : 20.05.2021
Date of Decision : 25.05.2021

IN THE MATTER OF:

SUNIL KUMAR Appellant
Through: Mr. Anwesh Madhukar, Advocate
(DHCLSC) alongwith Ms. Prachi Nirwan, Advocate

Versus

STATE OF NCT OF DELHI Respondent
Through: Mr. Ashok Kr. Garg, APP for State

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
JUDGMENT

MANOJ KUMAR OHRI, J.

1. The present appeal has been preferred under Section 374(2) read with Section 383 Cr.P.C. on behalf of the appellant against the judgment dated 27.07.2020 and the order on sentence dated 10.09.2020 passed by the learned ASJ (West), POCSO (Central), Tis Hazari Court, Delhi in Sessions Case No. 258/2013 in respect of FIR No. 353/2013 registered under Sections 377/376 IPC & Sections 6/9 of the POCSO Act at P.S. Punjabi Bagh, Delhi whereby the appellant has been convicted for the offence punishable under Section 6 of the POCSO Act. Further, vide order on sentence dated 10.09.2020, the appellant has been sentenced to undergo RI for a period of 10 years along with payment of fine of Rs.5,000/-, in default whereof to further undergo SI for a period of 15 days.

2. The brief facts, as noted by the Trial Court, are as follows:

"The present case was registered on the complaint of prosecutrix who shall be addressed as Ms. 'X' hereinafter (name and identity of Ms. 'X' is mentioned in the judicial file but not revealed here in order to protect her identity). The facts as alleged in the charge sheet are that Ms. 'X' was 12 years old at the time of alleged incident. Accused is her step father. Her real father died around six years back and her mother married the accused. Ms. 'X' was residing with her two younger brothers, mother and accused for the last 2-3 years. On 20.08.2013, their mother went to their native place along with the accused. On 24.08.2013, accused returned to Delhi without their mother. Ms. 'X' along with her two younger brothers went to sleep at the neighbour's house. At about 12.00 mid night, accused came there and took Ms. 'X' along with her two brothers to his jhuggi. It is further stated in the charge sheet that after reaching the jhuggi, accused gave beatings to the brothers of Ms. 'X' and sent them upstairs. It is further alleged that thereafter, accused removed her clothes and his own clothes and penetrated his urinal part in the vagina of Ms. 'X'. It is stated that neighbour

Rafiq has seen Ms. 'X' wearing her clothes and raised alarm. Seeing this accused tried to run away and neighbours caught hold of him. It is further stated that police came at the spot and recorded the statement of Ms. 'X'."

3. After completing the investigation, the charge sheet was filed and the charges were framed under Section 6 of the POCSO Act vide order dated 25.11.2013.

4. In support of its case, the prosecution examined total of 17 witnesses. The complainant i.e., the minor child victim was examined as PW-7. The child victim's younger brothers were examined as PW-8 and PW-9 and the neighbour- Mohd. Rafiq was examined as PW-2. The child victim's MLC was proved by Dr. Hemlata (PW-5) and Dr. Gurdeep Singh, CMO (PW-11). The age of the child victim was proved by Smt. Kamlesh Vaid, Principal (PW-4). SI Babita, the I.O. of the case was examined as PW-14. In defence evidence, the accused had examined Sh. Chander Shekhar, Nodal Officer and himself as DW-1.

5. I have heard learned counsel for the appellant as well as learned APP for the State and have gone through the Trial Court record. MLC

6. The MLC of the child victim (Ex.PW5/A) was recorded on 26.08.2013 at about 4:00 a.m. After the initial examination, the child victim was referred to Gynaecology, SR. The MLC has been proved by Dr. Gurdeep Singh, who conducted the initial examination and Dr. Hemlata who deposed that she had identified the signatures of Dr. Asha Nagpal who had prepared the MLC. She identified the handwriting of Dr. Asha Nagpal and also identified her signatures at point 'A'. As per the MLC, the hymen of the child victim was found torn. FSL

7. The clothes of the child victim including baby shirt and baby pyjama were seized during the investigation and sent to FSL. As per the FSL report (Ex.PW-14/G), the source of exhibit '1a', i.e., the pyjama of the child victim, was subjected to DNA examination. However, no male DNA profile could be generated from it.

Age of the Child Victim

8. The child victim in her examination-in-chief stated her age to be 13 years. The prosecution examined Smt. Kamlesh Vaid, Principal of the concerned School where the child victim was studying. She deposed that as per the school record, the child victim was admitted in their school on 21.07.2010 and her date of birth as per the school record was 04.02.2003.

The photocopy of the Admission & Withdrawal Register, Admission Form and the affidavit were exhibited as Ex.PW-4/A, Ex.PW-4/B and Ex.PW-4/C respectively. In the trial, the appellant has not disputed the age of the child victim except putting a suggestion to Smt. Kamlesh Vaid, Principal that no birth certificate was filed at the time of admission. Analysis

9. In the present case, the child victim has made allegations against her step-father. She was examined as PW-7. The child victim in her examination-in-chief stated that she had studied up to

4th class and was aged about 13 years. She deposed that she along with her siblings were residing with her mother. Her father Late Shri 'J' had expired earlier when she was about 5 years. Thereafter, her mother got married to the appellant.

10. It was further stated that in the year 2013, during summer time on the 20th day of the month, the appellant took her mother to their native village- Sitapur, U.P. On the 24th day of the said month, the appellant returned alone without her mother. On the next day, after preparing the meal, she served it to her brothers 'A' and 'R' and then went to the house of Mohd. Rafiq for sleeping. At around 12:00 midnight, the appellant, after awakening the child victim and her brothers, took them to his jhuggi and after giving beatings to her younger brothers 'A' and 'R', sent them upstairs. Thereafter, he removed her clothes as well his own clothes. She stated that 'accused Sunil Kumar ne apna susu mere susu me dal diya tha or mere muh (mouth) mei bhi daal diya tha'. She stated that while the appellant was doing these wrong things with her, Mohd. Rafiq had seen them from the hole of the door and called her name. She opened the bolt of the door and Mohd. Rafiq gave beatings to the appellant and called the police. The child victim also identified the appellant.

11. On a leading question put by learned APP for the State, the child victim stated that it was correct that the month of the incident when the appellant committed the offence was August. She further stated that the appellant had committed wrong acts with her two-three times earlier also. In cross-examination, the child victim clarified that she was sleeping in the house of Magan, who was the father of Mohd. Rafiq. She denied the suggestion that the appellant and Mohd. Rafiq were having any inimical relations. She denied the suggestions that she had falsely deposed at the time of recording of her statement under Section 164 Cr.P.C. as well as during the medical examination that the appellant had not committed the offence earlier also.

12. The child victim's minor brothers, 'R' and 'A' were examined as PW-8 and PW-9. During his examination, 'R' stated that he was aged about 11 years. He stated that his mother had gone to their village- Sitapur, U.P. along with the appellant and his younger brother. The appellant returned with his younger brother. On the date of the incident, after taking dinner, he along with his younger brother and sister (child victim) went to the house of their neighbour and slept there. The appellant brought them to his own house and after tying his and his younger brother's hands and feet, took them upstairs and thereafter, did 'galat kaam' with his sister (child victim). She was crying and the neighbour saw it. Thereafter, the appellant was beaten by the neighbours and the police was called. In cross-examination, he denied the suggestion that the appellant had inimical relations with Mohd. Rafiq.

13. 'A' was examined as PW-9. He stated that he was 8 years of age. He stated that on the night of the incident, he was beaten and thrown on the stairs. A neighbour had seen the appellant doing 'galat kaam' with his sister (child victim) and the police was called. In cross-examination, he deposed that on the date of occurrence, he along with his brother and the child victim were sleeping in the house of Magan from where the appellant took them to his own house. He also denied the suggestion that the appellant had any inimical relations with Mohd. Rafiq.

14. Mohd. Rafiq was examined as PW-2. He deposed that the child victim along with her family including her brothers 'R' and 'A', mother and the appellant were residing in his neighbourhood. He stated that he was residing in the neighbourhood of the child victim for the last one year. He correctly identified the appellant as the step-father of the child victim. He deposed that about five-six months back in the year 2013, the appellant had gone with his wife to their village and after few days, the appellant returned. He further stated that on the date of the incident, the child victim along with her brothers were sleeping in his neighbourhood and thereafter, at about 11/11:30 p.m., the appellant took them. When he woke up for urination, he heard the cries of the child victim and saw that the child victim was naked and was putting on her clothes. On becoming suspicious, he called the neighbours and opened the door, and at that time, the child victim told him that the appellant had committed rape upon her. In cross-examination, he denied the suggestion that he had any quarrel with the appellant on any issues. He stated that he had not seen the appellant committing rape upon the child victim.

15. SI Pankaj Kumar Thakur was examined as PW-12. He deposed that on 26.08.2013, on receipt of DD No. 6B (Ex. PW10/A) regarding a quarrel, he had visited the spot where he met the child victim. The child victim gave her complaint (Ex. PW7/A) and signed at point 'A'. The child victim was taken to Sanjay Gandhi Hospital for medical examination where her MLC was prepared. In cross-examination, it was stated that at the time of reaching the spot, many people had already gathered there.

16. SI Babita was examined as PW-14. She deposed that on registration of the FIR, the child victim was produced before her by SI Pankaj Kumar and she conducted the further investigation. In cross-examination, she replied that she had inquired from the persons living in four-five jhuggis in the area but none of them stated about inimical relations between the appellant and Mohd. Rafiq.

17. The information of the incident was reported immediately and DD No. 6B (Ex. PW10/A) was recorded at 1:55 a.m. on 26.08.2013. The MLC of the child victim was recorded within four hours of the incident.

18. In so far as the testimony of the child victim is concerned, it has been repeatedly held that if the testimony of the child victim inspires confidence, it is sufficient to record the conviction. In *State of Himachal Pradesh v. Manga Singh* reported as (2019) 16 SCC 759, the Supreme Court held as under:-

"10. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given facts and circumstances.

Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.

11. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the "probabilities factor" does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court."

19. For it to be acted upon, the testimony of the child victim needs to be credible and reliable. 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. [Refer: State of Punjab v. Gurmit Singh and Others reported as (1996) 2 SCC 384, later reaffirmed in Manga Singh (supra).]

20. Learned counsel for the appellant has contended that in the present case, the child victim's statement does not inspire confidence as there are contradictions about the place where the children had been sleeping on the night of the incident. It is noted that 'R' had stated that they had gone to the house of their neighbour. In cross-examination, he stated that it was the house of Magan. 'A', in his cross-examination, also stated that they had gone to the house of Magan on the night of the incident. The child victim had stated that they had gone to sleep at the house of her neighbour-Rafiq. In cross-examination, she clarified that on the night of the occurrence, they were sleeping at the house of Magan who is the father of Rafiq. This Court does not find any contradiction in the statements of the witnesses as to the place where they had gone to sleep on the night of the incident. Even otherwise, the contention sought to be raised is immaterial as all the witnesses had consistently stated that the incident had occurred in the house of the appellant.

21. A perusal of the statements made by the child victim during investigation and the trial show that she had consistently stated that on the night of the incident, the child victim along with her siblings had gone to sleep in the house of their neighbour from where they were called by the appellant. Thereafter, both her brothers after being beaten, were sent upstairs and thereafter, the appellant removed her clothes as well as his own clothes and inserted his male organ and committed rape upon her. The child victim had also stated that the appellant had inserted his male organ in her mouth. She had also stated that the appellant had committed the offence two-three times earlier also. The statement of the child victim to the effect that an incident had occurred on the intervening night of 25th and 26th find support not only from the testimony of her two minor younger brothers 'R' and 'A', but also from the testimony of Mohd. Rafiq.

22. The present case is not a case where any allegations of tutoring of child victim are levelled. The mother of the child victim was not examined. It has come on the record that in the statement of 'A' as well as the statement of the appellant that the mother of the child victim sat in a train for Delhi, however she never reached her house in Delhi. In cross-examination, no suggestion was given regarding tutoring of the child victim or her siblings by the neighbour- Mohd. Rafiq. In his statement, Mohd. Rafiq had stated that he had been residing in the neighbourhood of the child victim only for last one year. Except for vague suggestions of enmity between the appellant and

Mohd. Rafiq, no details of any incident or reasons for such enmity were mentioned. The appellant has failed to put any suggestion to the witnesses as to why his step-daughter levelled allegations against him even if he had some enmity with Mohd. Rafiq. The appellant examined himself as a defence witness (DW-1). A perusal of his testimony would show that he deposed that there used to be quarrel between his wife and Mohd. Rafiq on account of the fact that Mohd. Rafiq wanted them to vacate their tenanted premises. He stated that his stepdaughter i.e., the child victim got married twice/thrice at the behest of Mohd. Rafiq/Magan. However, no such suggestion was given either to the child victim or Mohd. Rafiq when they appeared as witnesses.

23. Another contention raised on behalf of the appellant challenging the testimony of child witness on the ground that no external injuries were noted in her MLC, also merits rejection. Recently, this Court had the occasion to deal with a similar contention in the decision rendered on 23.10.2020 in Crl. A. 1231/2018 titled as Ishwer Soni v. State (Govt. of NCT of Delhi) wherein the contention was rejected while relying on the following observations of the Division Bench of this Court (of which I was a member) in case of Jitender Sharma v. State (NCT of Delhi) reported as 2019 SCC OnLine Del 8266:

"25. The position of law on the question, whether absence of injuries found on the person of the prosecutrix, in a case of rape, would result in a finding of acquittal, is well settled. Dealing with this issue in a case of a child rape, a Coordinate Bench of this Court in Lokesh Mishra v. State of NCT of Delhi, in Criminal Appeal No. 768 of 2010, decided on 12.03.2014, relying on earlier decisions of the Apex Court, while upholding the conviction under section 376 IPC, made the following observations:

38....In the case of Ranjit Hazarika v. State of Assam, reported in (1998) 8 SCC 635, the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, the Apex Court took a view that the medical opinion cannot throw overboard an otherwise cogent and trustworthy evidence of the prosecutrix.

39. The apex court in B.C. Deva v. State of Karnataka, reported at (2007) 12 SCC 122, in spite of the fact that no injuries were found on the person of the prosecutrix, yet finding her version to be reliable and trustworthy, the Apex Court upheld the conviction of the accused. The Court observed that:

"18. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted."

24. Lastly, it was contended that the DNA examination report also does not support the prosecution case. A perusal of the FSL examination report would show that during DNA examination, no male DNA profile could be generated from the source of exhibit '1a'. The absence of semen on the pyjama of the child victim is immaterial as for the offence of rape, mere penetration is enough. It is worthwhile to note that neither the child victim in her statements nor the MLC stated about any bleeding. The contention being meritless, is rejected.

Conclusion

25. Prior to recording the testimony of the child victim, the Trial Court had recorded its satisfaction as to her maturity and competency for understanding the questions and giving their answers. Accordingly, this Court, in absence of submissions to the contrary, concurs with the opinion of the Trial Court that the child victim was competent to stand as a witness.

26. The identity of the appellant is not disputed. The appellant is the step-father of the child victim. The appellant was caught at the spot on the day of the incident itself. There is no delay in either reporting the incident or recording of the version of the child victim. As already noted above, the statements of the child victim made during investigation and the trial are consistent about the incident and the role of the appellant. Accordingly, this Court concurs with the finding of the Trial Court that the testimony of the child victim is trustworthy, reliable and admissible.

27. As per Section 29 of the POCSO Act, there is a presumption regarding guilt of the accused. The burden of proof on the prosecution is not of beyond reasonable doubt. The prosecution has to lay down and prove the fundamental facts regarding the guilt of the accused. Once such facts are proved, the onus is upon the accused to lead evidence to rebut the presumption. The appellant has failed to dislodge the statutory presumption under Section 29 of the POCSO Act.

28. Consequently, the impugned judgment and the order on sentence herein, are upheld and the present appeal alongwith the pending application(s), is dismissed.

29. It is also noted that while passing the order on sentence, the Trial Court awarded compensation of Rs.2,00,000/- to the child victim out of which amount, the appellant was directed to pay Rs.50,000/-. In *Laxmi v. Union of India and Others* reported as (2014) 4 SCC 427, the Supreme Court while emphasizing the need for rehabilitation of the victims or their dependents, held as under:-

"12. Section 357A came to be inserted in the Code of Criminal Procedure, 1973 by Act 5 of 2009 w.e.f. 31.12.2009. Inter alia, this Section provides for preparation of a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

13. We are informed that pursuant to this provision, 17 States and 7 Union Territories have prepared "Victim Compensation Scheme" (for short "the Scheme"). As regards

the victims of acid attacks, the compensation mentioned in the Scheme framed by these States and Union Territories is un-uniform. While the State of Bihar has provided for compensation of Rs.25,000/- in such scheme, the State of Rajasthan has provided for Rs.2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, learned Solicitor General suggested to us that the compensation by the States/Union Territories for acid attack victims must be enhanced to at least Rs. 3 lakhs as the after care and rehabilitation cost. The suggestion of learned Solicitor General is very fair.

14. We, accordingly, direct that the acid attack victims shall be paid compensation of at least Rs.3 lakhs by the State Government/Union Territory concerned as the aftercare and rehabilitation cost. Of this amount, a sum of Rs.1 lakh shall be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs.2 lakhs shall be paid as expeditiously as may be possible and positively within two months thereafter. The Chief Secretaries of the States and the Administrators of the Union Territories shall ensure compliance of the above direction.

15. The Chief Secretaries of the States and Administrators of the Union Territories shall take necessary steps in getting this order translated into vernacular and publicise the same appropriately for the information of public at large. List the matter on 3-12- 2013."

30. In exercise of powers conferred under Section 357A Cr.P.C., 1973, the Lieutenant Governor of NCT of Delhi in coordination with the Central Government approved the Delhi Victim Compensation Scheme, 2015 for providing funds for the purpose of compensation to the victim or her dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. The State, through the Delhi State Legal Services Authority, is directed to provide compensation to the victim in accordance with the aforesaid Scheme within a period of two months from the date of passing of this judgment.

31. A certified copy of this judgment be supplied to the appellant free of cost through the concerned Jail Superintendent and a copy of the same shall also be communicated to the Trial Court as well as to the Member Secretary, Delhi State Legal Services Authority for information and compliance.

(MANOJ KUMAR OHRI) JUDGE MAY 25, 2021 p'ma