

State vs.jaffar Khan

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Court : Delhi

Decided On : Sep-27-2019

Appellant : State

Respondent : Jaffar Khan

Advocate for Def. : Mr. Rajat Srivastava

Judgement :

\$~ * + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A5412019 STATE
JAFFAR KHAN Appellant Through Ms. Aashaa Tiwari, APP for State versus
Through Mr. Rajat Srivastava and Mohd. Respondent Jarjish, Advocates
Reserved on :

13. h September, 2019 Date of Decision:

27. h September, 2019 % CORAM: HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

JUDGMENT

MANMOHAN, J:

1. Present leave petition has been filed by the State challenging the judgment dated 1st August, 2018 passed by learned Additional Sessions Judge-05 (Central District), Tis Hazari Courts in FIR No.460/2014 registered with Police Station IP Estate wherein the respondent-accused was acquitted of the charges under

Sections 376(1) of IPC and Section 6 of POCSO Act, and was convicted under Sections 10 & 12 of POCSO Act and 354A IPC. The Trial Court vide order dated 6th August, 2018 sentenced the Page 1 of 13 CRL. A.541/2019 respondent-accused to rigorous imprisonment for five years under Section 10 of POCSO Act, rigorous imprisonment for three years under Section 12 of POCSO Act and rigorous imprisonment for three years under Section 354A IPC. The relevant portion of the trial court judgment is reproduced hereinbelow:-

"59. In the present case, there is no evidence on record to establish that the Accused had inserted his penis into the mouth of the Victim. The mere fact that as per PW3i.e. father of the Victim, Accused was advising her to do kulla(gargle) when he reached there cannot lead to presumption that Accused had inserted his penis in the mouth of the Victim. There is, in fact, no evidence whatsoever to show as to what was put by the Accused in the mouth of the Victim and in absence of such evidence, Accused cannot be convicted for having committing penetrative sexual assault upon the Victim.

60. At the same time, on the basis of testimony of the Victim and her father, duly corroborated by deposition of PW4 Ms Bimla and PW12 Dr. A. K. Mishra, I find that there is sufficient evidence to establish that the Accused had touched the vagina of the Victim with sexual intent. There is also evidence to prove that he had exhibited his penis to the child Victim and thus also committed sexual harassment within the meaning of Section 11 POCSO Act and punishable under Section 12 POCSO Act and also made physical contact and advances towards the Victim involving unwelcome and explicit sexual overtures and thus also committed offence punishable under Section 354A IPC. The fact that Accused was working as lift operator in GB Pant Hospital is not in dispute. Thus, Accused being a part of management of Hospital, though private, committed sexual assault upon minor Victim is also liable to be convicted for having committed aggravated sexual assault within the meaning of Section 9 (e) POCSO Act and punishable under Section 10 POCSO Act, and Section 354A IPC.

61. Thus, in my view, Prosecution has failed to prove the charges for offence under Section 6 POCSO Act and Section 376(i) IPC against the Accused, though

it stands proved that Page 2 of 13 CRL. A.541/2019 Accused Jaffar Khan S/o Mohd. Layak Khan committed offences under Section 10 and 12 POCSO Act & S.35A IPC. 2. Learned Predecessor Bench had granted leave to the State to assail the impugned judgment and order on sentence vide order dated 22nd April, 2019. Accordingly, present appeal was taken up for hearing on 13th September, 2019.

3. Ms. Aashaa Tiwari, learned APP for State had primarily prayed for enhancement of the sentence and conviction under Section 6 of the POCSO Act on the ground that the respondent-accused was guilty of committing aggravated penetrative sexual assault on the prosecutrix.

4. Learned APP for State contended that the trial court had failed to appreciate that the prosecutrix (PW-2) who was suffering from sixty per cent mental retardation had clearly deposed that the respondent-accused had opened the zip of his pant and put something in her mouth. She stated that the prosecutrix owing to her mental retardation as well as her young age, was not aware of the word used to identify the genital of a male.

5. She contended that the father of the prosecutrix (PW-3) had deposed that when he returned after meeting the doctor, he had seen the respondent-accused standing opposite to the prosecutrix with his pants unzipped and his penis out.

6. Learned APP for State pointed out that the mother of the prosecutrix (PW-1) had deposed as to what the prosecutrix had told her at home in the evening with regard to the incident.

7. On the other hand, Mr. Rajat Srivastava, learned counsel for the respondent-accused stated that the FIR was an afterthought as it was filed on Page 3 of 13 CRL. A.541/2019 25th October, 2014 and not on the date of the incident, i.e., 24th October, 2014. He questioned as to how the name of the respondent-accused could find mention in the FIR when it was revealed at the time of arrest only. He emphasised that as per testimony of the prosecutrix (PW-2) the offender was a security guard who looked like a policeman and that the respondent-accused had been wrongly arraigned despite lack of identification.

8. Mr. Rajat Srivastava had vehemently submitted that benefit of doubt had to be given to the respondent-accused as the prosecutrix had not mentioned the word penis in her testimony before the trial court and testimony of mother of the prosecutrix (PW-1) is inadmissible being hearsay evidence. He had referred to the MLC of the prosecutrix to state that absence of injuries suggested absence of penetrative sexual assault. He submitted that statement of the prosecutrix (PW-2) under Section 164 Cr. P.C. was not substantive evidence and could merely be used for corroboration.

9. In rejoinder, Ld. APP for the State had drawn our attention to the fact that hymen of prosecutrix was slightly torn.

10. Having perused the record and having heard the arguments, we are of the view that respondent-accused submission that he has been wrongly arrayed as an accused is false and incorrect. There are many reasons for it. The prosecutrix (PW-2) had deposed, When my father reached, the accused had left but my father had seen him. This statement is corroborated by statement of the father of the prosecutrix (PW-3), I enquired from the accused why he was doing so, the accused stated that uncle I am not doing anything and accused was frightened and after washing his hands in the wash-basin in the room and went away. Thus, the visibly startled Page 4 of 13 CRL. A.541/2019 respondent-accused left soon after seeing the father of the prosecutrix (PW- 3), but the little time during which he washed his hands was sufficient for the father of prosecutrix (PW-3) to identify the respondent-accused.

11. No suggestion with regard to false identification was ever put by respondent-accused to either father of the prosecutrix (PW-3) or Ms. Bimla (PW-4) or Dr. A.K. Mishra (PW-12) during the cross examination.

12. Moreover, the trial court has already convicted the respondent- accused under Sections 10 & 12 of POCSO Act and 354A IPC. In fact, the respondent-accused has already undergone imprisonment for the said offences. Accordingly, the finding with regard to identification and involvement of the respondent-accused has attained finality. Consequently, for all these reasons it is not open to the respondent-accused to now contend that he had been wrongly arrayed as an

accused.

13. To infer the true nature of the offence, it is important to refer to the testimonies and evidence on record. As per rukka, father of the prosecutrix (PW-3) stated that he had seen the respondent-accused standing with the zip of his pants open with his penis outside. He also added that he saw that the belt of his daughter was unbuckled and that her zip was slightly open. It is of utmost importance that the father of the prosecutrix (PW-3) was consistent in his stance while giving his testimony before the Court wherein he stated, ...Jaffer was standing opposite to my daughter and at that time zip of his pant was already opened and his penis was outside the zip. At that time, I had also noticed that the belt of the pant of my daughter as well as the zip of her pant was also slightly open. At that time, the accused was advising my daughter kulla kar lo, kulla kar lo. 14. Father of the prosecutrix (PW-3) had also mentioned about making a Page 5 of 13 CRL. A.541/2019 complaint to Ms.Bimla (PW-4) in his testimony. Notably, both Ms. Bimla (PW-4) and Dr. A.K. Mishra (PW-12) have testified that the father of the prosecutrix (PW-3) had made an oral complaint to them on 24th October, 2014 soon after the incident itself. Consequently, the testimony of the father of the prosecutrix (PW-3) stands corroborated by the testimony of Ms. Bimla (PW-4) and Dr. A.K. Mishra (PW-12).

15. Soon after the incident, prosecutrix (PW-2) complained to her mother (PW-1) about the same. Mother of the prosecutrix (PW-1) corroborated the factum of complaint in her testimony. The relevant portion of the testimony of mother (PW-1) is reproduced hereinbelow:-

"..... is my daughter, aged about 15 years. In the month of October 2014, my husband along with my daughter went to G.B. Pant Hospital for issuance of certificate from the doctor as mind has not been fully developed. My husband told me to enquire from about the incident. Thereafter, I asked my daughter what did happen with her. She told me that one guard present in the hospital had taken her in a room and after opening the zip of her pant had put his penis in her mouth. She further told me that the said guard after removing her pant and touched her vagina. After the incident the accused told my daughter not to

disclose about the incident to anyone and the said guard had also suggested my daughter to gargle/wash her mouth. Thereafter, I told about the incident to my husband and he lodged the complaint to the police. 16. We are also not inclined to accept the submission that the testimony of the mother of the prosecutrix (PW-1) is hearsay evidence. The mother of the prosecutrix (PW-1) did not depose as regards the commission of the act. It is nobody's submission that she is an eye witness. She merely deposed as to the factum of complaint made by the prosecutrix (PW-2) to her. Her position is akin to that of Ms. Bimla (PW-4) and Dr. A.K. Mishra (PW-12). Page 6 of 13 CRL. A.541/2019 In Kundan Singh Vs. The State, 2015 SCC OnLine Del 13647, a Coordinate Bench of this Court held as under:-

"25.In *Balram Prasad Agrawal v. State of Bihar*; (1997) 9 SCC338 the Supreme Court referred to the concept of hearsay evidence and observed that even if some information is ruled out as hearsay, it may still remain admissible as evidence of the conduct of the witness. Relying on Section 8 of the Evidence Act, it was observed as under:-

"is used 11. This part of the evidence of PW6 would not be hit by the rule of exclusion of hearsay evidence. A decision of this Court deserves to be noted on this aspect. In the case of *J.D. Jain v. State Bank of India* a Bench of three learned Judges speaking through Baharul Islam, J.

in the Report has made the following pertinent observations: (AIR p.676, para 10: SCC p. 148, paras 21 and

22) The word hearsay in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by someone else. (See *Stephen on Law of Evidence*) The Privy Council in the case of *Subramaniam v. Public Prosecutor*, observed: Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. The fact that it was made quite apart from

its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other persons in whose presence these statements are made. CRL. A.541/2019 Page 7 of 13 17. Moreover it was prosecutrix (PW-2) who herself told her mother (PW-1) about the incident directly without intervention of any third person. Her testimony is also relevant under Section 6 of the Indian Evidence Act, 1872, being part of the same transaction as the offence.

18. Furthermore, in her statement before the doctor conducting the MLC, the prosecutrix (PW-2) had reiterated her stance. The relevant portion of the MLC of prosecutrix (PW-2) is reproduced hereinbelow:-

"Medical Record Department, Medico Legal 098728 Form No.120 J.P.N.H. Lok Nayak Hospital, New Delhi Injury Registrar No.EBJa/19929 Name D/o..... Age 15 yrs Sex Female Religion Hindu Occupation Student Residence Name of relative of friend (father) Date of examination 25/

Date and hour of arrival 25/

at 8.15 p.m. No.and date of police docket WCt. Pushpa Rani 2083/C25

No.and name of Constable WCt. Pushpa Rani 2083/C25

If Admitted Date of admission ___ Date of Discharge ___ { PARTICULARS OF INJURIES OR SYMPTOMS, IN CASE OF POISONING from main casualty Pt. brought by WCt. Pushpa Rani 2083/C for medical examination Pt. give H/o sexual assault by unknown person at GB Pant Hospital room on 24/10/14 at 1 pm. Pt. give H/o some person cold drink given by that person. Pt. give H/o oral penetration of penis with fingering in vagina. No H/o. ejaculation No H/o. excessive bld P/V /P/V discharge Pt. take bath and change cloths after Page 8 of 13 CRL. A.541/2019 Date and hour of report sent to Police :

9. 30 p.m. of Space for particulars as to to further reference the case-date giving evidence in the Court or despatch of articles said to contain poison. Seal mark on Rt. side of forearm MI Seal mark on Rt. side of foot (near samples related and handed over to WCt. Sumit 2135/C Sunita thumb) All incidence & give all details of incidence to her mother. No H/o excessive bld P/V No any fresh injury mark over body and external genetalia. No any previous h/o sexual assault.- 3 days RC-

Hymen slightly torn No fresh injury.-

RNFpain P-90/min BP-1

mgdl xxxx xxxx xxxx xxxx Name of injuries ____ The kind of weapon used or poison suspected in case of poisoning _____ (Simple, Grievous or Dangerous)

Signature : Examining Medical Officer 19. Prosecutrix (PW-2) stated in her Section 164 Cr.P.C. statement that the respondent-accused took something out from his pant and inserted it into her mouth. She even indicated the place of retrieval by pointing towards the zip of her jeans. The statement of the prosecutrix (PW-2) under Section 164 Cr.P.C., is reproduced hereinbelow:-

"Page 9 of 13 CRL. A.541/2019 ...Usne apni pant utari aur mere muuh mein daal diya. Usne apni pant se nikalkar mere muh mein daala. Mujhe nahi pata use kya kehte hain. Usne vah yahaan [witness points towards zip of her jeans]. se nikaala tha aur mere muh mein daala. Phir mujhe ulti ho gayi. Phir usne meri pant utari aur kachchhi bhi utari. Phir mujhe haath lagaya aur haath andar daala. Mujhe dard hua. Usne mujhe kaha ki yeh kisi ko nahi batana. Phir vo chala gaya. Phir main Papa ke saath ghar gayi aur meri Mummy ko maine sab bataya. Usne mujhe yahaan par chua tha [Witness points towards her crotch]. 20. In a similar vein, the prosecutrix (PW-2) stated in her testimony before the Court, ...The person opened the zip of his pant and put in my mouth...That person removed my pant and undergarment and touched. He asked me to wash my mouth with water and I washed my mouth with water... 21. Consequently, the statement of the prosecutrix under Section 164 Cr.P.C. corroborates her testimony before the Court and there is no contradiction between the two.

22. We are conscious of the fact that the prosecutrix (PW-2) is just 15 years old and is also mentally disabled. Despite that, she has sufficiently described the reprehensible act of the respondent-accused. Merely because the prosecutrix (PW-2) could not ascribe specific name to the male genitalia, the respondent-accused cannot be allowed to claim benefit of doubt. To begin with, the accused consciously took the prosecutrix (PW-2) from where she was sitting on the bench to the other side of the partition in the room and made her sit on a chair. The prosecutrix (PW-2) elaborately described the act in her statement under Section 164 Cr.P.C. and in her testimony before the court. Father of the prosecutrix (PW-

3) who arrived in Page 10 of 13 CRL. A.541/2019 the immediate aftermath of the act caught the respondent-accused with his pants down and his penis out. He also saw that the belt of his daughter had been unbuckled and that her zip was slightly open. At that time, the father of the prosecutrix (PW-3) heard the respondent-accused telling his daughter to gargle. The prosecutrix's statement that she vomited soon after this further strengthens the Appellants' version. The prosecutrix (PW-2) has stayed consistent in her statement to her mother, to the doctor conducting her MLC, statement under Section 164 Cr.P.C. and in her testimony before the Court. Consequently, insertion of penis into the mouth of the prosecutrix stands proved and the same amounts to Penetrative Sexual Assault under Section 3(a) POCSO Act.

23. Furthermore, as per the prosecutrix's statement under Section 164 Cr.P.C., the respondent-accused removed the prosecutrix's pants and undergarment and after that committed two acts, namely, touched her genitalia and put his hand inside her genitals. Due to this act of the accused, the prosecutrix (PW-2) experienced pain. The factum of pain has been stated by the prosecutrix (PW-2) both in her statement under Section 164 Cr.P.C. and her testimony before the Court. Mere touch cannot produce the sensation of pain. Furthermore, the MLC of prosecutrix (PW-2) also reveals a slightly torn hymen. This is a clinching piece of evidence as to the fact of penetrative sexual assault. Consequently, insertion of fingers into the genitals of the prosecutrix (PW-2) also amounts to penetrative sexual assault under Section 3(b) POCSO Act.

24. Further, absence of injuries cannot be used to disprove penetrative sexual assault. We are convinced that rape law as it now stands does not call for evidence of injuries for conviction for the said offence. Page 11 of 13 CRL. A.541/2019 25. The fact that the respondent-accused was a lift operator in the hospital on the date of the incident is uncontroverted. His presence on duty on the date of incident has been proved by Mr. Jai Singh (PW-5). Thus, once the court is of the view, as it is in the present case, that the accused committed penetrative sexual assault, it would amount to aggravated penetrative sexual assault under Section 5(e) POCSO Act as the respondent-accused committed the offence while being a staff of the hospital. Further, as the offence was committed upon a

disabled child, Section 5(k) of POCSO Act would also be attracted as the assault was committed taking advantage of the (PW-2) prosecutrix's mental disability.

26. In our opinion, father of the prosecutrix (PW-3) upon his arrival at the scene of crime found both the respondent-accused and prosecutrix in such strange circumstances that he sensed something amiss. On 24th October, 2014, he made oral complaint about what he saw and heard. The conduct of father of the prosecutrix (PW-3) in immediately making a complaint to Ms. Bimla (PW-4) and Dr. A.K. Mishra (PW-12) lends credibility to the appellants' version. It is only when the prosecutrix (PW-2) and her father (PW-3) went back home and she (PW-2) told her mother (PW-1) about the details of the incident that the family came to know what exactly had transpired. On the following day, i.e., 25th October, 2014, a complaint regarding the incident in detail was lodged with the police. Consequently, in our view, there was no delay in lodging the complaint.

27. In light of the above mentioned findings and observations, the Court is of the view that the testimony of prosecutrix (PW-2) as corroborated by testimonies of the mother of the prosecutrix (PW-1), father of the prosecutrix (PW-3), Ms. Bimla (PW-4) and Mr. Jai Singh (PW-5) as well as Page 12 of 13 CRL. A.541/2019 the MLC Report inspires confidence. Consequently, respondent-accused is held guilty of offences under Sections 3, 5(e) and 5(k) of POCSO Act as well as Section 376(1) of IPC.

28. Ms. Aashaa Tiwari, learned APP for the State and Mr. Rajat Srivastava, learned counsel for the respondent are directed to advance their arguments on sentencing on the next date of hearing. Accordingly, list for arguments on the point of sentencing on 01st October, 2019. SEPTEMBER 27 2019 rn/sb MANMOHAN, J SANGITA DHINGRA SEHGAL, J Page 13 of 13 CRL. A.541/2019

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