IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND,MIZORAM AND ARUNACHAL PRADESH)

Crl. Appeal 9(AP)/2016

Shri Suresh K.
S/o K. Kuttappan,
Vill- Moonu Kallumik House,
P.O. : Anikkattu Pathaananamtitta,
Dist- Kerala.

... Appellant

-Versus-

State of Arunachal Pradesh & Anr.

....Respondents

BEFORE

HONOURABLE MR. JUSTICE MIR ALFAZ ALI

HONOURABLE MR. JUSTICE NANI TAGIA

For the Appellant : Mr. N. Ratan, Adv.

For respondent/State : Mr. S. Tapin, Sr. Govt. Adv.

Decided on : 08-03-2019

JUDGMENT & ORDER (CAV)

(By Mir Alfaz Ali, J)

This appeal is directed against the judgment and order dated 25-05-2016 passed by learned Sessions Judge, Tezu in Sessions Case No. 52(L)/2014. By the said judgment, learned Sessions Judge convicted the appellant u/s 6 of the POCSO Act as well as Section 376 IPC and sentenced

him to imprisonment for 10 (ten) years and fine of Rs.25,000/- with default stipulation.

2. As per prosecution case, on 13-01-2014 the victim (PW-11) was complaining of having pain on her private part and she was also having difficulty in passing urine. Upon enquiry by the informant, being the grandmother, the victim told, that one of the uncle penetrated his finger into her private part in the toilet of the school. When the informant (PW-2) discussed the matter with the guardians of other children of the school, she came to know, that other children also had similar complain. Having come to know about the occurrence, the informant accompanied with some other guardians went to the school, where the victim identified the accused, an employee of the school, as the perpetrator of the offence. The grand-mother of the victim (PW- 2) lodged the FIR (Ext. 2), on the basis of which, police registered the case and commenced investigation. During investigation, the victim was sent for medical examination, statements of the witnesses were recorded and on completion of investigation, charge-sheet was laid against the present appellant u/s 376 IPC read with Section 6 of the POCSO Act and eventually he stood trial.

3. In course of trial, charges were framed u/s 376 IPC and Section 6 of the POCSO Act, to which the appellant pleaded not guilty. Prosecution examined 12 witnesses to establish the charges. The accused also examined one witness in his defence. On appreciation of evidence, learned trial court convicted the appellant both under Section 376 IPC and Section 6 of the POCSO Act and awarded sentence as indicated above.

4. Aggrieved by the judgment of conviction and sentence, the appellant preferred the instant appeal.

5. We have heard Mr. N. Ratan, learned counsel for the petitioner and Mr. S. Tapin, learned Senior Government Advocate (for the P.P.) appearing for the State.

6. Mr. Ratan, learned counsel for the appellant submitted, that there was no direct evidence except the oral testimony of the victim (PW-11), which could not be relied upon because of inconsistency between the examination-in-chief and cross-examination and as such, conviction and sentence on the basis of such unreliable oral testimony of the victim cannot be maintained. Learned State Counsel (P.P.) supporting the conviction and sentence of the appellant submitted, that there was sufficient evidence to warrant conviction of the appellant and as such, no interference with the impugned judgment and order is called for.

7. Out of the 12 witnesses examined by the prosecution, (PW -11) was the victim, who was aged about 3 ½ years, deposed, that the accused inserted his finger into her private part twice in the toilet. While in her cross-examination, she stated that the uncle (accused/appellant) did not do anything to her. The learned trial court recorded a comment in the cross-examination part, that the victim could not answer properly the question put to her during cross-examination. What we notice is that the learned trial court did not follow the procedure laid down in sub-section (2) of Section 31 of the POCSO Act.

8. PW-2, the informant stated, that having come to know about the occurrence, she made a complain to the teacher over phone, but having not received any response, she along with other guardians went to the school and on their request, the teachers of the school paraded the male employees, where the victim identified the appellant.

9. PW-3 and PW-4 being the school teachers also stated that on demand of the informant, the male employees of the school was paraded for identification, where the victim identified the accused/appellant. PW-3 also supported the evidence of PW–2, that PW-2 made a complain about the occurrence over phone. PW-1 and PW-5, who also accompanied the PW-2 to the school, supported the version of the PW-2 as regards identification of the accused at the school. Learned counsel for the appellant submitted that such

identification could not be relied upon, inasmuch as, the evidence of the witnesses was not consistent, as to the position of the accused in the line. But what we find from the evidence is that the victim also identified the accused in the dock while deposing in court and such identification is a vital evidence, inasmuch as, it could not be shaken during cross-examination.

10. PW-6, the doctor, who examined the victim found that there was swelling in the vagina of the victim. PW-9 and PW-10 were the two minor girls of the school, deposed, that they were also the victims of sexual assault by the accused.

11. A dispassionate scrutiny of the oral testimony of PW-1, PW-2, PW-3, PW-4 and PW-5 as well as PW-11 crystalizes, that the victim identified the appellant in court and she also stated, that the accused inserted his finger into her private part in the toilet of the school. However, during cross-examination, the victim stated that the accused did not do anything to her. Having regard to the tender age of the PW-11 (victim), if her evidence, both in cross and in her examination-in-chief are taken as a whole, along with the comments of the learned trial judge, who had the opportunity to witness the manner/demanner of the witness, it is difficult to brush aside the entire evidence of PW-11.

12. Learned counsel for the appellant, Mr. Ratan placing reliance on a decision of the Apex Court in Raj Kumar-Vs- State of M.P. reported in (2014) 5 SCC 353 and K. Venkateshwarlu –Vs- State of Andhra Pradesh, reported in (2012) 8 SCC 73 submitted, that the testimony of the victim cannot be relied upon, as her evidence in examination-in-chief was not consistent with the cross-examination.

13. The Apex Court in Raj Kumar- State of M.P. observed that "the evidence of a child witness must be evaluated more carefully and with greater circumspection, because a child is susceptible to be swayed by what others tell her. The trial court must ascertain as to whether a child is able to discern between right and wrong and it may be ascertained only by putting the questions to her."

14. In K. Venkateshwarlu v. State of A.P (supra), the Apex Court held as under :-

> "Several child witnesses have been relied in this case. The evidence of a child witness to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon it the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record., because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it."

15. There is no gain saying, that the testimony of the child witness needs to be evaluated with great care and caution. It is evident from the deposition of the PW-11, that the learned trial court tested her capability of understanding the question and giving rational answer thereto, by putting some preliminary questions and thereafter only her statement was recorded. In the present case, the PW-11, the victim, clearly stated in her examination-in-chief, that the accused/appellant inserted his finger into her private part. If the evidence of PW-11 is considered in totality, it is difficult to say that her evidence did not reflect the truth. Medical examination report(Ext.-7) and the evidence of the doctor (PW-6) demonstrated that there was swelling on the private part of the victim and such medical evidence remained uncontroverted. No other material could be brought on record to suggest that such injury or swelling on the private part of the victim was for some other reason.

16. From the unshaken oral testimony of the PW-2, it was apparent, that immediately after the occurrence, the victim made complain to her grandmother (PW-2) and PW-2 informed the teacher of the school over phone.

The PW-3, teacher of the school, also supported the evidence of PW-2, that the PW-2 initially informed her over phone about the occurrence. Therefore, the oral testimony of the victim is found to be supported by the medical evidence of PW-6 as well as the oral testimony of PW-1, PW-2, PW-3 and PW-5, inasmuch as, immediately after the occurrence, PW-2 told PW-1, PW-3 and PW-5 about the occurrence.

17. S.29 of the POCSO Act provides that "where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

18. In our considered opinion, the evidence of PW 11 corroborated by the medical evidence and the oral testimony of PW-1, PW-2, PW-3 and PW-5 were sufficient to raise a presumption under Section 29 of the POCSO Act against the appellant, that he had committed the offence as defined under Section 6 of the POCSO Act. In view of such presumption, burden stood shifted to the appellant, to rebut such presumption and to prove, that he did not commit the offence. We are not oblivious of the proposition that in a criminal trial, it is the burden of the prosecution to prove the guilt of the accused and the accused has a right to keep silence and there is also a presumption of innocence in favour of the accused, unless the guilt is proved beyond reasonable doubt by the prosecution. But in view of statutory presumption under Section 29 of the POCSO Act, in case of any offence under the said Act, once the prosecution brings on record some incriminating evidence in support of the prosecution, the presumption of innocence in favour of the accused disappears in view of Section 29 of the POCSO Act and unless the statutory presumption is rebutted the accused cannot escape the culpability of committing offence under the Act.

19. The evidence on record as indicated above, more particularly, the oral testimony of the victim supported by the oral testimony of PW-1, PW-2, PW-3

and PW-5 and the medical evidence were sufficient, in our considered view to raise the statutory presumption u/s 29 of the POCSO Act.

20. The accused/appellant examined one witness, being the DW 1, who deposed about the duty schedule of the accused. From the evidence of DW 1, it appears, that besides bringing the children to the school and taking them from school by the vehicle, the accused was also engaged in the duty of library and he used to help the children for alighting and boarding the vehicle. He was also engaged in opening and closing the locks of the school. It is also in the evidence, that the same toilet was used by the children and also the other staffs, except the teaching staff. The oral testimony of DW-1 did not disclose anything, capable of rebutting the presumption u/s 29 of the POCSO Act against the appellant. When the evidence adduced by the prosecution were sufficient to raise a presumption u/s 29 of the POCSO Act, and the accused failed to rebut such presumption, we find no reason to interfere with the findings of the learned trial court recording conviction and imposing sentence on the accused under Section 6 of the POCSO Act. Accordingly, the conviction and sentence of the accused/appellant is upheld and the appeal stands dismissed.

21. Send down the LCR along with a copy of this judgment.

JUDGE JUDGE

arup