

Sahjan Ali Through Parokar Banu Khatun vs State Through Sho Ps Madhu Vihar on 23 December, 2024

Author: Prathiba M. Singh

Bench: Prathiba M. Singh, Amit Sharma

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 29th November, 2024

Pronounced on: 23rd December, 2024

+

CRL.A. 397/2024

SAHJAN ALI THROUGH PAROKAR

BANU KHATUN

.....Appellant

Through: Mr. Yashvir Sethi, Mr. Amit Kumar Singh, Mr. Saksham Sethi, Mr. Prashant Sharma & Mr. Manan Soni, Advs. (9971769673)

versus

STATE THROUGH SHO PS MADHU VIHARRespondent

Through: Mr. Ritesh Kumar Bahri, APP with Mr. Lalit Luthra & Ms. Divya Yadav, Advs.

SI Vineet Pratap Singh, PS Madhu Vihar.

Mr. Dinesh Malik (DHCLSC) with Mr. Puneet Jain & Ms. Kiffi Aggarwal, Advs. (M:9810306400)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUSTICE AMIT SHARMA

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been done through hybrid mode. CRL.M.(BAIL) 678/2024 in CRL.A. 397/2024

2. This appeal has been filed by the Appellant-Sahjan Ali, assailing the judgement of conviction dated 21st December, 2023 and order on sentence dated 20th March, 2024 passed by the Id. ASJ-06 (POCSO), Karkardooma Courts, Delhi in SC No. 171/2017, arising from FIR No. 88/2017 filed at PS Madhu Vihar under Section 363, 366, 376 of IPC and Section 4 of POCSO Act. The relevant portion of the order on sentence reads as under

"4.6 In absence of any mitigating circumstance, the convict Sahjan Ali, s/o Sikandar Ali, r/o. H. No.B- 94114, Gali No. 4, Joshi Colony. Delhi-110092 is held liable for following punishments u/sec. 4 POCSO Act:-

- Imprisonment for life for the remainder of his life, and • Fine of Rs.50,000/- (Rupees Fifty Thousand only)."

BACKGROUND

3. The background of the case is that a complaint was lodged on 18th March, 2017, in PS Madhu Vihar alleging that the minor girl Ms. X, aged about 14 years, was lured and kidnapped from her home by an unknown person on 17th March, 2017. The complainant in the said FIR was the mother of Ms. X. On the same day, Ms. X was found in Faridabad along with the Appellant.

4. The Appellant was arrested and the survivor was sent for medical examination at Lal Bahadur Shastri Hospital. The MLC No 58769 was recorded with respect to the said examination which records that no external injuries were found on the survivor.

5. Subsequently, on 20th March, 2017, the statement of the survivor under Section 164 of Cr.P.C was recorded by the Id. Metropolitan Magistrate (Mahila Court No.1), Karkardooma Courts, Delhi, in which she, inter alia, stated that she had a physical relationship with the Appellant.

6. Upon completing the investigation, a chargesheet was filed and the Court framed charges against the Appellant on 16th July, 2018 under Section 376 IPC as also under Section 4 of the POCSO Act, 2017. The order on charge reads as under :

"I, Gurdeep Singh, Additional Sessions Judge-01 & Special Judge (POCSO), Shandara District, Karkardooma Courts, Delhi, do hereby charge you accused (1) Sahjan Ali s/o Sh. Sikandar Ali, age 22 years as under:-

That on 17.03.2017, at about 10:00 a.m. from B-94, Gall No.6, Joshi Colony, Delhi within the jurisdiction of PS Madhu Vihar, Delhi, you accused took the minor victim girl child (name withheld) aged about 14 years to Faridabad, U.P. and committed rape upon her in a rented room, and thereby you committed an offence punishable U/s 376 IPC and within my cognizance. Secondly during the above said date, time and place you accused committed penetrative sexual assault on the above said minor victim child in the manner stated above and thereby you committed offence of penetrative sexual assault punishable u/s 4 POCSO Act and within cognizance of this court."

7. The prosecution led the evidence of 7 witnesses in the Trial. The survivor deposed as PW-1 and her mother had deposed as PW-2. The date of birth of the survivor is not in dispute, and she was admittedly born on 23rd May, 2003. On the date of the incident, therefore, she was approximately 14 years of age. The defence led with one witness, a mutual friend of the survivor and the Appellant, who testified to their relationship.

8. The Trial Court vide the impugned judgment, convicted the Appellant in the following terms:

"13. In the light of the aforesaid discussions and facts and circumstances of the case, this Court is of the considered opinion that the prosecution has successfully proved its case to the hilt against the accused and this court finds that accused had committed the offences upon the victim for which he had been charged. Accordingly, accused Sahjan Ali, son of Sh.

Sikandar Ali is held guilty as charged and is convicted for the offence punishable u/sec. 376 of IPC & u/sec. 4 of POCSO Act."

9. Mr. Yashvir Sethi, the Id. Counsel on behalf of the Appellant submitted that the judgment of the Trial Court lacks any reasoning. He submitted that the Trial Court failed to take into consideration essential facts from the testimony of the survivor such as the fact that she knew the accused/Appellant for more than a year and that she had gone voluntarily with the Appellant. He also pointed out that during her cross-examination, she had clearly stated that she was not subjected to any assault by the Appellant.

10. On the other hand, Id. APP submitted that the Section 164 statement of the survivor, made before the Id. Metropolitan Magistrate, Mahila Court, clearly makes out a case against the Appellant.

11. The Court has considered the matter. Firstly, the Court notes that in the impugned judgment, there is hardly any reasoning. The Trial Court has merely paraphrased the evidence on record and has not given any analysis of the said evidence.

12. A perusal of the testimony of the survivor would show that she refers Appellant to be her boyfriend. She also stated that she had voluntarily gone with him on 17th March, 2017 and that he was known to her for the last one and a half years, prior to the incident. In furtherance to this, she did not inform any of her family members about this. The relevant part of her testimony is set out below:

"I have studied upto 8th standard. I left my school in the year 2017. I have three sisters. My father is auto-driver. Today I have come to the Court along-with my parents.

On 17.03.2017 my boyfriend Shahajahan Khan had taken me to Faridabad with him from my house. He is known to me for last about 1 ½ year prior to the date of incident. I did not tell to any of my family member while leaving with him. We went to Faridabad in Metro.

I went on my own to roam with him. He told me that he will drop me at my house by evening. At about 4 pm on that day I asked him to drop me at my house. Then he told me that he would drop me. Thereafter, I asked him that it is already evening time therefore we should stay somewhere. Thereafter, we took the room on rent and stayed there in the night and on the next day at about 3 PM police reached there. There in the room he made physical relationship with me with my consent. At that

time he promised me to marry."

13. In cross-examination, the survivor again confirms that the Appellant was her boyfriend and that she was not forced to go with the Appellant. She also stated that she was aware of the religion of the Appellant, but since her parents opposed her marriage with the Appellant, she ran away with the Appellant. In her cross-examination, she stated that the Appellant neither committed any physical assault upon her nor did he commit any wrong act with her. The relevant portion of the cross-examination is set out below:

"During my stay with the accused Sahajan Ali he did not commit any physical assault upon me nor did any wrong acts with me."

14. The mother of the survivor i.e., PW-2 stated that she found her daughter missing when she came back home on 17th March, 2017. On 18th March, 2017, she filed a complaint in this regard. In her cross-examination, she stated as under:

"It is correct that my victim daughter did not tell me that accused has ever sexually assault her or committed rape upon her or made any physical relationship with her with her consent. I had no suspicion over the accused nor I knew the accused."

15. The Appellant, in his statement under Section 313 of CrPC, also stated that he and the survivor had gone together to Faridabad on 17th March, 2017, with each other's will and consent. He further stated in his statement that he was not aware of the age of the survivor. Relevant portion of the statement of the Appellant under Section 313 of the CrPC is produced as under:

"17. Do you want to say anything else ? - Ans. I am innocent and have been falsely implicated in the present case by the victim. The victim was maintaining friendly relations with me and we were used to go out and on the said date, we had gone to meet a common friend named Kiran. The parents of the victim did not like our friendship due to our different religions, therefore, they falsely implicated me through their victim daughter in the present case. I had not taken the victim anywhere and she with her own wish had visited Faridabad at the residence of our common friend Kiran."

16. A perusal of the MLC dated 18th March, 2017 would further show that there were no external injuries or signs of an assault on the survivor. Further, it clearly records that the girl denied having any physical or sexual assault. The MLC (exhibit PW-1/A) states as under:

CMO notes extracted below "She ran away with her boyfriend yesterday morning. Her boyfriend is Muslim and she knew him since last 1½ years & she wants to marry him but her parents are against her marriage. So she ran away with that boy and stayed overnight with him in a rented room in Okhla. No history of physical/sexual assault as stated by her, unmarried girl.

Now she is giving history of sexual contact with her consent with that boy after medical."

Extracts from General Physical Examination "Examination of Injuries - No External injuries seen "

17. The relevant sections i.e., Section 375 of IPC and Section 3 of POCSO Act, 2017 are extracted hereinbelow:-

"Section 375 IPC A man is said to commit "rape" if he--

1. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
2. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
3. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
4. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions ***** (6) With or without her consent, when she is under eighteen years of age.

Section 3 of POCSO Act, 2017

3. Penetrative Sexual Assault --A person is said to commit "penetrative sexual assault" if--

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

18. A plain reading of the above provisions would clearly show that in order to convict an accused for offences under the above stated sections, it is essential for the prosecution to prove that the accused had committed physical/sexual acts such as penetration, insertion etc., upon the survivor. In the statement given by the survivor under Section 164 of CrPC before the Id. Metropolitan Magistrate, the survivor only states that the boy (Appellant) made 'samband' with her. However, the victim, in her subsequent statements, had categorically denied that there was any form of sexual assault on her. A perusal of the MLC shows that there are no external injuries on the victim. The terminology used in the MLC is not clear and the prosecution has not examined any medical expert/doctor to explain the MLC.

19. In these circumstances, the Trial Court has interpreted the phrase "samband" and "physical relation" to imply sexual assault solely factoring in the young age of the survivor and the age difference between the accused and the survivor. The relevant observations of the Trial Court are quoted as follows:

"8. Ld. Counsel for the accused had argued that in the cross-examination of the victim, she had denied the fact that she was subjected to assault by the accused during her stay with him.

8.1 The pertinent portion of cross-examination of the PW1/ victim conducted on 07.12.2019 is reproduced below for ready reference:

"During my stay with the accused Sahajan Ali he did not committed any physical assault upon me nor did not any wrong acts with me."

8.2 The key-word which is the subject of interpretation in the testimony of the victim reproduced in para 8.1 above is - 'physical assault'.

8.3 The general import of the term 'physical assault' is use of force and causing injury thereby. In course of cross-examination of a prosecution witness, such witness answers the question put to it by the defence counsel. Thus, the answer contains the words put to it by the cross-examining party. When it was put to the victim that whether she was physically assaulted by the accused, she replied in the negative. The inference which follows is that the cross-examining counsel asked the victim that whether the accused used force upon her or not? This is not the case of the prosecution that whether victim was subjected to use of force by the accused or not because the victim had deposed that she consented to sexual intercourse. Thus, this testimony of the victim is in conformity with the case of the prosecution and non-use of force even if proved is immaterial for the purpose of prosecution. It does not exonerate the accused either.

8.4 The other key-word is 'wrong acts'.

8.4.1 This word must also have been put to the victim by the cross-examining counsel and it is of such general import that its generality cannot be considered as contradiction to the testimony of the victim to the effect that sexual intercourse with her took place.

8.5 During cross-examination of the victim manifestly she was not asked that whether the accused had sexual intercourse with her or not?

9. Thus, from the testimony of the victim, the case of the prosecution is proved and it does not contain exculpatory material vis-a-vis, the charge.

10. On the date of commission of offence i.e. 17.03.2017, the victim was about 14 years of age whereas the accused was 22 years of age. This age difference speaks volumes about the intent of the accused. If this age difference is put to a person of ordinary prudence and he is questioned about the inference, in the light and circumstances of the present case, he would draw, then the necessary and natural inference that he would draw would be that the accused had wooed a young girl/victim/PW-1, to satisfy his lust, by cajoling and enticing her nascent and impressionable emotional immaturity towards virtual imagery of love and affection."

20. Therefore, the entire case hinges only on the victim's evidence i.e., her statement under Section 164 CrPC and her testimony in Court which are not sufficient by themselves to convict the Appellant under Section 376 IPC and Section 4 of the POCSO Act inasmuch as in her testimony or statement under Section 164 CrPC she does not categorically state that there was any sexual assault let alone penetrative sexual assault. Even the MLC does not support a finding of penetrative sexual assault.

21. It is thus unclear as to the manner in which the Trial Court came to the conclusion that there was any sexual assault by the Appellant. The mere fact that the survivor is below 18 years cannot lead to a conclusion that there was penetrative sexual assault. The survivor, in fact, used the phrase 'physical relations', but there is no clarity as to what she meant by using the said phrase. Even the use of the words 'samband banaya' is not sufficient to establish an offence under Section 3 of the POCSO Act or under Section 376 IPC. Though consent would not matter if the girl is a minor under the POCSO Act, the phrase 'physical relations' cannot be converted automatically into sexual intercourse let alone sexual assault.

22. The fact that she voluntarily went with the Appellant is also not disputed. However, the leap from physical relations or samband to sexual assault and then to penetrative sexual assault is one which has to be established on record by means of evidence, and the same cannot be presumed or deduced as an inference. In such cases, the benefit of doubt ought to be in favour of the accused. Moreover, the impugned judgment completely lacks any reasoning and also does not reveal or support any rationale for the conviction.

23. Under such circumstances, the judgment is liable to be set aside. The Appellant is acquitted.

24. The appeal is allowed in the above terms. All pending applications are disposed of.

25. Copy of this judgment be communicated to the concerned Jail Superintendent for information and compliance.

PRATHIBA M. SINGH JUDGE AMIT SHARMA JUDGE DECEMBER 23, 2024 dj/am