2023:DHC:7444

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 04.05.2023
Judgment pronounced on: 11.10.2023

\+ **CRL.A. 482/2020 &CRL.M.(BAIL) 1460/2022**

ARUN KUMAR SHUKLA ..... Appellant

Through: Mr Manu Sharma, Mr Kartik Khanna, Mr Abhyuday Sharma, Mr Karl P Rustom Khan, Mr Gyanendra Kumar and Mr Kartikay Masta, Advs.

versus

STATE ..... Respondent

Through: Mr Aashneet Singh, APP for State
SI Mahesh Kumar, PS-Okhla Industrial Area
Mr Robin Raju, Adv. for prosecutrix/ victim

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

1. This is an appeal seeking setting aside of the judgment dated 22.07.2019 and order on sentence dated 30.08.2019, in FIR No. 936/2014, SC No. 2317/2016, u/s 342 IPC and 6 POCSO Act, registered at P.S. Okhla Industrial Area, passed by the learned ASJ-07 (POCSO), South-East District, Delhi.

2. *Vide* the judgment dated 22.07.2019, the appellant was convicted and *vide* order on sentence dated 30.08.2019, was sentenced to undergo rigorous imprisonment for 12 years along with fine of Rs. 20,000/- u/s 6 POCSO Act and simple imprisonment for 1 year for committing an

offence under section 342 IPC. In default of payment of fine, the Appellant was to further undergo simple imprisonment for 6 months. The sentences were to run concurrently.

BRIEF FACTS OF THE CASE

3. The complainant (PW-8A/mother of the victim) allegedly being a widow, was supporting her family by doing odd jobs at various houses. On 08.12.2014 at around 5:30 pm, the complainant returned from work a bit early and observed her daughter/victim (PW-2) playing on the street outside her house. After sometime, the complainant observed that her daughter was not visible in the street. In her pursuit, the complainant arrived at the residence of the Appellant, a place her daughter frequently visited. After knocking persistently, she heard the victim's cries coming from the room. Upon continued knocking, the Appellant eventually opened the door. The complainant saw him hastily zipping his trousers, and also observed her daughter adjusting her *payjami*/pants. Upon asking the victim about the incident, she disclosed that the Appellant took off her clothes as well as his clothes and committed penetrative sexual assault upon her by inserting his penis in her vagina. On gaining this information, the complainant went to the house of the Appellant in search for him, however by that time, he had already fled away from there.

4. The matter was reported to the police and then the police officials arrived at the spot and recorded the statement of the complainant. Necessary investigation was carried out and the Appellant was arrested. Medical examination of the victim and potency test of the Appellant was carried out at AIIMS Hospital. The samples including vaginal swabs and semen were collected by the doctors, which were sent to FSL. The clothes of the Appellant and the victim were seized and the statement of the

victimu/s 164Cr.PC and other witnesses were also recorded. 11 prosecution witnesses were also examined.

SUBMISSIONS OF THE APPELLANT

5. Mr. Sharma, learned counsel for the Appellant argues as under:

I. MLC OF THE VICTIM-It is stated that as per the MLC of the victim, the hymen is shown to be intact, with 1mm hole in centre. There is also no rupture of vaginal vault and associated visceral injuries; no redness and tenderness of the vulva and no inflammation and bruising of the labia. It is further stated that Dr. Yamini (PW-3), who conducted the MLC of the victim, has opined that as per the examination, it is not proved that any sexual intercourse has taken place. Additionally, it records that "*There is alleged history of sexual assault and attempted penile penetration by the accused, Subhash on 08.12.2014 at 5:30 pm. History as narrated by Mother and partly by victim*." Thus, it is stated that no case of penetrative sexual assault can be made out *qua* the Appellant herein.

II. FSL-It is submitted that as per the FSL report dated 30.03.2016, Exhibits were collected being Vulval Swab, Vulval Smear, Vaginal Swab, Vaginal Smear, Nail Cutting, Hair Combing, Underwear, Pyjami, Blood in gauze of Appellant. As per the biological examination, it was opined that blood and semen was not detected in the Exhibits collected and skin could not be detected in Nail Cutting. Hence, it was concluded that "The DNA profile of male origin could not be generated from the source of exhibits."

III. DISCREPANCIES IN THE STATEMENTS- It is argued that there are major discrepancies/material improvements in the statements of

the complainant and the victim u/s 164 Cr.PC with regard to the whole incident.

a. The victim has stated that she was sitting outside on the cot, while the complainant has testified that her daughter was playing outside.

b. The victim has stated that after the incident**,** she left the room and started playing with her friends after which her mother called her, as opposed to the complainant's statement that the victim went home.

c. The victim has stated that when her mother came to the room of the Appellant, her friend and sister were also with her, while the complainant has not mentioned about the presence of anyone else.

d. The victim has stated that "Subhash alias Arun Kumar Shukla had stated to me not to disclose the incident to anybody otherwise he will kill my father", while the complainant in the FIR and DD. No. 20A mentions that her husband had passed away in November 2014.

e. The other discrepancies mentioned are:-

MOTHER	VICTIM
Rukka- "Andar dala"	164 statement- "Daalnelaga"
FIR- "Andar daalrahe the"	PW-2- "Daalnelage"
PW-8 (Ms. Rani's testimony)- "Andar daaldiya"	

IV. INVESTIGATION LAPSES- It is further argued that there are several investigation lapses in the present case, being:

a. Non-examination of the sister of the Appellant who used to reside with him,
b. No public witness at the time of arrest,
c. Non-verification of Appellant's story with respect to money lending,
d. Delay in time of the incident and DD No. 28A (the incident is alleged to have occurred at 5:30 and the Rukka was recorded at 8:15, i.e 3 hours after the incident), and
e. Non-examination of the victim's friend and sister who were also present with the mother of the victim when they went to the room of the Appellant.

6. Mr. Sharma contends that the learned Trial Court failed to take into account the testimony of DW-1 (Rakesh Kumar Tiwari), who testified that the Appellant was in his company from 11 am on 07.12.2014 until 7 am on 09.12.2014 asDW-1wassuffering from dengue fever. He further asserts that even DW-2 (Shiv Nath, the Landlord) testified on 07.12.2014 that he saw the Appellant in the morning but noted the Appellant's absence in the evening, thus corroborating with the story of DW-1.

7. It is stated by learned counsel for the Appellant that the learned Trial Court has also failed to consider the Site Plan of the *Jhuggis*, which shows that the *Jhuggis* are connected and has a brick wall in between as partition. This being the case, he states that the possibility of no other person witnessing the incident is remote. He also states that an independent source cannot form the basis for conviction.

8. It is further stated that PW-8 does not dispute the fact that before the incident, the Appellant came to her house and had a cup of tea. This verifies the story of the Appellant that after having the tea, the Appellant and the victim's mother had a quarrel with respect to the money after which he was falsely implicated in the present case.

9. Mr. Sharma relies upon the judgment of this Court titled as "***Mohd. Azizul v. State***"[2022:DHC:3077] and more particularly paras 11-17 which reads as under:-

> ***"11.*** *From the arguments, documents and evidence the following emerges-*
>
> *a) The age of the victim at the time of the incident was 3 years old and this fact is not under dispute.*
>
> *b) While the FIR on the statement of the mother states that there was rape, the 164 statement of the mother states that there was no penetration.*
>
> *c) Additionally, the MLC of the victim states:'no bleeding', 'minimal discharge', 'no injury marks Present on labia majora and minora'.*
>
> *d) Also, the child victim was not examined and her description of the incident was that she was 'beaten' by the Appellant.*
>
> *e) The second FSL does match the DNA of the Appellant with the semen found on the underwear of the victim.*
>
> ***12.*** *It emerges from the above stated facts that while there was sexual assault, the statements and the MLC raise a doubt w.r.t. penetration.*
>
> ***13.*** *The prosecution has not laid down the foundational facts regarding penetration as per section 29 of the POCSO Act and the said fact is rebuttable.*
>
> ***14.*** *The case law relied upon by the counsel of the Appellant, Altaf Ahmed @ Rahul (Supra) state that the presumption under Section 29 of POCSO is rebuttable at the instance of the accused.*
>
> ***15.*** *I am of the opinion that while the Appellant assaulted the victim, no penetration took place. It cannot be denied that there was an attempt to rape by the presence of semen on the underwear of the victim, however, the MLC and the statement of the mother under 164 Cr.PC indicate that there was no penetration. The mother herself states that the Appellant was not able to penetrate in her 164 statement. I understand and sympathise that a 3 year old may not be called to court for her examination, and her vocabulary and her understanding of the situation itself would fall short of describing the*

incident, clearly and in its entirety, however, without presence of any evidence or testimony alleging penetration, the Appellant cannot be held liable/guilty under Section 6 of the POCSO.

16. *Section 7 of the POCSO Act describes sexual assault as follows:*

> *7. 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."*

17. *Therefore, without penetration it was only an attempt to rape or aggravated sexual assault as per Section 9(m) of the POCSO Act as the ingredients to prove an intent to commit rape has been proved before the trial court and not successfully rebutted by the Appellant herein. However, the prosecution did not successfully prove the foundational fact that there was penetration by the Appellant. Hence, it is a case of aggravated sexual assault and the present accused should have been convicted under Section 9 of the POCSO Act and sentenced under section 10 of the POCSO Act."*

SUBMISSIONS ON BEHAF OF THE VICTIM

10. Per contra, Mr. RobinRaju, learned counsel for the victim submits that the present appeal is liable to be dismissed on the following grounds:-

a. RELIABLE AND CREDIBLE TESTIMONY OF VICTIM- It is stated that in the 164 statement, the victim has mentioned that the Appellant took her to his room, bolted the door and committed penetrative sexual assault upon her. In addition, she has also mentioned about insertion of his penis to her vagina and the pain she felt by these acts of the Appellant. She further disclosed that the Appellant, even on previous occasions had committed similar acts

with her. It is stated by learned counsel that even the mother of the victim has fully supported the case of the prosecution, unlike in the judgment of ***Mohd. Azizul***(supra).

b. FALSE NARRATIVE- It is submitted that the Appellant has set up a false narrative that he was implicated in this case because of an alleged debt owed to him by the victim's mother. The mother of the victim was not cross-examined on this aspect and no questions were put to her in this regard (the cross-examination of the mother of the victim is reproduced later in this judgment). It is further submitted that the Appellant had also tried to build up a false defence of alibi, which was demolished by the contrary testimony of the Appellant's evidence himself.

c. DYNAMICS OF SEXUAL ASSAULT ON A CHILD IS DIFFERENT FROM RAPE ON AN ADULT- It is stated that the common conclusions of all the judgments starting from (i) State (Govt. of NCT of Delhi) v Khursheed (CRL.A. 510/2018); (ii) Radha Krishna Nagesh v State of Andhra Pradesh (CRL.A. 1707/2019) and (iii) Yogendra Radheshyam Shukla v State of Maharashtra (Bail. Appl. 674/2015) is that in cases of penetrative sexual assault upon minor children, the hymen may not rupture and the accused does not stand to gain advantage because of that. It is also stated that the legal definition of penetration cannot be equated with the term "sexual intercourse" as understood in ordinary parlance.

d. CONVICTION CAN BE BASED ON THE SOLE TESTIMONY OF THE VICTIM- It is submitted that the Supreme Court and the High Courts have often held that "conviction can be based on the sole testimony of the sexual assault victim". In "***Satish v State of Haryana"*** [(2018) 11 SCC 300], the Supreme Court held that the

evidence of the child witness can be accepted if it inspires the confidence of the Court. In the present case, there is no cogent or even a *prima facie* record to demonstrate that the child's evidence was erroneously accepted by the Trial Court.

e. THREAT TO THE VICTIM- Learned counsel for the victim states that the appellant tried to threaten the victim after this incident and while he was on interim bail, he was seen near the locality where the victim was residing. This fact was also recorded in the order dated 19.05.2021 passed by this Court. He further states the incident of penetrative sexual assault had a deep and long-lasting impact on the victim since she stopped going to the school after this incident and the school where she was studying also recommended her family to get her enrolled in a special school.

f. CORRECT APPRECIATION OF FACTS BY THE TRIAL COURT- As regards the submission of the Appellant that scientific evidence does not indicate assault on the victim, Mr. Raju states that this aspect was well addressed by the learned Trail Court by relying on the judgments of this Court and the Supreme Court. He further states that the learned Trial Court has correctly observed that the victim was an intelligent and a competent witness who has not tried to conceal anything from the Court and the statements made by the victim were reflective of her innocence, spontaneity and truthfulness.

11. The status report filed by DSLSA on 06.03.2023 has confirmed that the final compensation amount of Rs. 10,00,000/- has already been credited into the account of the victim on 14.11.2022.

ANALYSIS

12. The POCSO Act provides a legal framework for safeguarding the rights and well-being of the children and protecting them from sexual offences. This act acknowledges the unique vulnerability of children in such cases and it provides for punishment of sexual offenders who commit such offences against children. Therefore, these cases must be dealt with utmost sensitivity.

13. In the present case, there are allegations against the Appellant of committing aggravated penetrative sexual assault on a 7 year old girl child.

14. The submission made by learned counsel for the Appellant that there are contradictions and inconsistencies in the statement of victim and her mother, is of no help to the Appellant. The Supreme Court in "***Appabhai v. State of Gujarat***" [1988 Supp SCC 241] observed that-

> *"13....The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The*

witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.

..."

15. In the case at hand, the alleged discrepancies which have been pointed out regarding the victim sitting on the cot or playing outside, whether the victim was with her friends or went home, or the presence of anyone else in the room, or with regard to the contradiction between the statements of the mother of the victim and the 164 statement of the victim do not call into question the veracity of the prosecution's story. The abovesaid contradictions do not shake the prosecution's version.

16. The statements of the victim reads as under:-

i. 164 statement dated 09.12.2014:-

"Q: बेटा, क्या हुआ था. आप कहा पर थे.

Ans: मैं चारपाई पे बैठी थी. हमारे घर के बाहर बिछी हुई थी. उस aunty का भाई था व मुझे कमरे मे ले गया, ताला मारा,gate बंद किया फिर कुछ करने लगा.

Q: क्या करने लगा?

Ans: जो toilet करने वाली चीज़ होती है मेरी toilet करने वाली जगह पर डालने लगा.

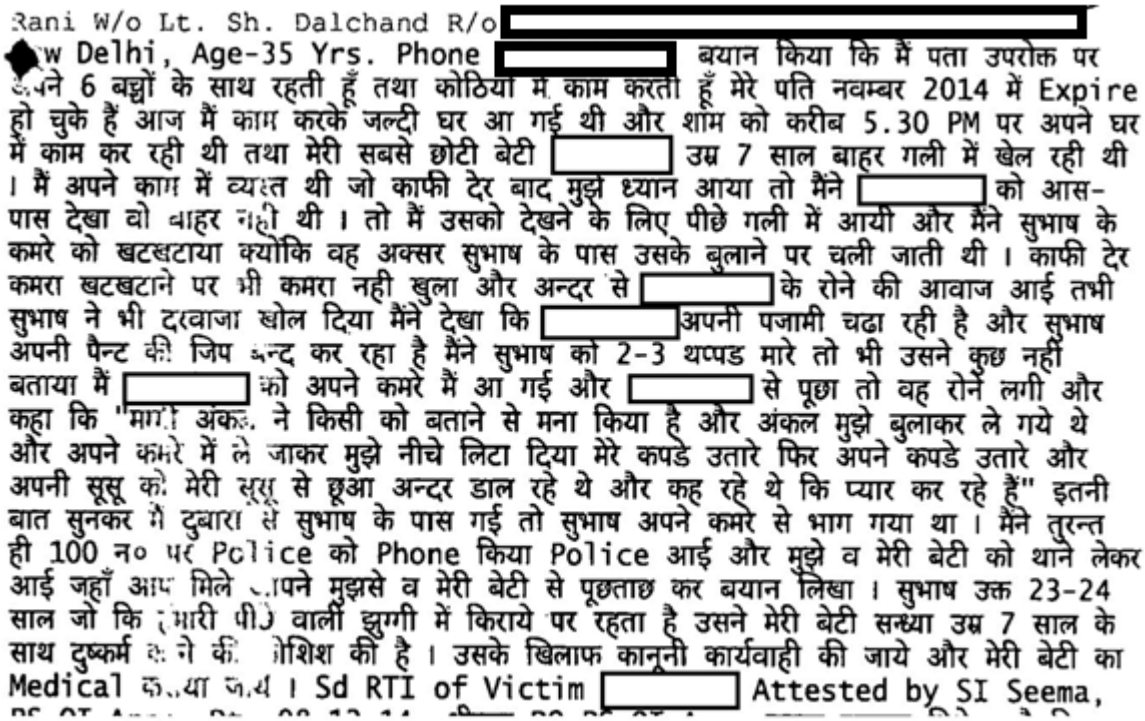
Q: फिर क्या हुआ ?
Ans: डालने लगा, लिटाया, मुँह बंद करने लगा. मैं रोने लगी. मेरी mummy ने आवाज़ सुन ली. कल दिन कि भी बात है. परसो की भी बात है. फिर

mummy आई, uncle को चाँटा मारा. उस aunty के भाई को मारा. व police को भी पता है. Police आई, उसका घर देखा, फिर व भग गया. Mummy ने गाली दी. Uncle ने घर पर प्यार किया था. अपनी toilet वाली चीज़ डालकर प्यार किया था."

ii. Examination in chief- "*That uncle was inserting his penis into my vagina. I was having pain. I started weeping. My mother came on hearing my voice of weeping. I was watching television. I narrated the incident to my mother. My mother had beaten him up with chappal and had given slap to him. Mummy called the police. The said bhaiya ran away along with somebody. Police took me to the hospital in a vehicle."*

iii. Cross-examination- "*The accused had made me lie on the bed in his room. It was day time when I was taken by the accused. It was evening time and the time was around 5.00PM. The police made inquiries from me in my house. The accused had put latch as well as lock after taking me inside the room. After the incident, I left the room and playing with my friends and thereafter, my mother called me. When my mother came to the room of the accused, my friend and my sister were also with her. The name of my sister is XXX. The name of my friend was YYY. I had narrated the incident to the doctor. I was not present when my mother had beaten up the accused. It is wrong to suggest that the accused had not done any wrong act with me or that I am naming him at the instance of my mother.*"

17. The statement of the complainant as per the FIR reads as under:-


Rani W/o Lt. Sh. Dalchand R/o [redacted]
w Delhi, Age-35 Yrs. Phone [redacted] बयान किया कि मैं पता उपरोक्त पर
ने 6 बच्चों के साथ रहती हूँ तथा कोठियों में काम करती हूँ मेरे पति नवम्बर 2014 में Expire
हो चुके हैं आज मैं काम करके जल्दी घर आ गई थी और शाम को करीब 5.30 PM पर अपने घर
में काम कर रही थी तथा मेरी सबसे छोटी बेटी [redacted] उम्र 7 साल बाहर गली में खेल रही थी
। मैं अपने काम में व्यस्त थी जो काफी देर बाद मुझे ध्यान आया तो मैंने [redacted] को आस-
पास देखा वो बाहर नही थी । तो मैं उसको देखने के लिए पीछे गली में आयी और मैंने सुभाष के
कमरे को खटखटाया क्योंकि वह अक्सर सुभाष के पास उसके बुलाने पर चली जाती थी । काफी देर
कमरा खटखटाने पर भी कमरा नही खुला और अन्दर से [redacted] के रोने की आवाज आई तभी
सुभाष ने भी दरवाजा खोल दिया मैंने देखा कि [redacted] अपनी पजामी चढा रही है और सुभाष
अपनी पैन्ट की जिप बन्द कर रहा है मैंने सुभाष को 2-3 थप्पड मारे तो भी उसने कुछ नहीं
बताया मैं [redacted] को अपने कमरे में आ गई और [redacted] से पूछा तो वह रोने लगी और
कहा कि 'मामी अंकल ने किसी को बताने से मना किया है और अंकल मुझे बुलाकर ले गये थे
और अपने कमरे में ले जाकर मुझे नीचे लिटा दिया मेरे कपडे उतारे फिर अपने कपडे उतारे और
अपनी सूसू को मेरी सूसू से छूआ अन्दर डाल रहे थे और कह रहे थे कि प्यार कर रहे हैं" इतनी
बात सुनकर मैं दुबारा से सुभाष के पास गई तो सुभाष अपने कमरे से भाग गया था । मैंने तुरन्त
ही 100 नं० पर Police को Phone किया Police आई और मुझे व मेरी बेटी को थाने लेकर
आई जहाँ आप मिले आपने मुझसे व मेरी बेटी से पूछताछ कर बयान लिखा । सुभाष उक्त 23-24
साल जो कि हमारी पीछे वाली झुग्गी में किराये पर रहता है उसने मेरी बेटी सन्ध्या उम्र 7 साल के
साथ दुष्कर्म करने की कोशिश की है । उसके खिलाफ कानूनी कार्यवाही की जाये और मेरी बेटी का
Medical कराया जाये । Sd RTI of Victim [redacted] Attested by SI Seema,

18. The cross-examination of the complainant reads as under:-

"...I had knocked the door of the room of the accused for about 15 times. It is correct that I had also entered the room when the accused opened the door. I slapped the accused inside the room. It is correct that I had not stated in the complainant that I slapped inside the room. It is correct that when I slapped the accused my daughter "S" was not there. (Vol. She has already left the room of the accused when accused opened the door). It is wrong to suggest that there was a quarrel with accused at that time. It is correct that before the incident accused came to my house and had a cup of tea. It is correct that prior to this incident there were cordial relations between me and accused. It is correct that no statement was given by "S" in the presence of that old lady. It is correct that I had stated in my complaint Ex. PW8/A that I brought my daughter "S" to my room. Ex. PW8/A was written by the police official in my presence. Portion A to A-1 of rukka Mark PW8/A is read over to the witness

and the witness states that 'S' did not make this statement in her statement. The call at 100 number was made by my son, who was present at that time there. At the time when tea was given to accused he was not under the influence of liquor. It is wrong to suggest that the accused is falsely implicated in the present case by keeping my daughter 'S' in front."

19. A reading of these statements of the victim and the complainant show that the basic version regarding the commission of offence is constant and corroborating with each other. The contradictions as pointed out by learned counsel for the Appellant are of a minor character which does not shake the quality of the statement of the victim and the complainant.

20. Moreover, the Supreme Court in "***State of Punjab v. Gurmit Singh"*** [(1996) 2 SCC 384], the Court observed as under:-

"21…A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court

must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

21. I find no reason to disbelieve the statements of the victim and her mother and thus, the argument that there are discrepancies and inconsistencies in the statements of the victim and her mother is dismissed.

22. It is argued by Mr. Sharma that there are investigation lapses in the present case. The Supreme Court in "***C. Muniappan v. State of T.N.***"[(2010) 9 SCC 567] held that:-

> ***"55.*** *There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. "*

23. In the present case, there are a few investigation lapses namely (i) non-examination of the sister of the Appellant who used to reside with him, (ii) no public witness at the time of arrest, (iii) non-verification of Appellant's story with respect to money lending, (iv) delay in time of the

incident and DD No. 28A (the incident is alleged to have occurred at 5:30 and the Rukka was recorded at 8:15, i.e 3 hours after the incident), and (v) Non-examination of the victim's friend and sister who were also present with the mother of the victim when they went to the room of the Appellant. However, the same cannot be a ground for acquittal of the Appellant.

24. Mere presence of lapses or errors in the investigation conducted by the investigating officer does not automatically entitle the accused to seek acquittal. The primary responsibility for evaluating the case and considering all the evidence lies with the Court.

25. In cases where the investigating agency has demonstrated negligence, made omissions, or conducted a flawed investigation, it becomes the legal duty of the Court to meticulously assess the prosecution's evidence independently of these shortcomings. This scrutiny aims to determine the reliability of the evidence and the extent to which it can be trusted, while also evaluating whether these investigative lapses have had any impact on the overarching goal of ascertaining the truth of the matter. In the present case, the quality of evidence of the victim as well as her mother corroborates the case of the prosecution and hence these minor omissions/negligence on part of the investigative agency needs to be ignored.

26. The most important question is that whether Section 6 of POCSO Act is attracted in the present case.

27. Section 3 and 5 of POCSO Act defines and deals with the offence of penetrative sexual assault/aggravated penetrative sexual assault. A bare reading of section 3 shows that penetration of penis, to any extent, amounts to penetrative sexual assault and section 5 states that a person is said to have committed aggravated penetrative sexual assault when it is committed upon a child below 12 years of age. It reads as under:-

"section 3-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.

Section 5- Aggravated penetrative sexual assault.

(a) Whoever, being a police officer, commits penetrative sexual assault on a child –

.....

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child--

.....

(m) whoever commits penetrative sexual assault on a child below twelve years; or

....

is said to commit aggravated penetrative sexual assault."

28. It is argued that as per the MLC of the victim, the hymen is shown to be intact, with 1mm hole in centre. There is also no rupture of vaginal vault and associated visceral injuries; no redness and tenderness of the vulva and no inflammation and bruising of the labia. The Supreme Court in "***Satyapal v. State of Haryana***"[(2009) 6 SCC 635] has observed that:-

"*18. In Modi's Medical Jurisprudence, 23rd Edn., at pp. 897 and 928, it is stated:*

> *"To constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."*

29. Hence the rupture of hymen is not necessary to prove the offence of penetrative sexual assault because any extent of penetration attracts the offence of penetrative sexual assault. It is also not necessary that there has to be some injury on the genitalia or any other part of the victim's body.

30. I am of the view that mere absence of hymen tear or injuries on the vital parts/organs of the victim is not enough to refute the otherwise reliable evidence of the victim and her mother**.** Hence, this contention of learned counsel of the Appellant is rejected.

31. The judgment of ***Mohd. Azizul*** (supra) does not assist the case of the Appellant. In that case, the victim herself did not give any statement regarding the incident of penetrative sexual assault and the only statements which were recorded regarding the incident of penetrative sexual assault were of her parents. In that case, the victim only alleged that she was "beaten" by the accused. The statement of her mother u/s 164 also indicated that there was no penetration.

32. However, in the present case, there is not only a statement of the victim herself alleging penetrative sexual assault committed by the Appellant, but the same is also consistent, reliable and inspires the confidence of

this Court. She has clearly deposed that the Appellant inserted his penis into her vagina.

33. In the present case, both the victim and her mother have provided their statements regarding the incident. These statements carry considerable weight in establishing the offence and the Appellant's involvement in it. The Court must take into consideration all the evidence and factors into account while arriving at a conclusion. Therefore, the medical record must be viewed in conjunction with the narrative provided by the victim and her mother.

34. With regard to the argument that as per the FSL report, nothing was detected on the exhibits and DNA of male organ could not be generated, I am of the view that medical opinion, although very crucial, is not conclusive evidence. The supreme Court in "***Madan Gopal Kakkad v. Naval Dubey***"[(1992) 3 SCC 204] opined that:-

> *"34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.*
>
> *35. Nariman, J. in Queen v. Ahmed Ally [(1869) 11 Sutherland WR Cr 25] while expressing his view on medical evidence has observed as follows:*

"The evidence of a medical man or other skilled witnesses, however, eminent, as to what he thinks may or may not have taken place under particular combination of circumstances, however, confidently, he may speak, is ordinarily a matter of mere opinion."

36. Fazal Ali, J. in Pratap Misra v. State of Orissa [(1977) 3 SCC 41 : 1977 SCC (Cri) 447 : AIR 1977 SC 1307] has stated thus:

"... [I]t is well settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused ... as to the exact time when the appellants may have had sexual intercourse with the prosecutrix.

37.....Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

35. A medical opinion holds significant importance, however, medical opinion is not considered conclusive evidence in itself, and it does not solely determine whether a crime has been committed. Medical reports, while extremely important in the realm of jurisprudence, may occasionally fall short of complete accuracy. It is ultimately the Court which has to weigh the medical evidence alongside other factual and circumstantial evidence to arrive at a conclusion.

36. The Supreme Court in "***Pantangi Balarama Venkata Ganesh v. State of A.P.,***" [(2009) 14 SCC 607]" held that:-

> *"44…For the purpose of this case it may not be of much consequence as this Court has not taken into consideration the evidence of DNA experts alone for the purpose of recording a judgment of conviction. It has been considered along with the other evidence. The prosecution case has been considered as a whole. Cumulative effect of the evidences adduced before the learned trial Judge have been taken into consideration for the purpose of arriving at a finding of guilt against the appellant."*

37. Thus, it is imperative that all the evidence surrounding the case is taken as a whole. Consistent and reliable statements of the victim and her mother regarding the incident of penetrative sexual assault cannot be disregarded merely on the ground that FSL records that "DNA of male organ could not be generated."

38. I am of the view that the judgement of the learned Trial Court is well reasoned. It has rightly observed that minor contradictions or insignificant discrepancies in the statement of the victim should not be a ground for throwing out an otherwise reliable prosecution case. In the present case, the victim is only a 7 year old child. It is natural for minor inconsistencies to arise in her statements given her young age and the circumstances surrounding the incident.

39. I find merit in the observation of the Trial Court that no mother would put her daughter's reputation at stake for falsely implicating the Appellant and tutor her to give a statement regarding penetrative sexual assault, which is not true. The improbability of the mother of the victim falsely implicating the Appellant merely due to a debt is also evident from the fact that no questions were put to the mother of the victim during her cross-examination regarding the alleged debt owed by her to the Appellant. The same seems to be an ill-founded, vague and meritless argument and is therefore rejected.

40. I am also in agreement with the observation made by the learned Trial Court that the investigation seems to be done in a fair manner. The case of the prosecution cannot be disregarded merely due to some investigation lapses. The consistent statements of the victim and her mother regarding the incident are sufficient to prove the guilt of the Appellant.

41. The learned Trial Court has also correctly observed the statements of DW-1, DW-2 and the Appellant to come to a conclusion that his plea of alibi is refuted. DW-1 testified that the Appellant was in his company from 11 am on 07.12.2014 until 7 am on 09.12.2014 due to his suffering from dengue fever and DW-2 testified that he saw the Appellant in his *jhuggi* in the morning of 07.12.2014 but did not see him after. However, the Appellant in his own statement u/s 313 Cr.PC contradicted their version by stating that he was present in his *jhuggi* on 08.12.2014, had gone to the room of the complainant, took tea and thereafter, there was a quarrel over payment issue. These contradictions in the statements of the Appellant and the defence witnesses raise a serious doubt due to which the same cannot be relied upon. Therefore, the defence of plea of alibi taken by the Appellant is devoid of any merit and the same is liable to be dismissed.

42. Learned Counsel for the Appellant has also pointed out that the mother of the victim has stated that she is a widow while the victim, in her cross-examination has stated that the Appellant threatened her not to disclose this incident to anybody or else he would kill her father. He states that this contradictory statement raises a doubt over the credibility of the story of the victim. I am of the view that that the learned Trial Court has correctly appreciated this statement of the victim, to state that by using this expression, the victim was only trying to convey that the Appellant extended threats to cause harm to her close ones if she

disclosed about this incident to anyone. This testimony of the victim needs to be appreciated in the light of the fact that the victim was only 7 years old. The vulnerability of a child victim has to be taken into consideration by this Court.

43. I find no infirmity in the conclusions arrived at by the learned Trial Court. The victim has given a detailed account of the incident mentioning that the Appellant wrongly confined her in his room and committed penetrative sexual assault on her. The Trial Court has rightly concluded that the Appellant is guilty of the offences u/s 342 IPC and 6 POCSO Act.

CONCLUSION

44. In this view of the matter, I see no reason to interfere with the judgment dated 22.07.2019 and order on sentence dated 30.08.2019, in FIR No. 936/2014, SC No. 2317/2016, u/s 342 IPC and 6 POCSO Act, registered at P.S. Okhla Industrial Area, passed by the learned ASJ-07 (POCSO), South-East District, Delhi.

45. The appeal is hereby dismissed.

JASMEET SINGH, J

OCTOBER 11th, 2023/(MS)/st

Click here to check corrigendum, if any