$~22

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

Judgment reserved on: 03.06.2022
Judgment delivered on: 17.08.2022

\+ **CRL.A. 116/2020**

MOHD AZIZUL ..... Petitioner

Through: Mr. Sumeet Verma, Mr. Amit Kala, Mr. Mahinder Pratap Singh, Advs.

versus

STATE ..... Respondents

Through: Mr. Sanjiv Sabharwal, APP for State, SI Rohit, PS Hazarat Nizamuddin

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

1. This is a petition filed seeking setting aside of the impugned judgment dated 24.09.2019 and order on sentence dated 10.10.2019 passed by ASJ-07, Special Court, POCSO Act, South East District, Saket Courts, Delhi in FIR No. 106/2014, P.S. Hazarat Nizamuddin u/s 6 POCSO Act, case titled '*State Vs. Mohd. Azizul*' wherein the Applicant has been found guilty under Section 6 of the POCSO Act and was sentenced to R.I. for 14 years and fine of Rs. 10000. In addition, since the fine was not paid, he was further directed to undergo simple imprisonment of 6 months.

2. The brief factual matrix is as under:

2.1 As per the prosecution victim baby 'R' used to reside along with her family at Jhuggi No. 114, Nizam Nagar Basti, Hazrat Nizammudin, New Delhi. She has 3 siblings and her parents were running a tea shop from a place near their Jhuggi. The accused was a vagabond who used

to sleep on the pavements near the tea shop.

2.2 On 13.03.2014, around lunch time, the mother and the father were attending to their tea shop and the victim was playing in the park behind the shop. Around 1.30pm on the same date, the mother of the victim left the tea shop for buying food for her children from a nearby hotel while her husband was minding the shop. It is then alleged by the prosecution that the victim remained unsupervised at the park and taking advantage of the same, the accused appellant committed penetrative sexual assault upon her. After being subjected to penetrative sexual assault, the victim came weeping at the tea shop with two 10 rupee notes in her hand.

2.3 On noticing this, the father made inquiries from the victim and she pointed towards the accused who was seen sleeping near the shop. The victim disclosed that the accused had 'beaten' her and given her the currency notes. The father of the victim observed that the underwear of his daughter was wet and he could make out that she had been sexually assaulted. He confronted the accused and started beating him.

2.4 In the meantime, the mother returned from the hotel and on seeing her husband beating the accused, she made inquiries from her husband and came to know about the alleged incident. The mother took her daughter in her lap and her daughter pointed towards the accused and disclosed that he had removed her underwear and also had beaten her. She observed that the underwear of her daughter was completely wet with semen and her clothes were sticky and dirty. She observed redness on the vagina of the victim. On finding that their daughter had

been sexually assaulted by the accused, the parents went to the police station and reported the matter.

2.5 The police collected the evidence and subsequently the same was sent for analysis and preparation of FSL report.

3. After analysing the documents, evidence and arguments of the parties, the Sessions Court was of the view that on 13.03.2014, between 01:00 PM and 02:00 PM, accused i.e. the appellant committed penetrative sexual assault upon the victim by inserting his penis in her vagina. The victim was less than 12 years of age at the time of offence and therefore, the penetrative sexual assault falls under the category of aggravated penetrative sexual assault as defined under Section 5(m) of the POCSO Act.

4. The learned Sessions Court further on the basis of the findings sentenced the appellant to undergo rigorous imprisonment for a period of 14 years and fine of Rs. 10,000/- for committing the offences u/s 6 of the POCSO Act.

5. It is this judgment dated 24.09.2019 which has been challenged by the appellant before me.

6. It is submitted by Mr. Verma, learned counsel for the appellant that the present case is devoid of the testimony of the prosecutrix/victim as the victim has neither been interrogated nor examined by the prosecution.

6.1 He submits that the prosecution solely relies upon the testimony of the parents of the victim PW-2 and PW-3 who are not ocular witnesses but have deposed regarding their impression of the alleged incident. Even PW-2 and PW-3 have not deposed about any penetration in the vagina and they have only learnt from the victim that the appellant had allegedly 'beaten' her.

6.2 He states that the Sessions Court has wrongly held that 'beating' can

be treated as penetrative sexual assault upon the victim.

6.3 He further relies upon the 164 statement of the mother of the victim dated 14.03.2014 i.e. exhibit PW-3/B as it totally negates any penetrative sexual assault as she stated that the man could not enter the victim and did everything outside.

6.4 He submits that even the rukka dated 13.03.2014 (exhibit PW-3/A) recorded on the complaint of the mother of the victim that there was no penetrative sexual assault.

6.5 Mr. Verma further states that medical evidence does not endorse the prosecution version. The MLC (exhibit PW-7/B) records: 'no bleeding', 'minimal discharge', 'no injury marks Present on labia majora and minora'. The conclusion of FSL report (Ex. PW- 8/B) dated 31.07.2015 reads as under: '*DNA profile generated from the source of exhibit '4' (i.e. underwear of victim) could not be matched as DNA profile could not be generated from the source of exhibit '9' (i.e. Blood in gauze of accused).*'

6.6 Relying on the above, the learned counsel for the petitioner submits that a combined reading of the MLC with FSL shows that there is a complete mis-construing of the medical evidence on record and the gynaecological examination unambiguously negates penetration of the vagina.

6.7 The counsel further submits that presumptions u/s 29 and 30 of the POCSO against the appellant requires that the prosecution has to first prove foundational facts by leading evidence before the presumptions can come into play. It is only thereafter that the onus shifts on the accused to lead evidence to rebut the presumption.

6.8 Lastly, he argues that semen was found on the underwear of the

victim but the same could not be matched with DNA profile of the accused in the first FSL report and subsequent testing had to be carried out.

7. He further relies on the following judgments:

7.1 Firstly, on the judgment of ***Altaf Ahmed v. Rahul @ State*** [CRL. A. 474/2020, Delhi High Court, dated 03.12.2020] to state that before the presumption under Section 29 of the POCSO Act can come into, the prosecution has to establish the foundational facts by leading evidence. The relevant para is as under:

> "*24. So far as the contention by learned APP for the State with respect to presumption under Section 29 of the POCSO Act is concerned, it is no doubt true that in a trial under POCSO Act, the accused is liable to rebut the aforesaid presumptions against him. However, at the same time, for the said presumptions to come into play, the prosecution first has to establish the foundational facts by leading evidence. The presumption is rebuttable by either discrediting the witnesses through cross-examination or by leading defence evidence."*

7.2 Secondly, on the judgment of ***Abhay Singh v. State*** [CRL. A. 968/2015, Delhi High Court dated 26.07.2017] wherein it was observed:

> "*36. Since the report of the chemical examiner Ex.14/F shows the presence of semen on the clothes and vaginal swab but the medical evidence as recorded in the MLC Ex.PW-8/A does not show that the private part of the victim had any mark of violence. Had there been penetration by a fully grown-up person like her father, even the slight penetration would have caused some injury in its attempt to enter the child's vagina.*"

7.3 Lastly on the judgment, ***Ragul v. State by Inspector of Police, Nallipalayam Police Station*** [CRL. A. No. 391/2016, The High Court of Judicature at Madras, dated 21.09.2017] wherein the High Court

held the following:

> "*11. In a case of this nature, the provisions of Section 29 of POCSO Act, have to be strictly construed inasmuch as penal consequences are involved. The Section does not say that it is an irrebuttable presumption and in this context it can be safely concluded that the presumption to be drawn under the provision is a rebuttable presumption….*"

8. Per contra, Mr. Sabharwal, learned APP, appears for the State and argues that a bare perusal of the FIR which was recorded on the victim's mother's statement alleges rape committed by the Appellant.

8.1 He relies upon the judgment of ***Rakesh @ Diwan v. State*** [CRL. A. 454/2020, Delhi High Court, dated 10.08.2021] that:

> "*15. Insofar as the sufficiency of the statement of child victim in convicting an accused is concerned, it has been repeatedly held that if the testimony of the child victim inspires confidence and is reliable, it is sufficient to record the conviction. In Dattu Ramrao Sakhare and Others v. State of Maharashtra reported as (1997) 5 SCC 341, the Supreme Court held that conviction on the sole evidence of the child witness is permissible, if the witness is found competent and the testimony is trustworthy. Similarly, in State of Rajasthan v. Om Prakash reported as (2002) 5 SCC 745 while reversing the decision of the High Court and upholding the conviction of the appellant, the Court held:-*
>
> *"13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In State of Punjab v. Gurmit Singh reported as (1996) 2 SCC 384, referring to State of Maharashtra v. Chandraprakash Kewalchand Jain reported as (1990) 1 SCC 550 this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also*

been observed in the said decision by Dr. Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the 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. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

14. In State of H.P. v. Gian Chand reported as (2001) 6 SCC 71 Justice Lahoti speaking for the Bench observed that the court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined."

16. Similarly, in State of Himachal Pradesh v. Sanjay Kumar alias Sunny reported as (2017) 2 SCC 51, while relying on the testimony of a child witness to restore the conviction, the following observations were made:-

"31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon

without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.""

8.2 Mr. Sabharwal submits that the statement of PW-2 and PW-3 are, in fact, statements of Baby R. It cannot be lost sight of the fact that baby R at the time incident was merely 3 years old. Her vocabulary, comprehension, her exposure all were at a nascent stage and at that age she may be at loss of words and expressions to:

a) Completely describe incidents;
b) Have a clear picture in describable words in her mind;
c) She at 3 years of age, is not expected or possible to recapitulate the harrowing incidents with mathematical precision.

8.3 What is relevant to consider in the present case is whether a combined reading of statement of PW-2, PW-3 as repeated based on the statement made by Baby R, are good enough. The same has been considered by the Trial Court Judge and he has held as follows:

"*23. One of the main arguments of the defence has been*

that the medical evidence does not corroborate the statement of the victim. Defence has argued that during medical examination, the hymen of the victim was found intact and therefore, the charge of penetrative sexual assault has not been established. Defence Counsel has pointed out towards the MLC of the victim and mentioned that neither injury nor bleeding was noticed in the vagina of the victim. He has mentioned that the medical evidence has demolished the prosecution's case. I am not convinced with this argument. The victim was around 3 years old at the time of sexual assault. In a female child of tender years, penetration may not always result in tearing of hymen. The Apex Court has held so in the judgment titled as "Radha Krishna Nagesh Vs State of Andhra Pradesh" 2013 (11) SCC 688. This was a case wherein the accused was charged with the rape of a minor girl. The court observed that in cases of rape upon minor girls, penetration may not always result in tearing of hymen and same would depend upon the facts & circumstances of a given case. The Apex Court further held in this case that the court must examine the evidence in its entirety and then see its cumulative effect to determine whether offence of rape was committed or it is a case of criminal sexual assault or a criminal case outraging the modesty of a girl. In the present matter, although, no injury was found on the vagina of the victim and the hymen was also found intact but from this, it cannot be concluded that penetrative sexual assault was not committed on the victim.

24. In the statement recorded under Section 164 Cr.P.C, the mother of the victim mentioned that accused disclosed that he tried to penetrate the vagina of the victim but could not succeed. She has mentioned that accused could not succeed in inserting his penis in the vagina of the victim. This aspect was considered by the High Court of Delhi in the decision in "State (Govt. of NCT of Delhi) Vs Khursheed" 2018 (251) DLT 498 DB. In para-67 of this judgment, the High Court referred to the

medico-legal literature and made reference to Parikh's Text Book of Medical jurisprudence, Forensic Medicine and Toxicology-6th Edition (page 5.38) authored by Dr. C.K.Parikh wherein it was observed, "in young children, as the vagina is very small and hymen deeply situated, the adult penis can not penetrate it. In rare cases of great violence, the organ may be forcibly introduced, causing rupture of the vaginal vault and associated visceral injuries. Usually, violence is not used and the penis placed either within the vulva or between the thighs and as such, only redness and tenderness of the vulva may be caused. The hymen is usually intact There may be no sign or very Jew signs of general violence, since the child has no idea of the act, is also unavailable to offer resistance". In para-74 of the judgment, the Court referred to a Text Book of Medical Jurisprudence & Tixicology-24th Edition (page 668) authored by Sh. Jai Singh P. Modi wherein it was observed that in small children, hymen is not usually ruptured but may become red and congested along with inflammation and bruising of the labia. Thus, the absence of injury in the vagina of the victim and the fact that the hymen was not torn does not suggest that penetrative sexual assault was not committed upon the victim.

25. Much emphasis has been placed by the defence on the argument that there are infirmities in the investigation. It has been argued that police has failed to join an independent witness during the investigation. Defence has also challenged the authenticity of the site plan and the arrest memo of the accused. I am not impressed with these arguments. The argument about the absence of independent witness is absurd. It is a matter of common understanding that crimes like these are committed in isolated spots. The accused would have chosen an isolated spot where no one could have seen him committing penetrative sexual assault upon the victim. In view of this, it would be grossly unfair to look for corroboration from an independent public witness. Admittedly, there are some infirmities in the investigation but the accused does not stand to gain advantage because of these infirmities. The testimony of

the parents of the victim can not be discarded merely because Investigating Officer has failed to carry out meticulous investigation. Investigation appears to have been done in a fair manner. The testimony of the parents of the victim, which finds corroboration from the forensic evidence, is more than sufficient to bring home the charges against the accused.

26. The argument that the testimony of the parents of the victim amounts to hearsay is erroneous. Admittedly, there is no eye-witness of the incident except the victim herself who was just 3 years old at the time of offence. The defence has not disputed the age of the victim. It is a matter of common understanding that child at such an age is hardly in a position to speak properly. The child at such a tender age does not even understand what actually has happened with her; She can explain and communicate the facts only by gestures and that too to a small extent. The father of the victim has deposed that her daughter came weeping to the tea shop and she was holding 20 rupees in her hand. He has stated that he made inquiries from her daughter and her daughter pointed towards the accused and she stated that accused gave her 20 rupees and gave beatings to her. The victim did not understand how to convey about the penetrative sexual assault to her parents. She had a small vocabulary and therefore, she conveyed to her parents that accused gave beating to her. By stating this, she definitely meant that accused had committed penetrative sexual assault upon her. The father of the victim has mentioned that the undergarments of her daughter were wet. The mother of the victim has also stated that the undergarments of her daughter were wet. She has mentioned that the discharged semen of the accused was present on the genitalia and the undergarments of her daughter. I am of the considered opinion that the testimonies of the parents of the victim does not fall under the category of hearsay. They have deposed what they actually saw

at the time of incident. They have given an honest and actual account of the incident. Their testimonies are coherent and reliable. The witnesses have not tried to make any improvement in their versions. Both have corroborated and supported the version of each other. Their testimonies are relevant and admissible."

8.4 He submits that the DNA profile generated from the sample of the accused was similar to the DNA profile generated from the underwear of the victim in the second FSL report.

8.5 Additionally, the statement of the mother of the victim recorded under section 161 CrPC and the statement of the father of the victim recorded under section 161 CrPC was similar and not contradicting with each other.

8.6 He also submits that at the time of the penetrative sexual assault, the victim was just 3 years old and the chances of injuries being found on the private part was remote. The FSL report established that the semen of the accused was found on the undergarment of the victim. The FSL report is a conclusive piece of evidence. He relies on the Delhi High Court judgment of ***The State Govt. of NCT of Delhi v. Khursheed*** [2018 SCC OnLine Del 10347] wherein it was held:

"*34. He argues that the second FSL report dated 24.05.2018, must be preferred over the first FSL report, as the former is founded upon a blood sample which does not appear to belong to the accused. Thus, it is not a case of two interpretations, or even two different expert reports on the same samples, but a case of two reports-the first being founded upon a partially incorrect data/sample viz. the blood sample which-as it now transpires, was not of the accused. He submits that the second FSL report Ex. CW-2/A is supported by the evidence of the prosecutrix PW-1 and eye-witness-PW8, which are both reliable and trustworthy. Mr. Mahajan further argues that if the*

direct evidence is satisfactory and reliable, the same cannot be rejected based on medical expert report. Reliance is placed on Anil Rai v. State of Bihar, 2001 SCC (Cri) 1009; Punjab Singh v. State of Haryana, 1984 Supp SCC 233 : AIR 1984 SC 1233. He also places reliance on Piara Singh v. State of Punjab, (1977) 4 SCC 452 : AIR 1977 SC 2274 to submit that where multiple contradictory reports have been produced before the court by two or more equally competent medical experts, then the court must consider the report which supports the direct evidence in the case."

9. I have heard the learned counsel for the Appellant and the Ld. APP on behalf of the State and perused the judgments relied upon.

ANALYSIS

10. In my analysis, I have to consider the following question:

a) Whether the prosecution has laid down foundational facts indicating aggravated penetrative sexual assault as punishable under section 6 of POCSO Act?

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 CrPC 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 vhild or makes the child touch the vagine, 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.

18. In this view of the matter, the appeal is partly allowed and the sentence under Section 6 of the POCSO Act is overturned. The Appellant is now convicted for the offence punishable under Section 9 of the POCSO Act and sentenced under section 10 of the POCSO Act. As per the Nominal Roll, the Appellant has undergone roughly 8 years and 8 months of his sentence. The Appellant has already undergone the maximum sentence provided for the offence and is thus directed to be released forthwith unless required in any other case.

19. Therefore, the Appellant be released from jail.

20. The Appeal is partly allowed in the above terms.

21. A copy of this judgment be communicated by the Registry to the concerned Jail Superintendent immediately.

JASMEET SINGH, J

AUGUST 17, 2022 / (MS) *Click here to check corrigendum, if any*