



2024:DHC:10017



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

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RESERVED ON- 05.11.2024
PRONOUNCED ON -23.12.2024

+ CRL.A. 288/2021, CRL.M(BAIL) 1223/2024

RAJA HALDER

.....Appellant

Through: Mr. Anwesh Madhukar, Adv.
(DHCLSC) with Ms. Prachi Nirwan,
Adv.

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Priyanka Dalal, APP for the State
with SI Yashveer Sharma, PS
Govindpuri.

ORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA,J:

1. The present appeal has been filed under Section 374(2) , challenging judgment dated 13.05.2021 and order on sentence dated 03.08.2021, passed by Learned Additional Sessions Judge-06 (POCSO), South East, Saket Courts, Delhi, in Case No. S.C. 428/2018, FIR No. 242/2018, under Section 376 AB of the IPC and Section 6 of the POCSO Act registered at PS Govind Puri, Delhi, whereby the appellant was convicted. The learned Trial Court vide order on sentence dated 03.08.2021 awarded rigorous imprisonment for 20



years and fine of Rs. 10,000/-; in default of payment of the fine, the appellant was to undergo simple imprisonment for 1 month.

2. The facts in brief as recorded by the Ld. Trial Court are as under:

“2. Brief facts leading to the filing of the charge sheet against the accused are that on 08.7.2018 the victim child (herein after referred to as the prosecutrix) went to the Police Station Govindpuri with her mother and made the statement EX PW-1/A. She was sent to AIIMS hospital for medical examination. IO WSI Buglesh prepared the rukka EX PW 8/A and the FIR EX PW-4/A was registered U/S 376 IPC and 6 POCSO Act. IO prepared the site plan EX PW-1/C at the instance of the victim. The accused was arrested on 08.7.18. As per the school record the D.O.B. of the prosecutrix is 13.06.2006. The birth registration certificate issued by SDMC containing the same D.O.B is EX PW-2/B. Statement of the prosecutrix EX PW-1/D was recorded under Sec 164 Cr.P.C by Ld. M.M. on 10.07.2018. On completion of the investigation the charge sheet was filed citing 15 prosecution witnesses. It is mentioned in the charge sheet that the Doctor who examined the prosecutrix, had advised that she be admitted in the hospital but her mother refused. It is also mentioned that the Doctor had not supplied some papers of the MLC and had told that she would produce the same at the time of the evidence.

3. In support of its case the prosecution has examined 9 witnesses. Remaining witnesses were dropped in view of the statement of the Ld. Cl for the accused at bar dated 11.02.21. The documents to be proved through these witnesses were exhibited as EX P-1 to P5.

4. PW-1 is the prosecutrix. PW-2 is her mother. PW-3 is her father. Examination in chief of PW-3 was partly recorded on 30.01.20. His examination could not be completed as he unfortunately expired. PW-4 is the Duty officer Retd. SI Yad Ram who had registered the FIR. PW-5 is Mohd. Naseem who was the landlord of the house where the families of the accused and the prosecutrix were residing as tenants. The two incidents which are subject matter of the charge also happened in different portions of the same house as shown in the site plan. PW-6 Ms Sunita Paul is



the In-charge of the SDMC Primary School. She was examined to prove the school record containing the D.O.B. of the prosecutrix. PW-7 Ct. Girwar remained with the IO during the investigation and he is a witness of arrest of the accused. PW-8 is the IO WSI Buglesh and PW-9 is Ms ArunaMongia Sub-Registrar, Central Zone, SDMC.”

3. The statement of accused was recorded under Section 313 Cr.P.C on 30.03.2021. Ld. Trial Court after hearing the submissions of the parties recorded the conviction of the appellant for the offence punishable under Section 376(2)(n) IPC, Section 376 AB IPC, and Section 6 of the POCSO Act, 2012. The appellant has challenged the impugned order primarily on the following grounds:
 - a) Ld. Trial Court has failed to appreciate the evidence properly as the prosecution has miserably failed to prove the charges against the appellant.
 - b) The prosecution has failed to prove the foundational facts in support of its case and therefore the presumption under Section 29 of the POCSO Act cannot be raised against the appellant.
 - c) The matter was reported to the police after about two months. Ld. Trial Court did not take into account the fact that the victim along with her mother had chosen to visit the police station Govind Puri filing the complaint alleging the commission of the alleged offence which makes the case of the prosecution improbable.
 - d) There are uncorroborated inconsistency in the testimony of the victim. In absence of any corroborative evidence the recorded judgment cannot sustain in the eyes of law.



4. Learned counsel for the appellant has further argued that though the prosecutrix / victim stated in her statement before the police that she was threatened by the appellant but there were no grounds which prevented the prosecutrix or her parents from reporting the matter to the police. Learned counsel submitted that the delay of two months in registration of the FIR makes the story of the prosecution totally unreliable. It has further been submitted that there is no medical evidence in support of the ocular testimony of the prosecutrix. Learned counsel for the appellant further submitted that even the site plan EX PW-1/C does not show the bathroom on the second floor at the roof of the house where allegedly second incident of sexual assault had taken place. Learned counsel for the appellant submitted that the photographs of the victim produced by the defense were not at all taken into account by the Ld. Trial Court.
5. Learned counsel for the appellant submitted that the Ld. Trial Court ignored the testimony of the mother of the victim i.e., PW-2 who deposed that she did not ask the child victim about the alleged incident and she made a complaint about the alleged offence when the wife of the appellant informed them. Learned counsel submitted that it is a totally unnatural human conduct that the mother of the victim would make a police complaint after being informed by the wife of the alleged accused that her husband has committed such a serious offence with her minor daughter
6. Learned counsel for the appellant further submitted that the Ld. Trial Court ignored the fact that internal medical examination of the victim was not conducted. Learned counsel submitted that the Ld. Trial Court



also did not take into account the cross-examination of PW-2 dated 30.01.2020 where it was admitted that she did not hand over the clothes of her daughter to the police which was worn by her daughter at the time of incident. Learned counsel submitted that the police failed to conduct a fair investigation. Learned counsel further submitted that the impugned judgment is totally based on conjunctures and surmises and therefore it is liable to be set aside.

7. Learned APP for the State has vehemently supported the impugned judgment. Learned APP for the State submitted that the age of the victim has duly been proved by the prosecution which proves that the victim was a minor as her date of birth was 13.06.2006. at the time of the alleged incident had the victim was under 12 years of age. Learned APP further submitted that the victim has made a consistent statement which has duly been supported by her mother and medical evidence. Learned APP submitted that minor contradictions which had appeared in the testimony of the prosecutrix does not go to the root of the matter. It has been submitted that the Ld. Trial Court has passed a reasoned order and there is no ground to interfere into the same.

Analysis and Conclusion

8. The criminal proceedings were set in motion in the present case by virtue of the statement made by the prosecutrix on 08.07.2018 wherein she alleged that she was sexually assaulted by the accused around two months back. The first issue which arises for consideration is the age of the prosecutrix. Section 34 of the POCSO Act reads as under:

“(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of 1[the



Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)].

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.”

9. In this regard it is also necessary to refer to Section 94 of the Juvenile Justice Act, 2015. The combined reading of both these provisions makes it clear that in case there is any dispute as to the age of the juvenile in the case of a child the Courts have to resort to the procedure prescribed under Section 94 of the Juvenile Justice Act. The Juvenile Justice Act provides that in order to determine the age of the juvenile, the Court has to consider the following documents:
- i. the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;
 - ii. the birth certificate given by a corporation or a municipal authority or a panchayat;
 - iii. and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:



10. Thus, while determining the age, the Court has to first take into account the date according to the birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board and in absence of this the Court will consider the birth certificate given by a corporation or a municipal authority or a panchayat.
11. In this regard, prosecution has examined PW-6 Ms. Sunita Paul who has produced the record in respect of the prosecutrix and deposed on oath that victim was admitted in the school on 21.04.2012 and at the time of admission the copy of birth certificate was submitted by the parents. It was deposed that as per birth certificate as well as in records of the school the date of birth of the child is 13.06.2006.
12. Similarly, PW-9 Ms. Aruna Mongia, Sub Registrar Central Zone appeared and stated that as per record the date of birth was recorded as 13.06.2006 which was got registered in their office on 13.07.2006. It was specifically stated that the certificate was issued by their office; the original of the certificate was duly proved. The copy of the register was also proved as EX PW-9/A. In view of the categorical testimony of PW-6 Ms. Sunita Paul, Official from the school and PW-9 Ms. Aruna Mongia, Sub Registrar Central Zone, no controversy remains as to the date of birth of the child. Thus, this Court has no hesitation in upholding the finding of the Ld. Trial Court that the prosecution has successfully proved beyond reasonable doubt that the date of birth of the prosecutrix is 13.06.2006.
13. In the present case, the appellant was charged for the offence punishable under Section 6 of the POCSO Act and Section 376(2)(n)



and Section 376A IPC. Section 7 of the POCSO Act defines “Sexual Assault” which reads as under:

“Section 7: 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.”

14. It is also necessary to refer to Section 3 of the POCSO Act which defines “Penetrative Sexual Assault”.

“Section 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.”

15. Section 2(a) of the POCSO Act provides that "aggravated penetrative sexual assault" has the same meaning as assigned to it in section 5. In the present case, Section 5(m) of the POCSO Act is relevant which reads that if a penetrative sexual assault is committed on a child below 12 years, it will fall within the definition of “Aggravated penetrative sexual assault”.



16. Before proceeding further, it is necessary to examine the aspect of the weightage to be given to the testimony of sole evidence of prosecutrix. In ***Ganesan v. State Represented by its Inspector of Police in Criminal Appeal No. 680/2020*** it was aspect inter alia held as under:

*“9.1 Whether, in the case involving sexual harassment, molestation etc., can there be conviction on the sole evidence of the prosecutrix, in the case of **Vijay alias Chinee** (supra), it is observed in paragraphs 9 to 14 as under:*

*“9. In **State of Maharashtra v. Chandraprakash Kewalchand Jain**, (1990) 1 SCC 550 this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under: (SCC p. 559, para 16)*

“16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to



the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

*10. In **State of U.P. v. Pappu**, (2005) 3 SCC 594 this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under: (SCC p. 597, para 12)*

"12. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do."

*11. In **State of Punjab v. Gurmit Singh**, (1996) 2 SCC 384, this Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost*



sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under: (SCC pp. 394-96 & 403, paras 8 & 21)

"8. The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.



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21.... 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."

(emphasis in original)

*12. In **State of Orissa v. ThakaraBesra**, (2002) 9 SCC 86, this Court held that rape is not mere physical assault, rather it often distracts (sic destroys) the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.*

*13. In **State of H.P. v. Raghubir Singh**, (1993) 2 SCC 622 this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity. A similar view has been reiterated by this Court in **Wahid Khan v. State of M.P.** (2010) 2 SCC 9 placing reliance on an earlier judgment in **Rameshwar v. State of Rajasthan**, AIR 1952 SC 54.*



14. Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

(Emphasis supplied)"

17. In view of the catena of the judgment discussed as above, the conviction can be based upon the sole uncorroborate testimony of a victim of sexual offence, unless there is strong motive proved on record, on her part to implicate the accused falsely. There can be also no doubt about the settled proposition that the victim of a sexual assault cannot be considered an accomplice. However, the Court must exercise caution and ensure that the uncorroborated testimony of the prosecutrix is above reproach and of "sterling nature." It is well established principal that at the sole testimony of the prosecutrix cannot be disregarded merely due to minor inconsistencies or contradictions. Such uncorroborated testimony may only be discarded if the Court finds it infirm or untrustworthy. If there is no evidence on record to suggest that the prosecutrix or victim had any motive to falsely implicate the accused, the Court should accept her testimony. It is a settled principle that the victim of a sexual offence stands on a higher pedestal than an injured witness. At most, the Court may look for material to satisfy its judicial conscience. In this context, the Court must focus on the broader probabilities of the case and should not be swayed by minor contradictions. Thus, the rule of caution or practice can be that: a conviction can be based on the sole uncorroborated



testimony of the victim, provided such testimony inspires confidence and is absolutely trustworthy, unblemished, and of sterling quality.

18. The term “sterling quality” came up for discussion before the Supreme Court in *Rai Sandeep vs. State (NCT of Delhi)*, (2012) 8 SCC 21 in which it was inter alia held as under:

“22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all 12 other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core



spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

19. Thus in order to take the witness as of “sterling nature” the witness must pass the following test:

- a) There should be consistency right from the first statement till the end i.e., no inconsistency between the first statement made before the police and the last statement made before the Court.
- b) Such testimony should be consistent with the entire case of the prosecution including the testimony of the other witnesses. Such a testimony is capable being accepted without any corroboration and all other attending circumstances should be in sync with it.

However, the above noted test can only be illustrative and not exhaustive.

20. The oral testimony made by the prosecution witnesses can be divided into three categories;

- i. Wholly reliable;
- ii. wholly unreliable; and
- iii. neither wholly reliable nor wholly unreliable.

There is no difficulty as far as first two categories are concerned. However, the difficulty arises while deciding the cases on the testimony falling in third category.

21. In *Nirmal Premkumar vs State Rep. By Inspector Of Police* Criminal Appeal No. 1098 of 2024, the Apex Court after referring to *Rai*



Sandeep (Supra), Krishan Kumar Malik v. State of Haryana (2011) 7 SCC 130 inter alia held as under:

“15. What flows from the aforesaid decisions is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a “sterling witness” without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution’s case. While a victim’s testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.”

22. In light of the above analysis and settled proposition relating to the appreciation of the evidence, it is necessary to examine the testimony of the prosecutrix made at different stages so as to assess that whether the judgment as recorded by the Ld. Trial Court can be sustained or not. The prosecutrix approached the police station on 08.07.2018 along with her mother and immediately thereafter she was taken for the medical examination. In the first medical examination admitted on 08.07.2018 at 04:27 PM at All India Institute of Medical Science, New Delhi, the sexual assault history was recorded as under,

“12 year old girl Miss Sushmita Ray resident of Kalka Ji, Govind Puri. She resides with parents, her neighbor Raja attempt sexual intercourse with her two time at 4 days interval 2 months back. She is residing in ground floor. Raja with his wife and baby 2 year old female child resides on second floor in same house. Sushmita usually goes there house for baby sake as a neighbor. She felt



pain while attempted intercourse on second time after 4 days from 1st attempt.”

23. Subsequently, after medical examination her statement was recorded by the Investigation Officer wherein she alleged that around 2 months back at around 11:00 am she had gone to the accused house and the accused was there as her wife had gone for her work. The prosecutrix stated while playing with his daughter, she slept there. After some time when she wakes up she found that accused had removed her legging and he was trying to put his private part into her private part on which she shouted. The accused allegedly closed her mouth and threatened that she should not tell it to anybody otherwise she will be implicated. The prosecuted stated that she was frightened by the accused and therefore she did not tell this incident at her home. The prosecutrix further stated that after 3-4 days of the incident while she was on the third floor of her house and coming back after putting the clothes for drying accused again caught her and after putting his hand on her mouth took her to the bathroom on third floor where he removed her maxi upwards and removed the undergarment and thereafter he lied down upon her in bathroom and thereafter he tried to put his private part in her private part. As she felt pain and started crying the accused left her. **It is also pertinent to mention here that the statement was recorded by the Investigation Officer at around 08:30 pm as is reflected in the rukka EX PW-8/A.**
24. The third statement of the prosecutrix was recorded under Section 164 Cr.P.C by the Ld. Duty MM on 10.07.2018 after taking all the



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precautions. The prosecutrix stated in her statement recorded under Section 164 Cr.P.C. as under:

In the Court of Samiksha Gupta, MM (NI Act),
Saket Courts, New Delhi.
STATEMENT U/S 164 CR.P.C.

FIR No.242/18
U/S 376 IPC & Section 6 Posso Act
PS Govind Puri

10.07.2018

Following formal questions are asked in simple Hindi from her:-

Q. What is your name ?

Ans: Sushmita Roy

Q. What is your age?

Ans: 12 years.

Q. Where do you live ?

Ans: Kalkaji

Q. Can you read and write Hindi?

Ans: थोड़ा थोड़ा

Q. What is your qualification.

Ans: 2th class.

Q. Has somebody told you what to depose here ?

Ans: नहीं

Q. Are you under any fear, force or coercion from anyone ?

Ans: नहीं

Q. Do you know the meaning of oath?

Ans: नहीं

Witness appears to be normal and without any influence and is giving the statement voluntarily.


10/7/18.


Sushmita Roy
A2'



(without oath :)

The witness states that she is more comfortable if her mother, Smt. Shumati Ray is also present. Hence, the mother is called who is sitting in a corner.)

2nd floor पर राजा Malldhar रहते हैं। मैं उनकी wife को
जैसी बोलती हूँ, आज रूठ डोरा सा बच्चा है, इसलिए मैं उसके
खेपके के लिए वहाँ जाती रहती थी। May में रूठ दिन को
जैसी आज पर गई थी। उन्होंने कहा था कि मेरे बच्चे को थोड़ा
देखना क्योंकि जैसी थोड़ी थी तो करीब 11-12 बजे मैं उनके
घर पर गई। उनके बच्चे को खिचते खिचते वो भी रूठ गया,
मैं भी रूठ गई। सोते वक्त उनके husband राजा ने मेरा
कपड़ा खोल दिया था। वो मेरे ऊपर लेट गया था, जब
मेरी आँख खुली, तो मैंने देखा कि वो मेरे ऊपर चढ़कर
लिट रहे थे। उन्होंने मेरी छाती पर दूका था, kiss लिया
था। मैंने चिल्लाते श्री शोबिता के तो उन्होंने मेरा गूँह दबा
दिया। मैं बोलने लगी, फिर उन्होंने मुझे डोड़ा दिया था
उस दिन उन्होंने कहा कि किसी से बोलना मत क्योंकि मेरे
पसना तो Handicap है, मेरा उड़ नहीं कर पाएंगे।

Sushmita Roy

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मैंने डर के जारे तिसी को बताया नहीं। फिर उसके 2-3 दिन बाद इत पर गपड़ा टांगने गई थी। अन्तरे निंजे बाजार गई थी। राजे ने मुझे जाने हुए देखा था। जब मैं नीचे उतर रही थी, 3rd floor पर एक शहरा खाली हूँ, तो वो मुझे वहाँ bathroom के अन्दर खींच कर ले गए। मैं Maxi पहने थी, उन्होंने मेरा Maxi ऊपर कर दिया, फिर से मेरे ऊपर ओर गए फिर वैसे ही खिच रहे थे। उन्होंने अपनी toilet वाली चीज शर्बी थी मेरी toilet वाली चीज के अन्दर। मैंने चिपकाया, पर उन्होंने नहीं छोड़ा। जब मुझे बहुत दर्द हुआ, तो मैं रोने लगी। तब छोड़ा फिर वो चले गए। मैंने अपना Maxi उतार दिया व रोते रोते नीचे आ गई। उन्होंने जाने हुए कहा था कि मेरे पापा कुछ नहीं कर पायेंगे। फरसों को अपना निंजे ने जार रहे थे वारु पीकर तो अन्तरे निंजे ने complaint दी। मैं चाहती हूँ उन्हें सजा मिले।

to her
 Sushmita Roy
 1/11/15

(Sanitscha Gupta)
 10/11/15.



25. Now coming to the testimony of the prosecutrix recorded before the Court. In regard to the first incident, the prosecutrix stated as “I was playing with the child of the accused and while doing so, I fell asleep. I felt uneasy and pain in my vagina and therefore I got up. I do not know what had happened. After getting up, I observed that accused has removed my leggings. I was frightened and therefore, I picked up my leggings and went back to my house.” Regarding second incident ,the prosecutrix stated that “I went to the terrace of the building to gather clothes and the accused also observed this that I was going on the terrace. The accused came and he entered the bathroom on the terrace and started waiting for me. The accused pulled me inside the bathroom and ‘*mere sath jabardasti kari. Me jab chillai, toh mera muh band kar diya*’

Q.1 What do you mean by 'jabardasti'?

Ans: By Jabardasti, I mean the accused pulled down my leggings and made me lye on the floor of the bathroom and thereafter, '*apni susu wali jagah meri susu wali jagah pe touch kari, mujhe pain hua.*'

Q.2 Why did you feel pain?

Ans: The accused tried to insert his penis in my vagina and therefore, I felt pain.

After this, accused extended threats to me by saying, "*mai bhi fasunga toh tub hi fasegi aur tumhare papa ka pata nahi kya ho jayega*’.”

26. Before proceeding further it is also necessary to see the statement of mother of the prosecutrix recorded by the police on 08.07.2018 wherein she stated as under:



U/S 161 CrPC

ब्यान किया की मे पता उपरोक्त पर सपरिवार किराए पर रहती हु मेरे पाँच बच्चे है जिनमे सुष्मिता चौथे नंबर की है 7/7/2018 को मेरी बेटी ने मुझे बताया की राजा हल्दर जो IIInd Floor पर रहता है 2 महीने पहले जब मे श्रुति को खिलाने गयी हुई थी और श्रुति को खिलाने खिलाते वह वही सो गयी जब उसकी आँख खुली तो राजा ने उसकी लेगी निकाल रखी थी और अपने गुप्तांग को उसके गुप्तांग में घुसाने की कोशिश कर रहा था जब वह शोर मचाने लगी तो उसने उसका मुह बंद कर लिया उसे धमकाया की यह बात किसी को नहीं बताना नहीं अगर यह बात किसी को बताई तो उसके साथ साथ वह भी फेंसेगी। वह डर गयी उसने किसी को नहीं बताया। उस दिन के 3/4 दिन बाद जब वह कपड़े टॉगकर नीचे आ रही थी तो राजा हल्दर उसका मुह दबाकर उसे बाथरूम में ले गया और उसकी पहनी हुई Maxi ऊपर कर दी और चढ़ड़ी को नीचे कर दिया उसने केवल तोलिया लपेट रखा हुआ था उसने अपना गुप्तांग फिर उसके गुप्तांग में डालने की कोशिश की उसे दर्द हुआ तो वह रोने लगी उसने उसे छोड़ दिया यह सब पता चलने पर हमने Police में शिकायत दी व आज आपने महिला सिपाही के साथ मेरी बेटी को लेकर AIIMS Hospital पहुंचे इसके बाद मेरी बेटी का Medical Examination कराया गया जहा पर Doctor साहब ने मेरी लड़की को Admit कराने के लिए बोला लेकिन मैंने Admit कराने के लिए व अंदरूनी जांच कराने के लिए मना कर दिया इसके बाद आपके साथ थाना वापस आए आपने मेरी बेटी का ब्यान लिखा व मुकदमा रजिस्टर किया फिर आपके साथ अपने घर आए जहा पर आपने मेरी बेटी की निशान देही पर राजा हल्दर पुत्र निर्मल हल्दर को गिरफ्तार किया व मेरी बेटी के बताने पर नक्शा मौका तैयार किया मैंने आपको अपनी बेटी का जन्म प्रमाण पत्र पेश किया जिसको आपने बतौर वजह सबूत कब्जा पुलिस में लिया गया आज आपने बदन छूताछ मेरा ब्यान लिखा जो सुन लिया ठीक है

By/ash

27. PW-2 when appeared in the Court stated that accused had established physical relationship two times with her daughter as told by accused's wife. PW-2 also stated that her daughter told her that one day when she had gone to the house of the accused, he had removed her clothes and did *galat kaam* and on another day when she went for drying the clothes at the roof he had taken her into the bathroom and did *galat kaam* with her.
28. Ld. Trial Court in regard to the contradiction in the testimony of the prosecutrix inter alia held as under:

"22. When we look at the first three statements of the accused ice before the police, before the Doctor and U/S 164 Cr.P.C., the prosecutrix is consistent except some minor variations which are not significant. In the examination in chief before the court she



initially faltered about the day on which the first and the second incident happened. She corrected this after the statement U/S 164 Cr.P.C. was exhibited. There is typographical error in the last portion of her examination in chief due to which the date of the complainant has been typed as 08.07.19 instead of 08.07.18. In the examination in chief, the description of the two incidents is substantially the same as described by her on the earlier three occasions except with a variation that before the court she stated that she was wearing a legging at the time of the second incident whereas earlier she had stated that she wearing a Maxi. This is not a major discrepancy which can go to the root of the matter. There is also a variation regarding the description of the first incident. In the complaint EX PW-1/A made to the police she stated that when she opened her eyes, she found that the accused was trying to insert his penis into her vagina. To the Doctor she gave the history of attempted sexual intercourse on two occasions. In the statement U/S 164 Cr.P.C. she stated that when she opened her eyes, she found that the accused was lying over her and moving. In the examination-in-chief before the court she stated "I felt uneasy and pain in my vagina and therefore I got up. I do not know what had happened. After getting up, I observed that the accused had removed my leggings. The prosecutrix is a young girl and it cannot be expected that every time she will describe the incident in the same words. The way of describing the incident may be different but all the statements quoted above show that the stand of the prosecutrix is that the accused tried to insert his penis into her vagina."

29. The Court upon perusal of the testimony of PW-1 prosecutrix along with the entire case of the prosecutrix is hesitant to hold the testimony of the prosecutrix as of "sterling character". The prosecutrix has brought in certain material variations in her testimony before the Doctor, before the Investigation Officer, in her statement recorded under Section 164 Cr.P.C. and the statement made in the Court. This also raises doubt when it is read along with the testimony of PW-2 i.e.,



the mother of the prosecutrix. It is pertinent to mention that in the MLC in the first statement the alleged history of sexual assault was given as an attempt of sexual assault. This version was made explicit by the prosecutrix in her statement EX PW-1/A made before the police. However, when it came to the statement under Section 164 Cr.P.C. it may be noted that here the version was different when in regard to the first incident she stated that accused has forced himself upon her and was moving and had also put his hand on the breasts and kissed and in regard to the second incident also she stated that accused removed her maxi and forced himself upon her and also put his private part into her private part.

30. Upon appreciation of the entire evidence, the Court is of the considered view that the testimony of the prosecution witnesses cannot be categorized as wholly reliable. Therefore, the Court's endeavor is to ascertain the true genesis of the incident. The Court do not find any evidence to suggest any motive on the part of the victim or her family to falsely implicate the accused, and thus, the occurrence of the incidents cannot be disbelieved. However, based on the initial statement made by the prosecutrix to the doctor and the first statement made by her mother to the police, it can be reasonably concluded that there was an attempt to commit aggravated penetrative sexual assault. The statement of the prosecutrix read along with the statement of the mother cannot persuade this court to believe that the convict has committed aggravated penetrative sexual assault. It is also pertinent to mention here that the graver the offence, higher is the threshold for the prosecution to prove its case beyond any reasonable doubt. The



punishments provided under the POCSO are very high and, therefore, the Court has to be very careful while appreciating the evidence of the witnesses. If there is even slightest of doubt the benefit must go to the accused.

31. In the circumstances, in view of the discussion made hereinabove, the material on record do establish that the convict has committed an offence punishable u/S18 of POCSO Act. In terms of Section 18 of POCSO the sentence of accused is modified to the extent that the convict is awarded rigorous imprisonment for ten years and fine for Rs.5,000/- in default of payment of the fine, the appellant was to undergo simple imprisonment for one month.
32. Before parting with the case, this Court records its displeasure over the way the Investigation Officer has not cared to mask the identity of the victim. Section 24 of the POCSO Act provides as under:

*“24. **Recording of statement of a child.**—(1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.*

(2) The police officer while recording the statement of the child shall not be in uniform.

(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

(4) No child shall be detained in the police station in the night for any reason.



(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.”

33. A bare perusal of the provision makes it evident that the Investigating Officer is required to take proper precautions while recording the statement of a child. Section 24, Sub-section (5), specifically mandates that the police officer must ensure the identity of the child is protected from public media. Section 74 in The Juvenile Justice (Care and Protection of Children) Act, 2015 prohibits disclosure of the child's identity publicly, which reads are under;

‘74. Prohibition on disclosure of identity of children.

(1) No report in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular, which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, under any other law for the time being in force, nor shall the picture of any such child be published:

Provided that for reasons to be recorded in writing, the Board or Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

(2) The Police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of.

(3) Any person contravening the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both. ”



34. Section 33(7) of the POCSO Act requires the Special Court to ensure that the child's identity is not disclosed at any stage during the investigation or trial. This provision is integral to protecting the privacy and dignity of the child victim throughout the legal proceedings and reads as under;

“33. Procedure and powers of Special Court.—

.....

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

PROVIDED that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.— For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.”

Section 228A of the Indian Penal Code (IPC) prohibits the publication or disclosure of the identity of a victim of certain offenses, such as rape or sexual assault, without their consent. This provision aims to protect the privacy and dignity of the victim, ensuring that their name is not made public in a way that could cause further harm or embarrassment. Section 228A IPC provides as under;

228A. Disclosure of identity of the victim of certain offences, etc.--

(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an ²[offence under section 376, ³[section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB] or section 376E] is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.



(2) *Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication*

(a) *by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or*

(b) *by, or with the authorisation in writing of, the victim; or*

(c) *where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:*

Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.

Explanation.--For the purposes of this sub-section, "recognised welfare institution or organisation" means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) *Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.*

Explanation.--The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.].

35. In ***Utpal Mandal @ UtpalMondal v. The State of West Bengal &anr.*** SLP (Crl) no. 8058/2024 order dated 04.04.2024, the Supreme Court inter alia held as under;

“However, before closing the matter, we must observe that the mandatory requirements of Section 33(7) of the POCSO Act and



*Section 228A of the I.P.C. have not been followed in this case inasmuch as while recording statements of the victim under Sections 164 and 161 of the Cr.P.C., her name is mentioned, and has not been masked as per law laid down in **Nipun Saxena v. Union of India** reported in (2019) 2 SCC 703. The relevant extracts of which are quoted hereinbelow:*

“11. Neither the IPC nor the CrPC define the phrase ‘identity of any person’. Section 228A IPC clearly prohibits the printing or publishing “the name or any matter which may make known the identity of the person”. It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim. We are clearly of the view that the phrase “matter which may make known the identity of the person” does not solely mean that only the name of the victim should not be disclosed but it also means that the identity of the victim should not be discernible from any matter published in the media. The intention of the law makers was that the victim of such offences should not be identifiable so that they do not face any hostile discrimination or harassment in the future.

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34.....A bare reading of Section 24(5) and Section 33(7) makes it amply clear that the name and identity of the child is not to be disclosed at any time during the course of investigation or trial and the identity of the child is protected from the public or media. Furthermore, Section 37 provides that the trial is to be conducted in camera which means that the media cannot be present. The entire purpose of Pocso is to ensure that the identity of the child is not disclosed unless the Special Court for reasons to be recorded in writing permits such disclosure. This disclosure can only be made if it is in the interest of the child and not otherwise. One such case where disclosure of the identity of the child may be necessary can be where a child is found who has been subjected to a sexual offence and the identity of the child



cannot be established even by the investigating team. In such a case, the investigating officer or the Special Court may allow the photograph of the child to be published to establish the identity. It is absolutely clear that the disclosure of the identity can be permitted by the Special Court only when the same is in the interest of the child and in no other circumstances. We are of the view that the disclosure of the name of the child to make the child a symbol of protest cannot normally be treated to be in the interest of the child.”

36. In the present case, the Investigating Officer failed to mask the identity of the victim in any manner, including during the medical examination. This reflects poorly on the Investigating Officer and the concerned Examining Doctor. **A copy of this order be sent to the Commissioner of Police and the Medical Superintendent, AIIMS, with directions to issue appropriate guidelines ensuring that all necessary measures are to be taken to protect the identity of the victim in such cases and such violation does not take place in future. The compliance report be place before the Court.**
37. The appeal along with pending application(s), if any, stands disposed of.

DINESH KUMAR SHARMA, J

DECEMBER 23, 2024

Ankit/NA