

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

**CRL.A. 1231/2018**

Reserved on : 29.07.2020

Date of Decision : 23.10.2020

**IN THE MATTER OF:**

**ISHWER SONI**

**..... Appellant**

Through: Mr. Kanhaiya Singhal, Advocate

Versus

**THE STATE (GOVT. OF NCT OF DELHI)**

**..... Respondent**

Through: Ms. Radhika Kolluru, APP for State

**CORAM:**

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

1. The present appeal is preferred under Section 374 Cr.P.C. on behalf of the appellant *Ishwer Soni* challenging the judgment dated 30.07.2018 and order on sentence dated 31.07.2018 passed by the ASJ-01, East District, Karkardooma Courts, Delhi, in SC No. 74/2016 arising out of FIR No. 177/2016 registered under Section 376 IPC and Section 6 of the POCSO Act at Police Station Geeta Colony, Delhi whereby the appellant was convicted for the offence punishable under Section 366A IPC and Section 6 of the POCSO Act. Further, vide order on sentence dated 31.07.2018, the appellant was directed to undergo RI for a period of 10 years for the offence punishable under Section 6 of the POCSO Act along with payment of fine of Rs.5,000/- in default whereof, to undergo SI for 2 months. He was further directed to undergo RI for a period of 5 years for the offence punishable under Section 366A IPC alongwith payment of fine of Rs.5,000/- in default

whereof, to undergo SI for 2 months. Both the sentences were directed to run concurrently.

2. The brief facts, as noted by the Trial Court, are as under:-

*“Brief facts as per the case of the prosecution are that on 30.04.2016, DD No. 3A was marked to IO WSI Deepa (PW-6). Mother of the victim (PW-2) alongwith the victim (PW-1) came to PS Geeta Colony. IO made enquiries from the mother of the victim and recorded her statement Ex.PW2/A wherein she alleged that on 29.04.2016 at about 7.00 pm, the victim had gone to her grandmother’s (nani) house and while she was coming downstairs for returning to her home, one tenant namely Ishwar met her and took the victim to his room and sexually assaulted the victim by inserting his hand into her vagina and started licking and he did it many times and also pressed her breast due to which victim was sweating and on returning home, she narrated the entire incident to her mother (PW-2). Thereafter, as per the instructions of IO, WASI Amrik Kaur (PW-4) took the victim alongwith her mother to SDN hospital where medical examination of victim was conducted. MLC of the victim child was obtained. Thereafter, IO prepared rukka and present FIR was registered under Section 376 IPC & Section 6 of POCSO Act. Accused was arrested at the instance of victim. Thereafter, IO prepared site plan at the instance of victim and also got recorded the statement of victim u/s 164 Cr.P.C. verified the date of birth of victim etc.”*

3. After completion of investigation, charge-sheet was filed and vide order dated 07.02.2017, the trial court framed charges under Section 366A IPC & Section 6 of the POCSO Act against the appellant. The appellant pleaded not guilty and claimed trial.

## **CONTENTIONS**

4. Learned counsel for the appellant doubted the credibility of the child victim by referring to her statement where she had stated that the appellant had inserted his hand inside her vagina, however, at the time of the MLC, no injury or swelling was noticed. Learned counsel for the appellant contended that there is an apparent contradiction in the statements of the child victim as well as her mother. While the child victim deposed that the appellant has used his hand, her mother, on the other hand, stated that the appellant had inserted his fingers. It was next contended that the appellant was falsely implicated on account of monetary dispute between the appellant and the family of the child victim. In this regard, he referred to the suggestions given to the child victim, her mother, the statement of the accused recorded under Section 313 Cr.P.C. and the testimony of *Mr. Pritam Singh*, who was examined as DW-1. As an alternative argument, though at the time of arguments it was submitted that even believing the testimony of the child victim, only a case of attempt is made out but in the written submissions it is contended that from the evidence available on the record, only offence under Section 10 of the POCSO Act is made out.

5. In support of his submissions, Mr. Singhal referred to the following extract from the Modi's Textbook of Medical Jurisprudence and Toxicology (Chapter XVII pa. 475):

*“The vagina is narrow and tight with rugose walls, but the rugosity of the vagina cannot be considered as a diagnostic proof of virginity, as it is only removed by the first birth and not merely by sexual intercourse, besides, in some cases it may be absent in a virgin.-It is*

*therefore submitted that the two finger test has no evidentiary or medical/forensic value.”*

He has also referred to the following extract at Page 504:

*“In small children, the hymen is not usually ruptured, but may become red and congested with the inflammation and bruising of the labia. If considerable force is used, there is often laceration of fourchette and perinaeum.”*

6. On the other hand, learned APP for the State supported the impugned judgment. It was submitted that the testimony of the child victim was cogent, credible and reliable. It was also submitted that *Pritam Singh* was initially cited as a prosecution witness to prove the tenancy of the appellant however, as the same was admitted by the appellant in the trial, the aforesaid witness was dropped from the array of the prosecution witnesses.

7. I have heard learned counsels for the parties and have also gone through the case records and the written submissions placed on the record.

### **MATERIAL WITNESSES**

8. The child victim was examined as PW-1. She deposed that the appellant was known to her and she used to address him as *Mama* (maternal uncle). Her *Nani* (maternal grandmother) used to treat the appellant as her son. The appellant was living in one of the rooms in her *Nani's* house. On the day of the incident, the appellant met her in the staircase and took her to his room where he inserted his hand in her vagina (*mere susu mei hath daal diya*) and also sucked her chest. She tried to stop him and also threw a *chappal* at him. Thereafter, she

opened the lock from the inside and ran away. She told her mother about the incident, who took her to the police station. During cross examination, she stated that the accused was living alone in his room and her *Nani's* house was six houses away from her own house. She denied the suggestion of having any knowledge about any quarrel between the appellant and her real uncle, *Dipankar*. She also denied the suggestion of tutoring. On a Court question, she replied that her mother told her to state only what had happened with her.

9. The mother of the *child* victim was examined as PW-2. She deposed that it was evening time when the child victim wanted to go to her *Nani's* house which was situated four-five houses away from her house. The child victim came back at about 9:00-9:30 p.m. Initially, the child victim disclosed about the incident to her friend 'R' who, in-turn, told the witness that the child victim wanted to tell her something. The witness made enquiries from her daughter who then told her that the appellant had met her in the staircase of her *Nani's* house and took her to his room where he removed her capri and inserted his finger in her vagina. The child victim also told her that the appellant pressed and sucked her breast. She was also told by her daughter that the appellant did so in spite of the protest by her and thereafter she gave him a hard push and ran out of the room. The witness proved her complaint made to the police as Ex.PW2/A. Thereafter, her daughter was medically examined at about 2:00-2:30 a.m. During cross-examination, she replied that her mother was living on the 2<sup>nd</sup> floor of the same building while the appellant was residing on the 4<sup>th</sup> floor. She also stated that earlier, the appellant used to reside on the 2<sup>nd</sup> floor and later, he shifted to the 4<sup>th</sup> floor. She admitted that the appellant was working in the shop of one

*Sardarji* who used to sell non-vegetarian food items. The appellant also used to request her mother to prepare non-vegetarian food for him. She denied the suggestion that she had tutored her daughter to depose in a particular manner. She denied the suggestion that the appellant used to give her non-vegetarian food and also used to help her financially. She also denied the suggestion that the appellant had stopped the supply of non-vegetarian food items to her brother as well as her mother because of the quarrel between the appellant and her brother.

10. So far as other witnesses were concerned, the appellant had admitted their statements in terms of Section 294 Cr.P.C. The trial court had observed as under:-

*“5. To prove its case, prosecution has examined as many as 07 witnesses. In view of admission by accused u/s 294 Cr.P.C. i.e. his medical reports prepared by Dr. Upasana Rai and Dr. Vikas, simple recording of statement of victim u/s 164 Cr.P.C. by Ms. Swati Katiyar, Ld MM, proving of birth record by Sub-Registrar EDMC, recording of present FIR and DD No. 3A by Duty officer ASI Ram Pal and tenancy of accused under the ownership of Pritam Singh, these witnesses were dropped.”*

### **AGE OF THE CHILD VICTIM**

11. The child victim, who was examined as PW-1, stated that she was 8 years old and was studying in 3<sup>rd</sup> class. The birth certificate of the appellant was sought to be proved through Sub Registrar, EDMC. As noted above, the appellant did not dispute the genuineness of the birth records as per his statement recorded under Section 294 Cr.P.C. According to the EDMC records, the child victim was born on

25.06.2009 and thus, at the time of the incident, was about 6 years and 10 months old.

12. During the course of arguments in the present appeal, learned counsel for the appellant did not dispute the age of the child victim. Accordingly, as per the admitted position, this Court is of the opinion that it stands proved that the child victim was less than 7 years of age on the date of the incident.

### **MLC**

13. Dr. *Chaudhary Noor Zaman* (PW-5) deposed that on 30.04.2016, at about 2:05 a.m., the child victim was brought to the hospital with an alleged history of sexual assault. On general examination, he did not notice any external injury and referred the victim to EMO (Obsc & Gynae). He proved the child victim's MLC as Ex.PW5/A.

14. Dr. *Ashikho Sazerou* (PW-7) deposed that the child victim was examined by Dr. *Payal*. After seeing the child victim's MLC, the witness stated that on local examination, no abrasion, swelling or bleeding was noticed in the private area of the child victim. It was further stated that during the course of official duties, the witness had seen Dr. *Payal* writing and signing and proved Dr. *Payal*'s handwriting and signatures on the MLC.

### **ANALYSIS**

15. It is well settled that in a case of rape, the finding of guilt can be recorded even on the basis of uncorroborated testimony of the prosecutrix provided it is cogent and reliable. Reference in this regard is made to the decisions rendered by the Supreme Court in Vijay @

Chinee v. State of Madhya Pradesh reported as (2010) 8 SCC 191 and Rajinder @ Raju v. State of Himachal Pradesh reported as (2009) 16 SCC 69.

16. So far as testimony of a child witness is concerned, it has to be evaluated even more carefully as the same is susceptible to tutoring. In State of Madhya Pradesh v. Ramesh & Anr. reported as (2011) 4 SCC 786, the Supreme Court held as under:

*“14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with grater circumspection because he is susceptible to tutoring. Only in case there is evidence or record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.”*

17. Similarly, in Ranjeet Kumar Ram v. State of Bihar reported as 2015 SCC OnLine SC 500, it was observed as under:-

*“14.... Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one...”*

18. The child victim, at the time of her examination, was about 8 years of age. Although, a suggestion of tutoring was given to the child victim but she emphatically denied the same. On the other hand, while



answering the Court question, she stated that her mother had told her to tell what had happened with her.

19. Learned counsel for the appellant contended that while the child victim stated that the appellant had inserted his 'hand', her mother testified that the appellant had inserted his 'finger'. A perusal of the record reveals that the FIR was lodged on the statement of the mother of the child victim where it was stated that the appellant had used his finger. In the MLC (Ex.PW5/A), it was mentioned that the child victim came with the alleged history of being "*fingered on the chest, nipple area and the private area*". In her statement recorded under Section 164 Cr.P.C. (Ex. PW-1/A), the child victim had stated that the appellant had used his finger. In view of the above, mere interchange of the word 'finger' with 'hand' at the time of her deposition will not materially change her deposition. The child victim was just about 7 years of age at the time of the incident and about 8 years at the time of her deposition.

20. So far as the contention with respect to false implication on account of monetary dispute is concerned, it is worthwhile to note that the appellant, in his statement recorded under Section 313 Cr.P.C. stated that he was working in '*Gazipur Murga Mandi*' and used to deposit all of his earnings with the *Nani* of the child victim. When he demanded his money amounting to Rs. 27,000/- from the *Nani* of the child victim, she refused on one pretext or the other. It led to quarrels with her and due to this reason, he was falsely implicated. *Pritam Singh*, who was examined as DW-1 stated that he was the landlord of the premises where the child victim's *Nani* and *Mausi* (maternal aunt) were living as tenants. The appellant was also a tenant in the same building.

He stated that the appellant had given money to the victim's *Mausi*, which, when demanded, was not returned by her. To appreciate the testimony of *Pritam Singh*, it is pertinent to note that initially he was cited as a prosecution witness only to prove the tenancy of the appellant in the house where the incident took place. However, since the appellant admitted his tenancy under the ownership of *Pritam Singh* in his statement under Section 294 Cr.P.C., the prosecution did not examine him.

21. A look at the cross-examinations of the child victim and her mother would show that no suggestion was given to them that the appellant gave any specific amount of money to the *Nani* or *Mausi* of the child victim which was demanded and not returned. Rather, a suggestion was given that the appellant used to provide non-vegetarian food and financial help to her uncle, which, when stopped, led to a quarrel. Both the witnesses emphatically denied the abovesaid suggestion.

22. From the above, it is apparent that there are inconsistencies in the suggestions itself given to the witnesses and the defense taken by the appellant. While in cross examination, the defense taken was of providing financial help but in his statement under Section 313 Cr.P.C., the stand taken was of giving Rs. 27,000/- for safekeeping.

23. Next, it was contended that absence of any injuries belies the prosecution case and the sole testimony of the child victim is not sufficient to convict the appellant. In this regard, it is noted that the mother of the child victim had refused to permit the internal medical examination of the prosecutrix. A perusal of the testimony of the child

victim would show that the present case is of ‘insertion’ and not of ‘penetration’. Although on local examination, the Doctor did not notice any abrasion/swelling/bleeding but absence of any injury on superficial examination does not lead to an inference that no offence took place. Even in a case of penetration, the consistent judicial dicta is that absence of injuries may not always be fatal to the prosecution case and the same would depend on the facts of each case.

24. A Division Bench of this Court (of which I was a member) in Jitender Sharma v. State (NCT of Delhi) reported as **2019 SCC OnLine Del 8266** held as follows:

*“25. The position of law on the question, whether absence of injuries found on the person of the prosecutrix, in a case of rape, would result in a finding of acquittal, is well settled. Dealing with this issue in a case of a child rape, a Coordinate Bench of this Court in Lokesh Mishra v. State of NCT of Delhi, in Criminal Appeal No. 768 of 2010, decided on 12.03.2014, relying on earlier decisions of the Apex Court, while upholding the conviction under section 376 IPC, made the following observations:*

*38....In the case of Ranjit Hazarika v. State of Assam, reported in MANU/SC/1319/1998 : (1998) 8 SCC 635, the opinion of the doctor was that no rape appeared to have committed because of the absence of rupture of hymen and injuries on the private part of the prosecutrix, the Apex Court took a view that the medical opinion cannot throw overboard an otherwise cogent and trustworthy evidence of the prosecutrix.*

*39. The apex court in B.C. Deva v. State of Karnataka, reported at MANU/SC/7856/2007 : (2007) 12 SCC 122, in spite of the fact that no injuries were found on the person of the prosecutrix, yet finding her version to*

*be reliable and trustworthy, the Apex Court upheld the conviction of the accused. The Court observed that:*

*"18. The plea that no marks of injuries were found either on the person of the accused or the person of the prosecutrix, does not lead to any inference that the accused has not committed forcible sexual intercourse on the prosecutrix. Though the report of the gynecologist pertaining to the medical examination of the prosecutrix does not disclose any evidence of sexual intercourse, yet even in the absence of any corroboration of medical evidence, the oral testimony of the prosecutrix, which is found to be cogent, reliable, convincing and trustworthy has to be accepted."*

25. Coming to the last contention raised on behalf of the appellant that from the evidence on the record, only a case of either attempt or aggravated sexual assault punishable under Section 10 of the POCSO Act is made out as the prosecution failed to prove any insertion. In this regard, it is noted that the testimony of the child victim unequivocally mentioned that the appellant had inserted his hand (finger) in her vagina. Also, no suggestion to the contrary was given to the child victim that the appellant had only touched and not inserted his finger. The only suggestions, as noted above, were with respect to the quarrel and false implication at the instance of her mother. As such, the contention has no merit and is rejected.

26. The reliance placed by the learned counsel for the appellant on the decision in Pappu v. State reported as **2009 SCC OnLine Del 1642** is of no help as in the said case, the child victim was held to be speaking only 'half truths' as she had admitted that she had deposed at the behest of her mother. Similarly, the reliance placed on the decision in Abhay

Singh v. State reported as **2017 SCC OnLine Del 9369** is of no avail as the said case was a case of ejaculation without penetration and the appellant's conviction was modified from Section 376 IPC to Section 376/511 IPC. The relied upon decisions were given in the facts of those cases and are not applicable to the facts of the present case.

### **CONCLUSION**

27. The trial court, before recording the testimony of the child victim, recorded its satisfaction as to her maturity & competency for understanding the questions and giving their answers. Accordingly, this Court, in absence of submissions to the contrary, concurs with the opinion of the trial court that the child victim was competent to stand as a witness.

28. The appellant did not dispute his identity. He was named in the FIR itself. The child victim during her testimony identified the appellant as the accused person. She also deposed that the appellant was known to her as he used to live in the same building where her *Nani* used to live and the victim used to address him as *Mama* (uncle).

29. The incident took place on 29.04.2016 at about 7 p.m. and the child victim returned to her home at about 9 p.m. when she disclosed about the incident to her mother. The incident was reported within few hours and after the medical examination conducted at 02.05 am on 30.04.2016, the FIR was registered at about 03.00 a.m. As such, there is no delay in reporting the incident.

30. From a perusal of the statements of the child victim recorded during investigation as well as before the Court, it is seen that she had

consistently stated that on the date of the incident while she was coming back from her *Nani's* house, the appellant met her in the staircase and forcibly took her to his room. In the room, he inserted his hand in her vagina and sucked her breast. She tried to stop him and threw a *chappal* at him and ran away after opening the lock. She also disclosed the incident to her mother. The mother of the child victim, during her examination, stated that the child victim told her that on the day of the incident, the appellant had inserted his finger in her vagina.

31. After careful consideration of the testimony of the child victim, this Court is of the opinion that the child victim has consistently stated about the incident in all of her statements. Her evidence is trustworthy, reliable and also admissible. The appellant has failed to dislodge the statutory presumption under Sections 29 & 30 of the POCSO Act.

32. Accordingly, the appeal fails and the judgment of the trial court is upheld.

33. A certified copy of this order be communicated to the trial court as well as the appellant through the concerned Jail Superintendent. TCR be also returned.

**(MANOJ KUMAR OHRI)**  
**JUDGE**

**OCTOBER 23, 2020**  
*p'ma*