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

\+ CRL. A. 367/2020, CRL. M. (BAIL) 7718/2020 & CRL. M. A. 13094/2020

Order Reserved on: 22.01.2021
Order Pronounced on: 29.01.2021

SALMAN ..... Appellant

Through: Ms.Aishwarya Rao, Advocate
Appellant through VC.

Versus

THE STATE GOVT. OF NCT DELHI ..... Respondent

Through: Mr.Ashok Kumar Garg, APP for State.
Victim is also present with IO.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The appellant vide the present appeal assails the impugned judgment dated 25.11.2019 of the learned ASJ-06, Special Court, POCSO, Rohini in relation to FIR No.269/14, PS Bawana whereby the appellant was convicted qua offences punishable under Section 325 of the IPC and under Section 6 r/w Section 5(m) of the POCSO Act, 2012 and was sentenced vide the impugned order on sentence dated

30.11.2019 to undergo RI for a period of 10 years, to pay a fine of Rs.10,000/- and in default of the payment of the said fine, to further undergo SI for 6 months qua the offence punishable under Section 6 r/w Section 5(m) of the POCSO Act, 2012 and to undergo RI for a period of 3 years, to pay a fine of Rs.5,000/- and in default of the payment of the said fine, to further undergo SI for a period of 3 months qua the offence punishable under Section 325 of the IPC with the sentences having been directed to run consecutively with the benefit of Section 428 of the Cr.P.C., 1973 having been given to the appellant.

2. Notice of the appeal was issued to the State. The Trial Court Record was requisitioned and has been received and perused.

3. The appellant was also produced through Video Conferencing by the Superintendent Jail, Delhi at the time of the hearing of the appeal.

4. Written submissions were also submitted on behalf of the appellant by the learned counsel for the appellant deputed by the Delhi High Court Legal Services Committee.

5. Vide order dated 01.10.2020, CRL.M.(BAIL) 7719/2020 filed on behalf of the appellant seeking interim bail was declined. The victim in the instant case named 'S' aged 8 years as per the prosecution version was sodomized by the appellant along with his accomplice CCL named B on 21.03.2014 when the appellant and his associate took the victim to a field near the house of the victim on the pretext of playing with marbles and the child victim came back to his

house and told the incident to his brother who in turn called the parents. The anus of the victim was swollen and bleeding. The child victim was taken to MV Hospital, Poothkhurd where he was medically examined and his exhibits preserved and the concerned doctor referred the victim for his surgery and the victim was shifted to the BSA Hospital and in view of the sensitive condition of the victim, the doctor at the BSA Hospital referred the victim to the LNJP Hospital and as the victim was not fit for giving statement, the FIR was got registered on the statement given by the mother of the victim. The child victim was also examined under Section 164 of the Cr.P.C., 1973 and the two culprits were arrested and were medically examined. The injuries sustained by the victim child were opined by the doctor concerned to be grievous.

6. The CCL was committed to the JJB on completion of the inquiry whereas the appellant herein was charge sheeted qua the offence punishable under Sections 377/325/34 of the IPC and Section 6 of the POCSO Act, 2012 and charges under Section 325 of the IPC and Section 6 of the POCSO Act, 2012 were framed against the present appellant on 20.08.2014 to which he pleaded not guilty and claimed trial.

7. 19 witnesses were examined by the prosecution. The avowed contention raised on behalf of the appellant is that the identity of the appellant as being the perpetrator of the crime has not even been remotely established and that the age of the minor child victim has also not been established by the prosecution and thus the culpability

under Section 5(m) of the POCSO Act, 2012 cannot be invoked and made applicable against the appellant.

8. *Inter alia* it has been submitted on behalf of the appellant that the site plan in the instant case was not prepared of the place where the alleged crime was committed; that the police did not examine the younger brother of the victim to whom the victim had allegedly narrated the incident; that there was no scientific evidence to connect the appellant with the incident; that there was no semen detected on the various exhibits seized as per the FSL result and the medical examination of the appellant was conducted after a lapse of 5 (five) days of the incident and no injury was found on the penis of the appellant and Dr.Amit Shokeen, PW-8 had stated in his cross examination that there was a possibility of an injury on the penis if an adult committed forcible sexual intercourse with a 10 year old boy which it is contended thus detracts from the veracity of the prosecution version. It has thus been submitted on behalf of the appellant that there are embellishments and improvements in the prosecution version which makes the whole prosecution version doubtful. Apart from the same, it is also submitted on behalf of the appellant that the appellant was apprehended 5 (five) days after the alleged incident at his house, which itself was an indication of his conduct in consonance with his innocence for if he had been guilty, he would have fled away from his house. It was also submitted on behalf of the appellant that the defence witnesses that had been produced by the appellant, brought forth through their testimonies the innocence of the appellant and a further submission was also made on behalf of the

appellant that no effective cross examination of the prosecution witnesses had been allowed by the learned Trial Court which had caused grave prejudice to the appellant.

9. It is submitted on behalf of the appellant that the appellant was not named in the two MLCs of the two hospitals as being the perpetrator of the crime which itself indicated his false implication.

10. On behalf of the State, learned APP for the State adverted to observations in paragraph 36 of the impugned judgment and the FSL report which indicated blood found on the undergarment of the victim child to submit that they corroborated the factum that the victim bled after the incident which was also so deposed by the mother of the victim and thus the absence of semen in the FSL result on the exhibits of the victim did not absolve the appellant. It was also submitted on behalf of the State that the factum that two surgeries were conducted to stop the bleeding from which the minor child was suffering due to the incident at such a tender age, itself explained the delay in recording of the statement under Section 164 of the Cr.P.C., 1973 recorded one month after the incident.

11. It is essential to advert to the testimony of PW-1, minor child master 'S' aged 10 years who testified in his examination without oath to the effect:-

> **"I was playing kanche (marble ball) outside my house with my friends at around 12 noon. In the meantime, two boys namely B and Salman came. I know them since they live in the neighborhood. They asked me to accompany them in the fields to play marble balls there. I accompanied them to the fields. There they**

tied my hands and legs with the cloth and also put some cloth in my mouth. B took out my clothes and then both of them had anal intercourse with me turn wise (the witness has said dono ne meri gaand mari thi). First B did the said act and then Salman did it. Then, B untied my hands and legs and I returned to my house, where I narrated the entire incident to my brother Sushil. Sushil intimated this to my father when he came after duty.

There was bleeding in my anus after they had committed the said act with me.

At this stage, the child has pointed out towards accused Salman by name and by pointing towards him (correctly identified by the witness/child).

I can identify the other boy namely B as well, if shown to me (Court Observation:- The said accused is facing trial before Juvenile Justice Board).

I was medically examined in the hospital by the police. My statement was also got recorded before a lady Judge and I had put my thumb impression on my statement. I do not remember my date of birth."

12. It was submitted on behalf of the appellant to the effect that the testimony of the minor child was tutored in as much as he had stated during cross examination to the effect:-

"Today my parents and my younger brother S1 have come to the Court. I had met police Madam outside the Court. She had told me what I have to say in Court."

13. It was thus submitted on behalf of the appellant that the testimony of the minor child victim examined as PW-1 could not be believed as he was tutored by the police. Qua this aspect, it is essential

to observe that the learned Trial Court had put Court queries to the witness master ‘S' to the effect:-

> **“Court Question:- Whether you are speaking on the basis of what the said police madam said to you or that you are speaking on the basis of what actually happened with you?**
>
> **Answer:- I have deposed what actually happened with me on that day.”**

14. Significantly the minor child categorically refuted the contention raised on behalf of the appellant herein during trial and stated that there was no quarrel between the appellant and his family at the time before the incident. It is also significant that the minor child categorically refuted the suggestion put forth on behalf of the appellant that the appellant was not present at the spot when the offence was committed and denied that he had named the appellant only at the instance of the police madam and denied that the appellant had not committed any offence with him. It is significant that the minor child in his statement on examination has categorically stated that he recognized B (JCL) and Salman, Salman being the present appellant as they lived in the same neighborhood.

15. PW-4 Smt. ‘G', mother of the minor victim has testified to the effect that on 21.03.2014, her son ‘S1' i.e. her son younger to the victim ‘S' had come to the factory where she worked with her husband and informed that their son ‘S' had received injuries and thus she and her husband had rushed to the house and found that the anus of ‘S', i.e. of the minor victim was swollen and bleeding and that her son was perturbed and was weeping and had informed her that the accused

Salman i.e. the appellant herein and B had committed a wrong act with him and had taken him out of the village on the pretext of playing marbles with him and that she and her husband took their son to PS Bawana and thereafter the police got him medically examined at the hospital and her son was later on referred to the LNJP Hospital where he was admitted for two months. The mother of the victim categorically denied that the appellant had been named in the present case only at the behest of the police and that he had not committed any offence.

16. SI Pushpa, the Investigating Officer examined as PW-18 testified to having reached the MV Hospital, Delhi along with ASI Narender, Constable Rajender and the victim and his parents on 21.03.2014 where the victim was medically examined and referred to the BSA Hospital and the concerned doctor had handed over the exhibits to Constable Rajender who handed over the same to ASI Narender and thereafter the victim was referred to the LNJP Hospital and ASI Narender collected the MLC of the victim and SI Pushpa along with him went to the LNJP Hospital for medical examination of the victim with the victim 'S' declared **'not fit for statement'** and thus the FIR was registered on the basis of the statement of the mother of the victim Ex.PW4/A. The Investigating Officer stated that she made inquiries from the parents and the victim and again filed an application seeking recording of the statement of the victim but the victim was unfit for statement and his statement could not be recorded and thus, she and ASI Narender returned to the police station. The Investigating Officer, SI Pushpa has further stated that on 22.03.2014, she along

with Constable Sansar Pal had apprehended the co-accused 'A' @ 'B' (JCL) from village Mungeshpur at the instance of the mother of the victim and that as his father informed that he was about 16 years old, hence the JWO SI Narender was called there and his apprehension memo was prepared and he was got medically examined. *Inter alia* PW-18, the Investigating Officer testified to the effect that on 26.03.2014, she along with Constable Wazir reached the Mungeshpur village, Bawana where she met the complainant who pointed out to the accused Salman i.e. the present appellant who was standing in front of the house of Phool Singh as being the person who had sexually assaulted her son and she made inquiries of the age of the accused i.e. the appellant herein from his father who had failed to produce any document in respect of age of proof but stated that his son was 16 years of age, that she called the Duty Officer, Bawana to authorize the matter to him, interrogated the appellant in the presence of JWO SI Uday Singh who admitted his guilt and his apprehension memo was prepared and thereafter the appellant was taken for a medical examination to the MV Hospital and in as much as the age proof of Salman i.e. the appellant herein from his school indicated his date of birth to be 30.01.1994, as he was more than 18 years of age at the time of the incident, the record of the age proof was placed before the JJB and the matter was remanded to the Rohini Courts by the JJB whereafter the appellant herein was further remanded to JC and the Investigating Officer went to the LNJP Hospital on 24.04.2014 to find out the condition of the victim and moved an application seeking to record the statement of the victim under Section 164 of the Cr.P.C.,

1973 and thereafter the statement under Section 164 of the Cr.P.C., 1973 of the victim was recorded. The medical record of the victim was also obtained by the Investigating Officer from the LNJP Hospital and on completion of investigation, she filed the charge sheet and also obtained the FSL result.

17. Sh.Naresh Kumar, the principal of M.C. Primary School Boys, Mungeshpur examined as PW-19 put forth the date of birth of Master 'S' victim as being 11.10.2006 in the admission register as had been put forth at the time of admission of the said child on 01.10.2013.

18. Though the learned counsel for the appellant submitted that there was no birth certificate issued by any Government Agency given by the mother of the student at the time of the admission of Master 'S' as stated by Sh.Naresh Kumar, principal of M.C. Primary School, Mangeshpur, Delhi examined as PW-19 and that the mother of the victim Master 'S' did not state in her testimony on oath that she had given any affidavit as testified by Sh.Naresh Kumar, principal of M.C. Primary School Boys, Mungeshpur, Delhi in relation to the date of birth of the minor child victim as being 11.10.2006 and the same could not be believed,- it is essential to observe that there appears no ostensible reason for disbelieving the date of birth of the minor child victim as being 11.10.2006 for the minor child was admitted to Standard 2nd on 01.10.2013 with the date of the alleged commission of the offence being 21.03.2014 and thus it cannot be contended that the date of birth of the minor child given on 01.10.2013 had been fabricated for any reason whatsoever for the commission of the

offence in question with which the minor child 'S' has been assaulted and inflicted could never have been within the prior contemplation of the parents of Master 'S'.

19. There is in the circumstances no reason thus to disbelieve the age of the minor child 'S' as having been put forth through the prosecution version as being 10 years at the time of the commission of the offence on 21.03.2014. Merely because the name of the appellant was not given by the minor child at the time of the preparation of the MLC at the BSA Hospital as well as at the LNJP Hospital, the same *per se* does not in any manner detract from the veracity of the testimony of the minor child victim nor from the testimony of his mother PW-4 Smt.G in relation to the identity of the appellant as being the person who had committed the aggravated penetrative sexual assault on the minor child 'S' below the age of 12 years in terms of Section 3(a) of the POCSO Act, 2012, which provides to the effect:-

> ***"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;"***

r/w Section 5(m) of the POCSO Act, 2012, which provides to the effect:-

> **"Section 5**
> **….**
> **….**
> **…. (m) whoever commits penetrative sexual assault on a child below twelve years;**
> **….."**

r/w Section 6 of the POCSO Act 2012, which provides to the effect:-

> ***"Section 6. Punishment for aggravated penetrative sexual assault****.—(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.*
>
> *(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."*

20. The testimony of DW-1 Sh.Vikas who through his testimony in cross examination categorically stated that he was not present in the locality on the date of the alleged commission of the offence and the testimonies of DW-2 Sh.Tejpal and DW-3 Sh.Anwar Khan produced by the appellant do not inspire any confidence. Significantly, DW-3 who in his examination in chief stated of having recorded a conversation in his mobile phone made by the victim allegedly that the appellant herein had committed no offence which he transferred on to the mobile phone of the father of the appellant herein through bluetooth, who was unable to open the bluetooth on the mobile phone which his uncle brought in Court despite efforts and who stated that he did not know how to transfer the data from one mobile to another mobile through bluetooth, is apparently unbelievable when he states that he did not even know how to convert the data from the mobile phone to the CD and thus, the alleged conversation recorded by

Sh.Anwar Khan, DW-3 doesn't have the requisite evidentiary value for lack of proof in terms of Section 65B of the Indian Evidence Act, 1872.

21. As rightly held by the learned Trial Court, the testimonies of DW-1, DW-2 & DW-3 are not reliable in view of the prosecution evidence that has been brought forth on the record which is cogent and consistent in relation to all material particulars qua the commission of the offence on the minor child victim by the appellant herein.

22. As regards the contention raised on behalf of the appellant herein by the learned counsel for the appellant that the testimony of the child witness cannot be believed, in as much as the said witness can be tutored, it is essential to observe as has been laid down in ***"Dinesh Chand Vs. State"*** a verdict dated 18.03.2019 in CRL.A.330/2018 vide paragraph 7 thereof to the effect:-

> *"7. It is essential to observe that it is only a rule of prudence that the Court always finds it desirable to have the corroboration of the evidence of a child from the testimonies of witnesses and it is not the law that if the witness is a child, his evidence shall be rejected even if it is found reliable. As observed by this Court in* ***"Afzal Vs. State (Govt. of NCT of Delhi)" 2018 X AD (Delhi) 434*** *and as laid down by the Hon'ble Supreme Court in* ***"Nivrutti Pandurang Kokate&Ors. Vs. State of Maharashtra" AIR 2008 SC 1460,*** *wherein there were observations to the effect:-*
>
> > ***"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination***

which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

it is apparent that where the Court comes to the conclusion that there is an impress of truth in the statement of the minor, there is no obstacle in the way of accepting the evidence of a child witness. There is nothing on the record in the instant case to indicate that the minor child examined as PW-3 had in any manner been tutored for even though he stated that he had stated what the 'police uncle' told him to state in the Court, he categorically denied that he had identified the accused i.e. the appellant herein on the basis of what the 'police uncle' had told him."

to observe to the effect that it is only a rule of prudence that the Court finds it desirable to have the corroboration of the evidence of the child from the testimonies of the witnesses and it is not the law that if a witness is a child, his evidence shall be rejected even if it is found reliable. In the instant case, the testimony of Smt.G, the mother of the child witness is also categorical stating that the minor child had

informed her that the perpetrator of the crime was the appellant along with another JCL.

23. **It is essential to observe that even in the instant case the child examined as PW-1 has categorically stated that he had identified the appellant himself and not on the basis of what the police madam told him to state.**

24. In the circumstances, it is held that there is no infirmity in the impugned judgment of conviction of the appellant vide the impugned judgment dated 25.11.2019 in relation to FIR No.269/2014, PS Bawana of the learned ASJ-06, North, Special Court, POCSO, Rohini and the impugned order on sentence dated 30.11.2019 sentencing the appellant to RI for a period of 10 years, to pay a fine of Rs.10,000/- and in default of the payment of said fine to further undergo SI for a period of 6 months qua the offence punishable under Section 6 r/w Section 5(m) of the POCSO Act, 2012 as well as RI for a period of 3 years, to pay a fine of Rs.5,000/- and in default of the payment of said fine to further undergo SI for a period of 3 months qua the offence punishable under Section 325 of the IPC is upheld, **however, the impugned sentence vide which the sentences qua the offence punishable under Sections 6 r/w 5(m) of the POCSO Act, 2012 and under Section 325 of the IPC had been directed to run consecutively are directed to run concurrently with the benefit of Section 428 of the Cr.P.C., 1973 being given to the appellant.**

25. Furthermore, taking into account the age of the appellant who is not a previous convict being 26 years of age as on 28.07.2020 as per the nominal roll received from the Superintendent Central Jail-01,

Tihar, Delhi and in terms of the verdict of Supreme Court in ***"Phul Singh Vs. State of Haryana"*** in ***Criminal Appeal No. 506/1979*** decided on 10.09.1979 and directions laid down by us in ***"Sanjay vs. State" MANU/DE/0430/2017 : 2017 III AD (Delhi) 24*** dated 20.02.2017 so that the *"carceral period reforms the convict"* as also reiterated by this Court in ***"Randhir @ Malang vs. State"*** in ***Crl.A. No. 456/2017, "Chattu Lal vs. State"*** in ***Crl.A. No. 524/2017, "Afzal vs. State (Govt. of NCT of Delhi)"*** in ***Crl.A. No.996/2016, "Billo Vs. State NCT of Delhi"*** in ***Crl.A. 378/2017, "Dinesh Chand Vs. State (Govt. of NCT of Delhi)"*** in ***Crl.A. No. 330/2018, "Rinku @ Ram Prasad Vs. State"*** in ***CRL.A. 865/2019, "Sanjeev Kumar vs. State (NCT of Delhi)"*** in ***Crl.A. No.643/2019*** and ***"Manoj Tyagi Vs. The State (Govt. of NCT, Delhi)"*** in ***Crl. A. No. 93/2019***, it is essential that the following directives detailed hereunder are given so that the sentence acts as a deterrent and is simultaneously reformative with a prospect of rehabilitation.

26. It is thus directed that the concerned Superintendent of the Jail, New Delhi where the appellant shall be incarcerated for the remainder of the term of imprisonment as hereinabove directed shall consider an appropriate programme for the appellant ensuring, if feasible:

- ***appropriate correctional courses through meditational therapy;***

  educational opportunity, vocational training and skill development programme to enable a livelihood option and an occupational status;
- ***shaping of post release rehabilitation programme for the appellant well in advance before the date of his release to make him self-dependent,; ensuring in terms of Chapter 22***

clause 22.22 (II) Model Prison Manual 2016, protection of the appellant from getting associated with anti-social groups, agencies of moral hazards (like gambling dens, drinking places and brothels) and with demoralised and deprived persons;

- ***adequate counselling being provided to the appellant to be sensitized to understand why he is in prison;***
- ***conducting of Psychometric tests to measure the reformation taking place;***
- ***and that the appellant may be allowed to keep contact with his family members as per the Jail rules and in accordance with the Model Prison Manual.***

27. Furthermore, it is directed that a Bi-annual report is submitted by the Superintendent, Central Jail-01, Tihar, New Delhi to this Court till the date of release of the measures being adopted for reformation and rehabilitation of the appellant.

28. Copy of this judgment be also sent to the Director General, Prisons, Delhi and to the Secretary, Law, Justice and Legislative Affairs, GNCTD, Delhi to ensure compliance of the above directions.

29. The CRL.A.367/2020 is disposed of accordingly.

30. The Trial Court Record be returned.

31. Copy of this judgment be supplied to the appellant and be sent to the Superintendent Jail, Delhi for compliance.

ANU MALHOTRA, J.

JANUARY 29th, 2021
'neha chopra'