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

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Date of Decision: 21.11.2017

% **CRL.A. 647/2015**

MANOJ

..... Appellant

Through: Mr. Chetan Lokur & Mr. Nitish Chaudhary, Advocates.

versus

STATE

.....Respondent

Through: Ms. Aashaa Tiwari, APP along with SI Pardeep, PS-Begum Pur, Rohini, for the State.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P. S. TEJI

VIPIN SANGHI, J. (ORAL)

1. The appellant has preferred the present appeal to assail his conviction under Section 5(k) of the Protection of Children from Sexual Offences Act, 2012, (POCSO) and consequent punishment under Section 6 of the said Act, vide judgment dated 03.12.2014 in Sessions Case No.114/2013 arising out of FIR No.157/2013 registered at PS–Begum Pur. By the order on sentence dated 10.12.2014, the appellant has been sentenced to life imprisonment with fine of Rs.10,000/-, and in default of payment of fine, to undergo further Simple Imprisonment of six months.

2. The submission of Mr. Lokur, learned counsel for the appellant is that the victim child G was, indisputably, a person with mental disability. This

finding is not disputed by the appellant. Though the age of the prosecutrix was mentioned as 19 years in the medical examination report, as well as in the complaint/ statement made by the complainant under Section 161 Cr.P.C., learned counsel for the appellant also does not dispute the fact that she was below the age of 18 years, as medically opined on record.

3. The only submission that Mr. Lokur has pressed is that the offence proved against the appellant is not one falling under Section 5(k) inasmuch, as, it has not been proved that the appellant had committed penetrative sexual assault on the prosecutrix.

4. The expression "*Penetrative sexual assault*" is defined in Section 2(f) of POCSO to have the same meaning as given to it in Section 3. Section 3 of the said Act reads as follows:

"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.”

5. Mr. Lokur has read the testimonies of the prosecutrix G (PW-1), the niece (sister's daughter) of the prosecutrix, who is named as C (PW-2), and the complainant Roshan Khatun (PW-6)/ elder sister of the prosecutrix, to submit that neither of them have claimed penetration by the appellant falling in either of the clauses (a) to (d) of Section 3.

6. The prosecutrix (PW-1) in her statement had, inter alia, stated:

“ Baaji (witness is referring to her elder sister Smt. Roshan) kundi band karke chali gayi thi. Manoj aya. Kundi khol kar aya, isne C ne sab dekha, aur mummy ko bata diya. Maine bhi Baaji ko sab bata diya.

Q. Apne Baaji ko kaya bataya?

Ans. The question has been explained to the witness by Smt. Roshni, after which, the witness has stated as under :-

Usne galat kaam kara tha, to hamne Baaji ko bata diya.

Q. Kaya galat kaam kara tha?

The question has been explained to the witness by Smt. Roshni, after which, the witness has stated as under :-

Ans. Usne seene par haath mara tha. Salwar utar diya tha, aur yahan mara tha (witness has pointed towards her private parts with her right hand)

Q. Phir kaya hua tha?

The question has been explained to the witness by Smt. Roshni, after which, the witness has stated as under :-

Ans. Usne hamari ye khol kar kara tha. (the witness has

pointed towards her salwar)

Q. Aap Manoj ko Jante ho?

The question has been explained to the witness by Smt. Roshni, after which, the witness has stated as under : -

Ans. Haan. Vo Hamare ghar ke pass rahta tha.

At this stage, the glass pane of the window in the chamber has been opened. The window is overlooking the corridor outside the Court room where accused is present in police custody. There are other persons i.e. advocates, litigants, etc. also present in the Corridor. The witness has looked through the window at the accused and has pointed towards a person with black jacket, who is in police custody, and states that he is the same person (witness has correctly identified the accused Manoj). ”

7. PW-2, the child ‘C’ had, inter alia, stated:

“Q. Kya hua tha?

Ans. Mummy bahar se kundi band karke Bawana gayi thi. Phir, wo uncle jo jail me hai, wo aye, aur kundi khol kar andar ghar me gaya.

Q. Phir Kya hua?

Ans. Mujko bola ki, meri patni Pinki tumhe bula rahi hai, aap jao. Phir me chali gayi.

Q. Phir Kya hua?

Ans. Main Pinki ke pass gayi, maine poocha, unhone kaha, tum jao, maine apko nahi bulaya.

Q. Phir hua tha?

Ans. Phir, main wapas ghar aa gayi. Darwaja band tha, jab

maine khola, to wo khul gaya. Maine dekha ki khala ki salwar khuli thi yahan tak (the witness has made a gesture with her hands pointing towards her ankles). Uncle ki chain khuli thi, aur susu karne wala nikla hua tha.

Q. Phir Kya hua?

Ans. Unhone khala ke sar par haath rakha hua than. Phir maine dekha, to vo bhag gaye.

Q. Phir kaya hua?

Ans. Jab mummy aye, maine mummy ko sab bata diya.

Q. Apni G Khala ke bare me batao?

Ans. Mujhe unke bare me kuch pata nahi hai, par jub mummy unhe kuch kaam batati hai, to vo ulta kar deti hai. Vo school nahi jaati.

Q. Kaya aap uncle ka naam janti ho?

Ans. The witness is quiet.

Q. Kaya aap unhe pahchan logi?

Ans. Haan.

At this stage, the glass pane of the window in the chamber has been opened. The window is overlooking the corridor outside the Court room where accused is present in police custody. There are other persons i.e. advocates, litigants, etc. also present in the Corridor. The witness has looked through the window at the accused and has pointed towards a person with black jacket, who is in police custody, and states that he is the same person (witness has correctly identified the accused Manoj).

Q. Wo uncle kahan rahte hai.

Ans. Wo hamare ghar ke bagal me rahte hai. Jahan Neem ka

ped (tree) hai.”

8. Mr. Lokur submits that in her statement recorded under Section 161 Cr.P.C., the complainant (PW-6) had not alleged penetrative sexual assault by the appellant. She had, inter alia, stated that:

“Aaj dinank 14/5/13 ko mai kisi kaam se samay karib ek baje Bawana gayi huyi thi. Mai ghar par apne teeno bachchon va chhoti bahan Bela ko ghar per chhodkar gayi thi. Samay karib 4 baje jab mai wapis ghar aayi to meri beti C umar 5 saal ne bataya ki samay karib 2 baje manoj hamare ghar per aaya aur C ko ghar se bahar bhej diya. Jab mei wapis ghar ke andar aayi to maine dekha ki G mausi ne salwar nikal rakhi thi aur manoj apni pant ki chain band kar raha tha. So yah baat pata chalne per maine iske bare mei G se pucha to usne bataya ki

“aaj manoj hamare ghar par aaya aur C ko ghar se bahar bhej diya aur meri chhati ko apne dono haathon se dabaya aur manoj ne meri salwar nikal di tatha apni pant ki chain kholkar mere saath jabardasti karne ki koshish ki. So mai chillai aur apni susu karne wale ko meri susu karne wali jagah mei lagaya va daalne ki koshish ki””
(emphasis supplied)

9. Similarly, Mr. Lokur has referred to the Rukka (Ex. PW-7/B), which refers to the medical examination report of the prosecutrix, and only records about the attempt to commit sexual assault. However, the same does not record the commission of penetrative sexual assault. The Rukka (Ex. PW-7/B), inter alia, records:

“Shriman, Duty Officer, Thana Begumpur Delhi Sarkar nivedan is prakar hai ki maine SI Thana haja mei hi maujood thi ki Duty Officer ne vide DD No.42A se T.K., R.K. ve Ladki G se

poochtaach kar uska uprokt bayan haasil kiya jo G ka medical examination MLC No.8527/13 per karvaya jis per STP Sahiba ne "Alleged H/o sexual assault by neighbour Manoj at 1:00 PM on 14/5/13 while victim's sister was not at home aur examination for injuries me^c Right Breast 3x4 cm bluish scene simple, left breast small blust seence ve a small abrasion mark a left cheek va Hymen Intact/ Torn mein appears to be intact, only one finger can be inserted with difficulty, vagina & cervix me bare mei Dr. Sahiba ne Slight BPV+ No tear/ discharge as patient is menstruating. Sligh tenderness + jo clinical opinion me Attempt to sexual Assualt tehrir farmaya"

10. Mr. Lokur submits that the incident took place on 14.05.2013. It was reported by the complainant on the same day. The medical examination report of the prosecutrix shows that the same was conducted on 15.05.2013 at 01:35 a.m. Though the same records that the patient had given history of penetration in standing position, it is pointed out by Mr. Lokur that the said medical examination initially recorded that the hymen appears to be intact. This was also stated in the Rukka. However, subsequently on 25.06.2013, the said report was changed by striking out the words "*appears to be intact*", and the word "*Torn*" was encircled by the examining doctor. The examining doctor also made the endorsement on 25.06.2013 "*findings are suggestive of recent sexual assault*".

11. Mr. Lokur points out that there is no basis for the said changes made in the medical examination report and, it is not even the case of the prosecution, that the prosecutrix was re-examined by the doctor on 25.06.2013. Mr. Lokur points out that the said medical report under the heading "*Clinical Opinion*" initially mentioned "*attempt of sexual assault*". However, the same was subsequently changed on 25.06.2013 to "*C*" –

which corresponds to “*Opinion reserved pending availability of reports of the sample sent*”.

12. Mr. Lokur points out that the FSL report (Ex. PX) came only on 14.10.2013, and the result of analysis did not show presence of semen on the vaginal or the vulva swab of the prosecutrix. Mr. Lokur has also drawn the attention of the Court recording made in the MLC of the prosecutrix Ex. PW-6/X against “10. *General Physical Examination – (iii) clothing*”. The same reads “*not changed*”. The words “*fresh torn, stains of blood/semen/mud etc.*” were encircled and against them, the word “*Nil*” had been written. He points out that the said entry was not changed even on 25.06.2013. He submits that, thus, there is contradiction in the MLC Ex. PW-6/X inasmuch, as, the same initially recorded on 15.05.2013 in respect of the hymen that it “*appears to be intact*” and that there was “*Nil*” “*fresh torn, stains of blood/semen/ mud etc.*” but the subsequent additions/ changes made in the report on 25.06.2013, inter alia, records “*findings are suggestive of recent sexual assault*”.

13. Mr. Lokur submits that the prosecutrix in her statement recorded under Section 164 Cr.P.C. merely stated that the accused had performed “*galat kaam*” with her. However, she had not stated that the appellant had committed penetrative sexual assault on her.

14. Mr. Lokur further submits that the medical examination of the appellant was also conducted on 15.05.2013 at 6:20 a.m. vide Ex. PW-9A. In the said medical examination, no blood was found on his private parts. He points out that it has come in the medical examination of the prosecutrix

that she would found menstruating. PW-13 Dr. Sarika proved the MLC of the prosecutrix prepared by Dr. Parvinder Kaur, SR Gynae, which records that the prosecutrix was found menstruating. Mr. Lokur submits that had the appellant committed penetrative sexual assault on the prosecutrix, during his medical examination, traces of blood would have been found on his private parts. However, the medical examination report of the appellant did not reveal presence of any blood. It is not the case of the prosecution that penetrative sexual assault was committed by the appellant in any other manner described in Section 3 of POCSO. The absence of any blood on the private parts of the appellant goes on to show that the appellant had not committed penetrative sexual assault on the prosecutrix.

15. Mr. Lokur, learned counsel for the appellant, further submits that the present case could be at best the case of attempt to commit penetrative sexual assault and not the case of penetrative sexual assault and the appellant at the most could be convicted under Section 18 of the POCSO Act.

16. On the other hand, the submission of Ms. Tiwari, learned APP is that in her statement the prosecutrix had stated that the appellant had done “*galat kaam*”. On a further question as to “*Kya galat kaam kara tha?*”, the prosecutrix had stated that the appellant had hit on her private parts. She had further stated in response to the question “*Phir kya hua tha?*”, “*Usne hamari ye khol kar kara tha (the witness has pointed out towards her salwar)*”. Ms. Tiwari, therefore, submits that the statement of the prosecutrix establishes that the appellant had committed penetrative sexual

assault on the prosecutrix.

17. In response to the aforesaid submission, Mr. Lokur has pointed out that the prosecutrix suffered from mental disability, and was not in a position to express herself clearly. During her testimony, she had stated that she was hit in her private parts. He further points out that even though PW-6 was not an eye witness, and she had made her complaint on the basis of the information derived by her from the prosecutrix and the child "C", in her earliest statement she had only alleged attempt to commit penetrative sexual assault on the prosecutrix.

18. We have heard learned counsels, perused the impugned judgment and the evidence brought on record. Before we deal with the statements of the prosecutrix, we may deal with the other evidences brought on record. The child "C" is an eye witness, and she entered the room and saw for herself that the salwar of the prosecutrix was untied till ankles, and that the zip of the appellants pant was also open and his penis was protruding. She does not state in her statement that she saw the appellant with his penis, or other any object or part of the body inserted into vagina, mouth, urethra or anus of the prosecutrix, or that he withdrew the same upon seeing her. The complainant PW-6 – as we have extracted herein above, in her statement under Section 161 Cr.P.C. merely alleged attempt to commit penetrative sexual assault on the prosecutrix. The same position is reflected in the rukka Ex PW-7/B. Pertinently, the said rukka records the position as originally recorded in the medical examination report Ex. PW-6/X, and it is obviously not premised on the alterations and additions made by the doctor on

25.06.2013. The medical examination of the prosecutrix was undertaken in close proximity of the sexual assault on the prosecutrix by the appellant. Pertinently, as per the MLC Ex. PW-6/X, the prosecutrix had “*not changed clothes, not washed genital*”, though she had passed urine.

19. The medical history referred in the MLC Ex PW-9/B, no doubt, records that the “*patient is giving H/O penetration in standing position*”. Ex PW-6/X, as originally recorded on 15.05.2013 at 2:30 a.m., records that the hymen appears to be intact. The clinical opinion initially recorded “*attempt to sexual assault*” and it also recorded “*fresh torn, stains of blood/semen/mud etc.*” as “*Nil*”. As pointed out by Mr. Lokur, the vaginal and vulva swabs upon examination by FSL, did not find any presence of semen. Coupled with the aforesaid is the fact that even in the medical examination of the appellant, no blood/ injury was found. Had the appellant committed penetrative sexual assault upon the prosecutrix, the same would have left traces of blood of the prosecutrix on the private parts of the appellant.

20. We also find merit in the submission of Mr. Lokur that the MLC of the prosecutrix i.e. Ex. PW-6/X appears to have been subsequently altered and additions have been made therein by the examining doctor on 25.06.2013 (the initial report Ex. PW-6/X was prepared on 15.05.2013). The prosecution has not explained as to how and why the said alterations and additions were made in Ex. PW-6/X, and that too after nearly 40 days of its preparation. Pertinently, Dr. Parvinder Kaur, who had made the said report initially, and who had also carried out the subsequent alterations and additions, was not examined as a prosecution witness. PW-13 Dr. Sarika

was not the doctor who had herself examined the prosecutrix on 15.05.2013. The testimony of PW-13 is, therefore, only relevant insofar as she has identified the said medical examination report and the signatures of the author of the said report Dr. Parvinder Kaur. The remaining testimony is nothing more than a reproduction of what is recorded in the said medical examination report. Thus, the prosecution has failed to explain as to under what circumstances the changes were made by the examining Dr Parvinder Kaur in her initial report Ex. PW-6/X. Despite the prosecutrix having given history of penetration in standing position in Ex. PW-9/B, the initial report of Dr Parvinder Kaur merely recorded "*attempt of sexual assault*" while also observing that the hymen appears to be intact and that "*fresh torn, stains of blood/semen/ mud etc.*" was "*Nil*". Thus, we cannot accept the subsequent additions/ alterations made in Ex. PW-6/X on 25.06.2013. The clinical opinion originally recorded in Ex PW-6/X was that the opinion was reserved pending availability of reports of the sample sent. As we have already noted, the report of the sample prepared by the FSL does not show the presence of semen in the vaginal and vulva swabs of the prosecutrix. Thus, the original medical opinion rendered on 15.05.2013 by Dr. Parvinder Kaur that it was a case of "*attempt of sexual assault*" is credible.

21. We may now turn to that part of the testimony of the prosecutrix where she stated, "*Usne hamari ye khol kar kara tha.*" while pointing towards her salwar. The appellant was evaluated in Mental Retardation Clinic at IHBAS, and was diagnosed as a case of Mild Mental Retardation with Social Quotient of 54. This is so recorded in the testimony of PW-1. On that basis, the prosecutrix PW-1 was examined with the help of her

sister, the complainant PW-6.

22. PW-1 had given the history of penetration in standing position when she was medically examined on 15.05.2013. However, her medical examination and forensic examination did not support her said claim. It appears to us that the mental condition of the prosecutrix may well have been the reason for her not comprehending or understanding the nature and extent of sexual assault done upon her by the appellant. The history of penetration in standing position given by the prosecutrix at the time of her medical examination on 15.05.2013, and her aforesaid testimony, thus, have to be read in the aforesaid light. Moreover the complainant, who is the elder sister of the prosecutrix – who had interacted with the prosecutrix and the minor daughter “C” before making the complaint, also did not claim penetrative sexual assault by the appellant upon the prosecutrix in her initial statement.

23. Thus, in the aforesaid circumstances, the testimony of the prosecutrix to the aforesaid extent does not inspire confidence and, in our view, should be discarded.

24. From the testimony of the minor child “C”/ PW-2, it appears that the sequence of events starting from the time when the appellant asked PW-2 to go to his wife – by stating that she was calling her, till the time when PW-2 went to the wife of the appellant and came back after she was sent back by the wife of the appellant, did not give sufficient time to the appellant to actually commit penetrative sexual assault on the prosecutrix, though that may have been his intent. PW-2 has stated that when she returned and saw

the prosecutrix and the appellant, the appellant ran away. Thus, it appears to us that the commission of penetrative sexual assault is not established against the appellant. However, the consistent testimonies of the prosecutrix (PW-1), and the child witness 'C' (PW-2), which are corroborated by the medical examination report of the prosecutrix Ex.PW-9/B and PW-6/X, clearly establish the attempt to commit the said offence by the appellant on the prosecutrix. The said attempt is established by the fact that the salwar of the prosecutrix was untied till her ankles; the zip of the appellant was open; the penis of the appellant was protruding out; the prosecutrix was standing and the appellant had placed his hand on the head of the prosecutrix; the appellant ran away when PW-2 saw the situation. The statement of the prosecutrix that the appellant had pressed her breasts ("*Usne seene par haath mara tha*") is corroborated by the medical examination report Ex. PW-6/X which, inter alia, records:

- “1. *Right Breast 3x4 cm bluish green seen simple*
2. *Left Breast small bruise bluish green.*
3. *a small abrasion mark on left cheek.*”

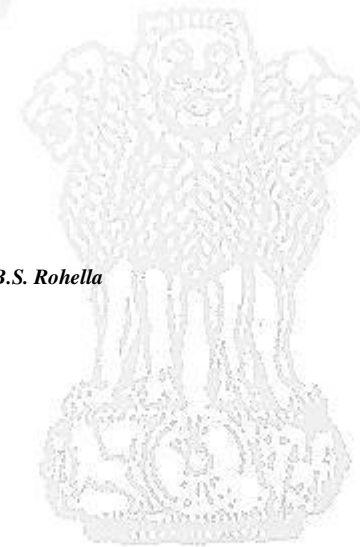
25. The discussion made above establishes that in the absence of penetrative sexual assault, the offence under Section 5(k) of the POCSO Act is not made out. As a result the conviction and sentence cannot be awarded to the appellant under section 6 of the POCSO Act. So, in the given facts and circumstances, we are of the considered opinion that the conviction and order on sentence passed by the court below is not sustainable in the eyes of law. Consequently, the appellant/accused is acquitted of the charged offence under Section 6 of the POCSO Act and order on sentence is set aside.

26. Undisputedly, the evidence led in the instant case establishes the offence under Section 18 of the POCSO Act which is an attempt to commit offence of penetrative sexual assault, which is a lesser offence. Thus, the appellant/accused is convicted under Section 18 of the POCSO Act and sentenced to 10 years rigorous imprisonment with fine of Rs.10,000/-, and in default of payment of fine, to undergo simple imprisonment for six months. The appeal stands allowed to the above extent.

VIPIN SANGHI, J.

P. S. TEJI, J.

NOVEMBER 21, 2017 / B.S. Rohella



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