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

Judgment reserved on: 28th February, 2020
Judgment pronounced on: 06th March, 2020

\+ **CRL.A. No. 1212/2018**

SOMVEER @ LALLA ..... Appellant

Through: Mr. Avinash, Advocate.

versus

STATE ..... Respondent

Through: Ms. Neelam Sharma, APP for State.

\+ **CRL.A. No. 455/2019**

STATE ..... Appellant

Through: Ms. Neelam Sharma, APP for State.

versus

SOMVEER @ LALLA ..... Respondent

Through: Mr. Avinash, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SANGITA DHINGRA SEHGAL, J

1. Present appeals No. 1212/2018 and No. 455/2019 are directed against common judgment dated 03.08.2018 and order on sentence dated 29.08.2018 passed by the learned Additional Sessions Judge, Special Court, (POCSO ACT)/North East District, Karkardooma Courts, Delhi in Sessions case No. 06/2017 arising out of FIR No. 341/2016, under Section 363 of the Indian Penal Code, 1860 (hereinafter referred

to as 'IPC') and Section 10 POCSO Act registered at Police Station Karawal Nagar, Delhi whereby the learned Sessions Judge found the accused guilty and sentenced him to undergo rigorous imprisonment for a period of 02 years and to pay a fine of Rs.5,000/- for offence under Section 363 IPC and in default of payment of such fine for this offence, he shall undergo simple imprisonment for a period of one month. Convict was also sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.10,000/- for the offence punishable under Section 10 POCSO Act and in default of payment of such fine for this offence, he shall undergo simple imprisonment for a period of one month. Both the sentences were directed to run concurrently.

2. The brief facts of the case, as mentioned by the learned Trial Court are reproduced as under:

> *"Brief facts of the case of prosecution are that on 07.10.2016, on receipt of DD No. 76B, SI Abodh and Ct. Arvind went at the informed place i.e. Gali No.7, Mahalaxmi Vihar, Karawal Nagar and met complainant Asha Ram. Complainant gave a statement that on 07.10.2016 at about 09.00 p.m., she was cooking food and her daughter/victim, aged about 05 years, was playing in verandah. She further alleged that at that time, Somveer, whom she knew for last one year, had come to her house. After sometime, she noticed that victim was missing. She suspected that Somveer had taken her daughter. On these allegation, FIR u/s 363 IPC was registered.*
> *During the investigation, victim was recovered and it was found that victim had been raped. Thereafter, victim was medically examined. Her statement u/s 164 Cr.P.C. was recorded. Accused was arrested.*

3. After completion of investigation, charge sheet under Sections 363/376/506 IPC and under Section 4 POCSO Act was filed against accused. On 01.02.2017, charges under sections 363/366/376 (2) (i) IPC and u/s 6 POCSO Act were framed against the accused to which he pleaded not guilty and claimed trial.

4. In order to bring home the guilt of the accused, the prosecution examined 18 witnesses in all. The statement of the accused was also recorded under Section 313 of the Code of Criminal Procedure wherein he pleaded his innocence by denying all the incriminating circumstances and claimed to have been falsely implicated by prosecution. Accused examined only one witness in his defence.

5. Ms. Neelam Sharma learned counsel appearing on behalf of the State contended that the impugned judgment dated 03.08.2018 passed by the learned Trial Court was perfunctory in nature, full of conjectures and surmises, ignoring the well-settled proposition of law that the sole testimony of the victim of a sexual offence is sufficient to base conviction of the accused. She further contended that the impugned judgment is full of legal defects and the Trial Court has failed to appreciate the testimony of the prosecutrix in its correct perspective, and therefore is liable to be set aside.

6. She further contended that the learned Trial Court has failed to appreciate that the prosecutrix was minor at the time of the incident and her statement was consistent, cogent and there are no major omissions and contradictions in her testimony.

7. She submitted that the learned Trial Court failed to appreciate the statement of PW-4 (Vikas Kumar) who had witnessed the accused

taking the victim with him. She further submitted that the Trail Court failed to appreciate the testimony of PW-7 (Victim) who has categorically deposed that the accused had committed sexual assault on the victim. She further submitted that the learned Trial Court failed to appreciate that the MLC of the prosecutrix mentions about the ruptured hymen of the victim. To substantiate her arguments, learned APP has placed reliance on ***Chand Bibi v. State & Anr.*** reported in (***2019) 256 DLT 593.***

8. Learned APP on behalf of the State further contended that the MLC is only a corroborative piece of evidence and not a conclusive one. She further submitted that the learned Trial Court erred in disbelieving the testimony of PW-4 (Vikas Kumar), PW-5 (Asha Ram) and PW-15 (W/Ct. Mamta) on the basis of MLC. To substantiate her arguments, she has placed reliance on ***Chimnabai Ukhabhai v. State of Gujarat*** reported in ***AIR 1983 SC 484*** and ***Ranjanben Maheshbhai Vasava v. State of Gujarat*** reported in ***2019 (3) RCR (Criminal) 630***

9. She further argued that the Trial Court failed to appreciate that penetration may not always result in tearing the hymen and even an attempt to penetrate into the private part of the victim would constitute the offence of rape. In order to support her contention, she has placed reliance on ***Radhakrishna Nagesh v. State of A.P.*** reported in ***(2013) 11 SCC 688*** and ***Tarkeshwawr Sahu v. State of Bihar*** (Now Jharkhand) reported in ***(2006) 8 SCC 560.***

10. She further submitted that the age of the victim at the time of the incident was 5 years and she cannot be expected to narrate the incident

in the same manner or standard as they expect from adults. She placed reliance on ***State v. Rahul*** reported in ***ILR (2013) Delhi 1861.***

11. She finally concluded by submitting that the learned Trial Court failed to appreciate the effect of Section 29 of POCSO Act, wherein the Statute has provided that there shall be presumption that the accused has committed the offence under Section 6, POCSO Act, unless the contrary is proved.

12. Learned Counsel for the appellant while vociferously rebutting the contentions of the APP for the State argued that the learned Trial Court erred in convicting the accused under Section 10 of POCSO Act and under Section 363 of IPC. He submitted that the testimony of the prosecutrix is totally unreliable and there are material contradictions and concealments in her testimony recorded under Section 164 Cr.P.C and in her deposition before court. He further argued that the sole testimony of the prosecutrix has to be evaluated more carefully with greater circumspection and the same can only be relied upon if there are no embellishments or improvements therein.

13. He submitted that there are severe contradictions and inconsistencies in the testimonies of other material witnesses and the case of the prosecution is neither supported by medical evidence nor by scientific evidence. He further submitted that PW-18 (Dr. Surbhi Goyal) was the doctor who conducted the MLC of the victim and had stated that no blood, no dirt and no spotting was found in the vagina. He further argued that the case of the accused is fortified by the FSL report which proves that there was no blood or semen detected from the victim and the tear of hymen was probably old which would necessarily mean that

she had not been sexually assaulted by the appellant and absence of injuries will inevitably discredit the version of the prosecutrix.

14. We have heard the learned counsel for the parties and carefully examined the impugned judgment and the material available on record as well.

WHETHER THE ACCUSED KIDNAPPED THE VICTIM

15. Law on kidnapping is mentioned in Section 361 of IPC which reads as under: -

> *361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.*

16. In order to determine whether the accused has committed an offence under Section 361 of IPC, we deem it necessary to peruse the evidence on record, i.e. the testimonies of various prosecution witnesses, namely PW-4 (Vikas Kumar), PW-5(Asha Ram), PW-6 (Kanak Lata), PW-7 (Victim). PW-4 (Vikas Kumar) stepped into the witness box and deposed as below: -

> *"**On 06.10.2016, at about 9.00/9.15pm, accused Somveer who is present in Court today (correctly identified), who is known to me as he resides in my neighbour, came to my shop alongwith a female child who also resided in our neighbour but I do not know her particulars. At that time, the accused was under influence of liquor. The***

accused demanded toffee and I gave him worth Rs. 2/-. Earlier also, the accused used to come to my shop with the children of the locality and used to buy them toffees etc. The said child was saying that she had to attend a jagran. The accused was talking affectionately to the child. After purchasing toffee to the child, the accused took her with him and walked towards the side where the jagran was taking place. *Since, it was time for me to close my shop, I started binding up work and did not pay much attention. Later my statement was recorded by the IO."*

17. PW-5 (Asha Ram) was the father of the prosecutrix, he deposed as under: -

> *On 6th day before Diwali, last year I returned to my house from my work at about 8.30pm. My wife was cooking food in the kitchen and she had given food to me and the victim was playing outside of the room in the veranda.* ***The victim was demanding sweets and my wife handed over Rs. 10/- to her. Meanwhile, Somveer, who used to come to visit out neighbours, took the victim and told her that he would purchase sweets for her and he took her away. While my wife was about to wash the dirty utensils after taking dinner, she recollected that the victim had not returned and then went out in her search. After sometime, she returned back home and told me that the victim could not be found and I also joined the search for the victim.*** *I and my wife alongwith one or two neighbours then went in search of the victim. I and my wife alongwith one or two neighbours then went in search of the victim and reached a place where a jagran was being held but she was also not found there. We also made an announcement in the jagran about the victim but she was not found. Thereafter, I made a call to the PCR at 100 number. Police arrived and I told all the facts to the police and police recorded my statement, which is Ex.PW5/A bearing my signatures at point A. Thereafter, police searched for the victim and about 30 people from the*

locality joined the search and after sometime, the police handed over the victim to me.

18. PW-6 (Kanak Lata), mother of the decease deposed as below: -

> *"On 06.10.2016, at about 8.30pm, I was cooking in the kitchen and the victim was playing outside of the room in the veranda and victim was demanding sweets and I told her that I will provide the same to her whenever her returned. Thereafter, she started playing there. Meanwhile, my husband returned to the house and he was taking dinner.* ***Meanwhile, Somveer, who used to come to visit our neighbours, came there and he told me that he would provide sweets to the victim but I refused for the same. Thereafter, I came inside of my room and started dirty utensils. After 10 minutes, I came outside of my house and found that the accused had taken away the victim from there. I searched for the victim in the neighbour. After sometime, I returned home and informed husband that the victim could not be found****. Thereafter, I and my husband started for searching the victim in the area and three-four times announcement was also made from a place where a jagran was being held. Thereafter, my husband made a call to the PCR at 100 number. Police arrived and started there proceedings and also searched for the victim. At about 03/04.00am, the victim was recovered. Police had informed me this fact."*

19. PW-7 (Prosecutrix/Victim) deposed as below: -

> *"Without Oath*
> *Q. how do you know the person shown to you whom you addressed as Somveer bhaiya?*
> *Ans.* ***Vo mujhe cheez ke bahane koodedan me le gaya tha*** *aur vahan usne apni tutu meri tutti me lagyae thee."*

20. A conjoint reading of the testimonies of PW-4 (Vikas Kumar), PW-5 (Asha Ram), PW-6 (Kanak Lata), PW-7 (Victim) established the following: -

   a. The victim was demanding sweets after which the accused (Somveer), who used to visit the neighbours of the victim, offered to provide sweets to the victim. The mother of the victim, PW-6 (Kanak Lata) realized that the accused had taken the victim from her custody.

   b. The accused was under the influence of alcohol and he took the victim to the shop of PW-4 (Vikas Kumar) from where he bought her toffee. The accused took the victim with him thereafter.

   c. The accused took the victim to the nearby dumpster from where the victim was recovered.

21. It is therefore established that the accused enticed the victim from the lawful guardianship of her parents without the consent of her parents and therefore committed the offence of kidnapping.

TESTIMONY OF PROSECUTRIX/VICTIM

22. Learned counsel for the accused argued that the testimony of the prosecutrix and other material witnesses from prosecution is full of inconsistencies which go to the root of the matter and therefore the testimonies are unreliable and do not establish that the accused committed aggravated sexual assault on the victim.

23. It is a settled principle of law that in cases involving sexual assault/rape, it is generally difficult to find any corroborative witnesses, except the victim herself and therefore, the evidence of the

victim is sufficient for conviction unless there exist compelling reasons for seeking corroboration. Thus, a conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The Apex Court has time and again held that the sole testimony of the prosecutrix is sufficient to hold the accused guilty if it inspires confidence and the same principles have been reiterated in ***Vijay v. State of Madhya Pradesh*** reported in ***(2010) 8 SCC 191***. Relevant paragraph of the judgment reads as under:

> *"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."*

24. In ***Gagan Bihari Samal v. State of Orissa*** reported as ***(1991) 3 SCC 562***, the Hon'ble Supreme Court of India whilst observing that corroboration is not the sine qua non for conviction in a rape case, held as follows:

> *"**6.** In cases of rape, generally it is difficult to find any corroborative witnesses except the victim of the rape. It has been observed by this Court in Bharwada Bhoginbhai Hirjibhai v. State of Gujarat [(1983) 3 SCC 217: 1983 SCC (Cri) 728: AIR 1983 SC 753] as follows: (AIR headnote)*
>
> > *"Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt,*

disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors, the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated."

The above observation has been made by this Court relying on the earlier observations made by this Court in Rameshwar v. State of Rajasthan [1952 SCR 377, 386 : AIR 1952 SC 54 : 1952 Cri LJ 547] with regard to corroboration of girl's testimony and version. Vivian Bose, J., who spoke for the Court observed as follows: (SCR p. 386)

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, ... The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or

them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand."

25. Further, it is also a well settled principle of law that the testimony of child witness can be relied upon along with other circumstances and corroborative evidence to convict the accused. Undoubtedly, the settled proposition of law that the evidence of a child witness is required to be scrutinised and appreciated with great caution. In this regard, reference can be made to the dicta of the Apex Court in the case of ***Yogesh Singh Vs. Mahabeer Singh and others*** reported in ***AIR 2016 SC 5160***, wherein the Apex Court has held that:

> ***"22. It is well settled that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law.*** *(See Prakash v. State of M.P. [Prakash v. State of M.P., (1992) 4 SCC 225 : 1992 SCC (Cri) 853] , Baby Kandayanathil v. State of Kerala [Baby Kandayanathil v. State of Kerala, 1993 Supp (3) SCC 667 : 1993 SCC (Cri) 1084] , Raja Ram Yadav v. State of Bihar [Raja Ram Yadav v. State of Bihar, (1996) 9 SCC 287 : 1996 SCC (Cri) 1004] , Dattu Ramrao Sakhare v. State of Maharashtra [Dattu Ramrao Sakhare v. State of Maharashtra, (1997) 5 SCC 341 : 1997 SCC (Cri) 685] , State of U.P. v. Ashok Dixit [State of U.P. v. Ashok Dixit, (2000) 3 SCC 70 : 2000 SCC (Cri) 579] and Suryanarayana v. State of Karnataka [Suryanarayana v. State of Karnataka, (2001) 9 SCC 129 : 2002 SCC (Cri) 413] .)*
>
> ***23. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness***

is an easy prey to tutoring. *(Vide Panchhi v. State of U.P. [Panchhi v. State of U.P., (1998) 7 SCC 177: 1998 SCC (Cri) 1561])*

26. In view of the settled law, we shall now examine whether the evidence adduced by ***the prosecution, particularly the testimony of the victim, is trustworthy, credible and can be relied upon.*** PW-7 (Prosecutrix/Victim) deposed as below: -

> *"Without Oath*
> *Q. how do you know the person shown to you whom you addressed as Somveer bhaiya?*
> *Ans.* ***Vo mujhe cheez ke bahane koodedan me le gaya tha aur vahan usne apni tutu meri tutti me lagyae thee.***
> *Q. Whether you got injured on any part of your body, felt pain or had bled from any part of your body?*
> *Ans. No. (The victim says so by gestures by nodding her head left and right).*
> *Q. How did you get released?*
> *Ans. Usne chhod diya aur me bhaag keghar aa gayee.*
> *Q. Did you got soiled when the accused took you to the garbage house?*
> *Ans. Yes. (The victim says so by gestures by nodding her head up and down).*
> *Q. What clothes were you wearing at that time?*
> *Ans. Sandow banian and kachcha.*

In her cross-examination she deposed as below: -

> *It is wrong to suggest that I have deposed today on being tutored by my parents and that the accused had not taken me anywhere nor had committed any act with me."*

27. Her testimony is corroborated by her statement under Section 164 Cr.PC which is produced as under:-

> *"Somveer bhaiya raat ko aayatha, ushne meri kachhi uteri.* ***Ushne apni tutti meri tutti mein laga di, mujhe dard hua tha aur meinrone lag gayithi.****"*

28. A perusal of the testimony of PW-7 (Prosecutrix/Victim) proves that her version was trustworthy, cogent and consistent and therefore can be relied upon. The prosecutrix had been consistent with her version that the accused took her with him and took off her underwear and with a sexual intent touched her vagina.

TESTIMONY OF OTHER MATERIAL PROSECUTION WITNESSES

29. The version of the prosecutrix receives corroboration from the testimony of PW-5 (Asha Ram) who deposed as below: -

> *Thereafter, police searched for the victim and about 30 people from the locality joined the search and after sometime, the police handed over the victim to me.* ***She was having dirt (keechar) all over her body. She was only wearing a banian and no undergarment. Blood was coming from her private parts. The police then took us to the hospital where the victim was medically examined.*** *We then returned home in the PCR van. After sometime, the accused met us near the place of jagran and he was also having dirt on his body. The said place was a vacant plot near the drain. I had gone there alongwith the IO, who inspected the said place. The accused was under intoxication at that time. He was arrested by the police vide memo Ex.PW5/B bearing my signature at point A and was brought to the PS.*

In his cross-examination he deposed: -

> ***My statement was recorded after the recovery of the victim and prior to that no statement was recorded by the IO. The victim was recovered at about 3.00am. Thereafter, the police and I took the victim to the***

hospital. *Then I went to the PS from the hospital. Police prepared the documents at the PS.*

30. This version is further corroborated by the testimony of PW-6 (Kanak Lata) who deposed as under: -

> *"At about 03/04.00am, the victim was recovered. Police had informed me this fact.* ***I also went to the hospital where I found the victim and her condition was very disturbing an there was having dirt (keechar) all over had body and her undergarment was missing. Blood was also coming out from her private parts. I asked the victim as to what had happened with her and she told me that accused Somveer had taken away her and gave beatings to her and that "usne batya ki usne apni tuttu mere tutu mein dalne kikoshish kee" (had tried to insert his penis into her vagina).*** *The victim was medically examined in the hospital."*

In her cross-examination he deposed as under: -

> *"Police informed me that the victim was found in the jagran. I met the victim at about 5.00am in the hospital after her missing. Police informed me about the recovery of the victim at my house and then took me in the police gyspy to the hospital. From the hospital, I went to the PS at about 6.00am and thereafter, we reached at Karkardooma Courts. My statement was recorded by the police at the PS before we started for Karkardooma Courts. After that day, I did not meet the police and they did not record my any other statement."*

31. PW-15 (W/Ct. Mamta), who got the prosecutrix recovered deposed as below: -

> *"On 06.10.2016, I was posted as above and I was on duty at the night time. On that day, at about 11.45pm, I alongwith SI Monika reached Mahalaxmi Vihar where SI*

Abodh and one constable, whose remember I do not remember now, met us. The victim and her parents were also found present there. ***At that time, victim was wearing only a banian and she was covered with mud. Some blood was seen on the private part of victim.*** *Thereafter, I alongwith SI Monika, victim and her parents went to JPC Hospital for medical examination of victim. After her medical examination, doctor handed over her MLC, two pullindas i.e. SAFE Kit and of clothes in sealed condition alongwith sample seal. I handed over the same to SI Monika at the PS, who seized the said pullindas and sample seal at the PS. I have seen seizure memo dated 07.10.2016. It bears my signatures at point A. The memo is now Ex.PW15/1."*

In her Cross-examination she deposed as under: -

"When the victim was taken for medical examination, she was accompanied by her mother and father. We reached the hospital at around 4.00am. We remained there till around 6.30am. In my presence, statement of victim's mother was recorded by the IO. This statement was probably recorded at victim's house and prior to going to the hospital. The parcels were not deposited in malkhana in my presence. It is wrong to suggest that I had not joined the investigation of this case at any point of time, or that I had not accompanied the victim and her parents to the hospital."

32. A conjoint reading of the testimonies of PW-5 (Asha Ram), PW-6 (Kanak Lata) and PW-15 (W/Ct. Mamta) established the following: -

a. The victim was found with dirt all over her body. She was only wearing a *banian* and was not wearing an underwear.

b. Blood was coming out of the victim's vagina.

c. Therefore the version of the other material prosecution witnesses namely PW-5 (Asha Ram), PW-6 (Kanak Lata) and PW-15 (W/Ct. Mamta) corroborate the version of the prosecutrix.

MEDICAL AND SCIENTIFIC EVIDENCE

33. Learned counsel for the accused argued that the medical and scientific evidence is in favour of the accused and there is nothing on record to show that accused had committed penetrative sexual assault on the victim. He further submitted that PW-18 (Dr. Surbhi Goyal) stated that no blood, no dirt and no spotting was found in the vagina. He further argued that the case of the Appellant is fortified by the FSL report which proves that there was no blood or semen detected from the victim and the tear of hymen was probably old which would necessarily mean that she had not been sexually assaulted by the appellant and absence of injuries will inevitably discredit the version of the prosecutrix.

34. At this stage, it is relevant to examine whether the medical evidence placed on record furthers the case of the accused or that of the prosecution.

35. Dr. Surbhi Goyal, S.R. Obs and Gyne. Department JPC Hospital was examined as PW-18 who deposed on behalf of Dr. Arundhati Pathak who had conducted the MLC of the victim at the night of the incident. She deposed as below: -

> *"I came before the Hon'ble Court on the directions of MS to depose regarding MLC No.5078, which was prepared by Dr. Arundhati Pathak, who is not working in our hospital at present and her present whereabouts are not*

known to us. I can identify her handwriting and signatures as she had worked me and I had seen her writing and signing.

I have seen MLC No.5078 dated 07.10.2016 of the victim D/o Asha Ram, female, 5 years old. It is in the handwriting of Dr. Arundhati Pathak and bears her signatures at point A. The MLC is now Ex.PW18/1.

As per the MLC, the victim was brought to the hospital at about 4.00am. As per MLC, on local examination, no external injury was found, however, dirt was found all over the body and around the vagina. In per speculam examination, hymen was found ruptured. I have also seen the emergency card of the victim, which is also in the handwriting of Dr. Arundhati Pathak and bears her signatures at point A. The card is now Ex.PW18/2. ***Dr. Arundhati Pathak also collected the samples of sexual assault evidence collection kit and handed to the police in sealed condition alongwith sample seal.***

In her cross-examination, PW-18 deposed as below: -

It is correct that the hymen can get ruptured by strenuous physical activities such as cycling, stretching etc. As the doctor had not recorded any bleeding or spotting, the tear of the hymen was probably old*."*

36. The MLC of the prosecutrix ***Ex. PW-18/2*** is reproduced below: -

According to alleged's mother – At 9pm on 06.10.2016 just after dinner, the accused, Somveer, 15 years of age known to alleged's family came to her house in drunken condition. The accused abducted the alleged in favour of some sweets. Alleged's mother realised after 20 minutes that her child was missing. They started searching for her 3-4hr. They informed Police Station Karaval Nagar. Police found the alleged in a mob (at some holy jagran) two lanes after the alleged's home with dirt all around body without her undergarment. Alleged told police that the accused forcefully held her and tried to insert the

sexual organ into her. Police considered it to be forceful penetrative sexual assault between 9pm to 12.30pm. Blood was seen around intratus according to police. They brought the alleged to JPCH at 4am. As last contact was done around 5hrs back so SAFE KIT will be opened. O/E victim is conscious & well oriented to time place person.

O/n unmarried
m/n menarche not yet attained

TYPE OF INJURIES
GE No external injury dirt all over body
No laceration/ bruises seen dirt around vagina
No blood seen
Gynecologist exam no congestion no tear no spotting
p/s hymen ruptured admits tip of little finger.

37. During the investigating samples from the body of the prosecutrix as well as the accused were sent to the FSL for further opinion. The FSL report has been reproduced below: -

Forensic Science Laboratory
Govt. of NCT of Delhi
Sector 14, Rohini, Delhi-110085.
Tel:011-27555811, Fax: 011-275555890
Accredited by the National Accreditation Board for Testing and Calibration Laboratories (NABL)
As per standards of ISO/IEC 17025:2005 and NABL 113:2008
REPORT NO. FSL-2016/B-7828 BIO NO.2270/16
Dated: 23.03.2017

Please quote the Report (Opinion) No. & Date in future correspondence & Summons.
This report is Per se admissible u/s 293 Cr.PC.

To,
The SHO,
PS : Karawal nagar,
Delhi.

Your letter No. 3766/SHO/Karawal nagar Dated: 14.10.16 regarding 05 (five) parcels in connection with the case FIR No.341/16 Dated: 07.10.2016 u/s: 363/376/506 IPC & 4 POCSO ACT P.S: Karawal nagar received in this office on 14.10.16.

DESCRIPTION OF PARCELS & CONDITION IN SEALS

Sealed cardboard box	:	*01*
Sealed envelope	:	*01*
Sealed tape parcel	:	*03*
Total	:	*05 (five)*

DESCRIPTION OF ARTICLES CONTAINED IN PARCEL

Parcel '1 : One sealed cardboard box sealed with the seal of "CMO" containing exhibits'A-1', 'A-2', 'A-2', 'A-3', 'A-4', 'A-5', 'A-6', 'A-7', 'A-8', 'A-9', 'A-10', 'A-11', 'A-12', 'A-13', 'A-14', 'A-15', 'A-16, & 'A-17'.

Exhibit 'A-1' : Empty envelope labeled as debri collection.

Exhibit 'A-2' : Empty envelope labeled as debri collection.

Exhibit 'A-3': Dirty cotton wool swab on stick kept in vial labeled as body fluid collection.

Exhibit 'A-4' : Empty envelope labeled as nail scraping.

Exhibit 'A-5' : Cotton wool swab on a stick labeled as in between fingers.

Exhibit 'A-6' : Cotton wool swab on a stick labeled as breast swab.

Exhibit 'A-7' : Empty envelope labeled as combing of pubic hair.

Exhibit 'A-8' : Empty envelope labeled as clipping of pubic hair.

Exhibit 'A-9' : Empty envelope labeled as matted of pubic hair.

Exhibit 'A-10': Cotton wool swab on a stick kept in vial labeled as cervical mucus collection.

Exhibit 'A-11': Cotton wool swab on a stick and two microslides labeled as vaginal swab & smear.

Exhibit 'A-12': Cotton wool swab on a stick kept in vial

labeled as culture.

Exhibit 'A-13': Dirty liquid kept in syringe labeled as washing from vagina.

Exhibit 'A-14': Cotton wool swab on a stick and two microslides labeled as rectal swab & smear.

Exhibit 'A-15': Cotton wool swab on a stick and two microslides labeled as oral swab & smear.

Exhibit 'A-16': Dark brown liquid kept in the three vials microslides as blood collection of victim.

Exhibit 'A-17': Dirty straw colored foul smelling liquid kept in plastic container labeled as urine 7 oxalate blood vial.

Parcel 'B' : One sealed envelope sealed with the seal of 'CMO' containing exhibit 'B' described as clothes of victim.

Exhibit 'B' : Dirty baniyan

Parcel 'C' : One sealed tape parcel sealed with the seal of 'CMO' containing exhibit 'C'.

Exhibit 'C' : Dark brown liquid kept in two vials described as blood sample of accused.

Parcel 'D' : One sealed tape parcel sealed with the seal of 'CMO' containing exhibit 'D'.

Exhibit 'D' : Dirty underwear of accused.

Parcel 'E' : One sealed tape parcel sealed with the seal of 'CMO' containing exhibit 'E'.

Exhibit 'E' : Small bunch of hair described as pubic hair of accused.

RESULTS OF ANALYSIS

Blood was detected on exhibit 'A-16 and 'C'.

Blood could not be detected on exhibits 'A-3, 'A-5', 'A-6', 'A-10', 'A-11', 'A-12', 'A-13', 'A-14', 'A-15', 'A-17', 'B', 'D', & 'E'.

Semen could not be detected on exhibits 'A-3, 'A-5', 'A-6', 'A-10', 'A-11', 'A-12', 'A-13', 'A-14', 'A-15', 'A-17', 'B', 'D', & 'E'. Hence DNA examination was not done on exhibit 'C'.

NOTE: *Remnants of the exhibits have been sealed with the seal of 'S.G FSL DELHI'.*

(MS. SUNITA GUPTA)"

38. A conjoint reading of the testimony of PW-18 (Dr. Surbhi Goyal), MLC of the victim (***Ex. PW18/2***) and the FSL report reveal the following: -

a. There was no external injury, no abrasions or lacerations around the vagina of the victim.

b. There was no blood present around the vagina of the victim.

c. Gynecologist examination revealed that there was no tear and no spotting.

d. PW-18 (Dr Surbhi Goyal) stated that as the doctor who conducted the MLC had not recorded any bleeding or spotting, the tear was probably an old tear. and there are a variety of other reasons for the hymen to be ruptured such as strenuous physical activity.

e. FSL report proves that no blood or semen was detected from the samples recovered from the accused and victim.

WHETHER THE ACCUSED COMMITTED AGGARAVATED SEXUAL ASSAULT OR AGGRAVATED PENETRATIVE SEXUAL ASSAULT

39. Learned Trial Court in its judgment dated 03.08.2018 while discussing whether the offence committed by the accused falls under aggravated sexual assault or aggravated penetrative sexual assault has held as below: -

> *"35. I have carefully weighed this contention. It is correct that victim's mother, father and police officials who appeared as witnesses have deposed that when the victim was recovered, blood was coming from her private parts. However, this part of their testimony in the light of medical evidence seems to be an exaggeration. It is to be*

noticed that the MLC of the victim is Ex. PW18/1. In the MLC, the doctor had observed that the history was given by the mother of the victim and as per that history there was forceful penetrative assault and when the victim was recovered, according to the police blood was seen around interiors. ***This MLC was proved by PW-18 who deposed that as per MLC on local examination no external injury was found. However, dirt was found all over the body and around vagina, hymen was found to be ruptured. During her cross-examination, she admitted that hymen can get ruptured by strenuous physical activity such cycling, stretching etc. She further deposed that as the doctor had not recorded any bleeding or spotting, the tear of hymen was probably old. From this testimony of the doctor one fact which clearly emerges is that when the victim was taken to the hospital and was examined by the doctor, there was dirt all over her body and around vagina. This proves that immediately after the recovery of the victim she had been taken straight to the hospital and had not been bathed or cleaned.*** *If that be the case, it is impossible that blood which was seen by everyone to be coming out of the private parts of the victim would not have been seen by the doctor.* ***Not only this, per speculam examination of the victim was also conducted and there also the doctor did not observe any bleeding or spotting. It is also to be seen that the mother of the victim states to have seen blood coming out of the private parts of the victim but in the history which she had provided to the doctor, she stated that this information was given to her by the police. Therefore, on the one hand, the bleeding from the private parts is not proved and other hand, the tear of the hymen which has been relied by Ld. Addl. Prosecutor to establish penetrative sexual assault could have been, as***

per the doctor, an old tear. Therefore, on the basis of this evidence, penetrative sexual assault has not been proved and we have to look at the testimony of the victim to find that whether through that testimony the prosecution has succeeded in establishing an offence of penetrative sexual assault.

36. Victim while appearing as PW-7 did not state that ***accused had penetrated her vagina. She stated that accused had touched his penis to her vagina. She also stated that during this incident, she did not feel any pain, she did not bled from any of her body parts or got injury on any of her body part. It is to be seen that the victim was a small child of five years and if there had been a penetrative sexual assault upon her, it would necessarily have been painful and despite there being an old rupture of hymen there could have been bleeding also, but according to the victim she neither bled nor felt any pain and therefore, her testimony only establishes that accused had only touched his penis on her vagina. Thus the testimony of victim, which has been found to be credible only establishes sexual assault and not penetrative sexual assault. I find that testimony of the victim is sufficient to prove that after kidnapping her accused had sexually assaulted.*** *As the victim, at the time of incident, was aged less than twelve years, this assault becomes aggravated sexual assault as defined u/s 10 POCSO Act. This being a lesser offence than the offence that accused is charged with no fresh charge is required to be framed.*

37. In view of my above discussion, the accused is convicted for offence punishable u/s 10 of POCSO Act and

section 363 of IPC. Be heard separately on the point of sentence on 06.08.2018."

40. A perusal of the testimony of the prosecutrix as discussed above proves that the accused had taken off her underwear and with a sexual intent touched her vagina. The same is corroborated with the testimony of PW-5 (Asha Ram), PW-6 (Kanak Lata) and PW-15 (W/Ct. Mamta) who found the victim covered in mud and without her undergarment. Hence the act of the accused falls within the purview of Section 10, POCSO Act i.e. aggravated sexual assault.

41. Now the question which needs to be determined by us is whether the accused had committed aggravated penetrative sexual assault. At this stage we deem it necessary to refer to the Medical Jurisprudence (5th Edition) by Dr. R.M. Jhala and V.B. Raju, at page 469. The relevant portion of the same is reproduced as below: -

> *"**In young girls under the age of 12 years the hymen is situated relatively more posteriorly (in backward position) and higher up in a narrow vaginal canal. This prevents the hymen from coming in contact with the male organ in forceful penetration of the organ**. This also saves the hymen from bearing the brunt of the blow and thus it escapes injury. Thus absence of injury to hymen in a girl under 12 years does not rule out the act of rape.*
>
> ***Labia majora**—Next to hymen in positive importance but more than that in frequency are the injuries on labia majora. These, viz., labia majora are the first to be encountered by the male organ. **They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. In case of girls under 12 years where examination of hymen may not prove useful, examination of labia majora given conclusive evidence. The narrowness of the canal makes***

> ***it inevitable for the male organ to inflict blunt, forceful blows on the labia. Such blows invariably lead to contusion, because of looseness and vascularity. The interesting feature of such contusion is its vividness especially on the side it forms inner wall of vagina.*** *Against the pink background of the mucous membrane dark red contusion is visible even on initial inspection."*

42. Medical Jurisprudence as referred to above reflects if the hymen of an adolescent girl is torn due to rape, the penetration has to-be a deep penetration. The Medical Jurisprudence guides that the labia majora are the first to be encountered by the male organ and they are subjected to blunt forceful blows, depending on the vigour and the force used by the accused and counteracted by the victim. The narrowness of the vaginal canal makes it inevitable for the male organ to inflict blunt, forceful blows on the labia and such blows lead to contusion because of looseness and vascularity. The feature of such contusion is revealed against the pink background of the mucous membrane dark red contusion being evident to the naked eye.

43. In the present case, the MLC of the victim reflects that there was neither abrasions/lacerations nor any blood around the vaginal region. In addition to the aforesaid, the gynecologist examination revealed that there was no spotting or tear. The aforesaid facts are confirmed by the deposition of PW-18 (Dr. Surbhi Goyal) who deposed that "***As the doctor had not recorded any bleeding or spotting, the tear of the hymen was probably old".*** Further the perusal of the FSL report reflects that no blood or semen could be detected from the samples which were procured from the person of the victim and the accused

except from ***(Ex..A-16)*** and ***(Ex. C)*** which happens to be the blood sample of the victim and the accused respectively.

44. In terms of the above discussion, we are of the firm view that the present case is not of aggravated penetrative sexual assault, hence, the culpability of the accused cannot be said to be of such nature which can be covered under Section 6 of the POCSO Act.

45. In view of the aforesaid facts, we do not find any infirmity in the impugned judgment passed by learned Trial Court and the conviction of the accused/Somveer under Section 10 of POCSO Act as well as Section 363 of IPC is upheld.

46. Accordingly, CRL.A No.1212/2018 filed by the accused seeking setting aside of the impugned judgment wherein he has been convicted for the charges under Section 10 of POCSO Act as well as Section 363 of IPC and CRL.A No.455/2019 filed by the State seeking enhancement of the punishment from Section 10 of POCSO Act to Section 6 of the POCSO Act are devoid of merit, hence, are dismissed.

47. Copy of the judgment be sent to Superintendent Jail, Tihar Jail.

48. Trial Court record along with a copy of this judgment be sent back forthwith

SANGITA DHINGRA SEHGAL, J.

MANMOHAN, J.

MARCH 06, 2020
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