

\$~R-52

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

Reserved on: 16.03.2023

Decided on: 27.04.2023

+ **CRL.A. 137/2019**

SATISH KUMAR KASHYAP alias **SAGAR** Appellant

Represented by: Mr. Anwesh Madhukar, Adv. through
VC, with Mr. Yaseen Siddiqui, Ms.
Prachi Niswan and Mr. Pranjal
Shekhar, Advs.

versus

STATE Respondent

Represented by: Mr. Laksh Khanna, APP for the State
with Ins. Surender, P.S. Kanjhawala.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

POONAM A. BAMBA, J :-

1.0. Vide this appeal, the appellant is assailing the judgment dated 04.10.2018 (**'impugned judgment'** in short) passed by Ld. ASJ-01, North-West District, Rohini Courts, Delhi, whereby the appellant was convicted for the offence punishable under Section 366 Indian Penal Code, 1860 (**'IPC'** in short) as well as under Section 6 of the Protection of Children from Sexual Offences, 2012 (**'POCSO Act'** in short), in Sessions Case No. 116/2015, in FIR no. 393/2015, Police Station Kanjhawala ; and order on sentence dated 08.10.2018, whereby the appellant was sentenced to undergo

imprisonment for life under Section 6 of POCSO Act with fine of Rs. 10,000/-, in default to undergo simple imprisonment for six month months ; and is also to undergo rigorous imprisonment for a period of 10 years under Section 366 IPC with fine of Rs. 5,000/-, in default to undergo simple imprisonment for three months.

2.0. Briefly stating, the prosecution case is, that on 02.06.2015, at about 5.46 pm, a PCR call (Ex. PW-13/A) was received regarding ‘*galat kaam*’ with a minor girl near *Pani ki Tanki*, Ladpur Road, Kanjhawala. On which, DD no. 35-A dated 02.06.2015 (Ex. PW-8/A) was recorded at Police Station Khajhawala, which was assigned to ASI Suresh/PW-8. On receipt of the said DD, ASI Suresh (PW-8) along with Lady/Ct. Chitra reached the spot/Kanjhawala Chowk, where Smt. U, mother of the prosecutrix (PW-10) and the victim S (PW-7) were met and mother of the prosecutrix informed that ‘*galat kaam*’ has been committed with her daughter. ASI Suresh/PW-8 then accompanied victim S and her parents to Sanjay Gandhi Memorial Hospital (‘SGM Hospital’ in short). IO/WSI Anita/PW-12 also reached the hospital and met victim’s mother U. On inquiry, victim’s mother told that on that day i.e. 02.06.2015, at about 2.00 pm, when she looked around for her daughter/victim S (PW-7) to give her bath, she could not find her. She then searched for S around her house and while she was searching, a child in the neighbourhood (PW-14) informed that the victim S has been taken by Sagar/the appellant/accused, who worked in a factory near their residence. But still, she could not trace her daughter S. While she was still searching for her daughter, she saw the appellant coming from the opposite side along with her daughter and the moment, she saw the appellant, he ran leaving her

daughter/victim S. Her daughter was continuously crying. With the help of neighbours, the appellant was nabbed. In the meanwhile, her daughter/victim S told that the appellant/accused allured her on the pretext of giving her chocolate and took her to some bushes and beat her up. She then checked her daughter and found that her underwear was having blood stains and that a *galat-kaam*/rape had been committed with her daughter. She then checked her daughter's private part and saw that her daughter was even having scratches/abrasions over her entire body caused by the bushes. Victim S and her mother were counselled by a Counsellor. Victim S was got medically examined vide MLC Ex. PW-6/A and was also admitted in the hospital. After medical examination, exhibits of the victim were handed over by the doctor in sealed condition along with one sample seal, which were seized by the IO/PW-12 vide seizure memo Ex. PW-12/A. Statement Ex. PW-10/A of the victim's mother (PW-10) was recorded, on which, rukka for registration of the FIR was sent through Lady/Ct. Chitra. On the basis of the said rukka, PW-2 HC Rajesh Kumar recorded the FIR Ex. PW-2/A in the case under Sections 376 IPC and 6 of POCSO Act.

2.1. Charge sheet mentions that meanwhile, the appellant/accused was arrested vide arrest memo Ex. PW-12/C and his personal search was conducted vide memo Ex. PW-12/D. The appellant/accused was also got medically examined at SGM Hospital by the IO/PW-12 vide MLC Ex. PW-5/A and thereafter, IO seized the exhibits of the appellant vide seizure memo Ex. PW-12/B. The appellant/accused was interrogated and his disclosure statement Ex. PW-12/E was recorded. The appellant/accused also pointed out the place of incident i.e. vacant plot near Public Against

Corruption Office, surrounded by thorny bushes, vide pointing out memo Ex. PW-12/F. On 04.06.2015, exhibits of the present case were sent to FSL Rohini through PW-1 Ct. Sandeep. On 05.06.2015, statement of the victim child was got recorded u/s 164 Cr.P.C (Ex. PW-3/B) by the IO vide application Ex. PW-3/A. Ossification test of the victim S was also got conducted, wherein age of the victim S was opined by the Medical Board (Ex. PW-15/A) to be between 5 to 6 years. After completion of investigation, the charge sheet was filed in the court.

2.2. The appellant was charged for offences punishable under Sections 363/366/307 IPC and Section 6 of POCSO Act. The appellant was acquitted for the offence punishable under Section 307 IPC and was convicted and sentenced for the offences punishable u/s 366 IPC and Section 6 of POCSO Act.

3.0 In order to prove its case, the prosecution examined 15 witnesses.

4.0 On incriminating evidence being put to the appellant/accused, he vide his statement and additional statement under Section 313 Cr.P.C, denied the same and stated that he is innocent. He also stated that he has been falsely implicated in this case by the parents of the victim S because of a previous enmity between him and the victim's parents. He further stated that the police obtained his thumb impression forcibly on some blanks papers and printed proforma and those papers were later on used against him. Appellant chose not to lead any evidence in his defence.

5.0 Learned counsel for the appellant/accused argued that the learned ASJ

failed to appreciate that the testimony of victim S suffered from many discrepancies and there were material improvements in her testimony before the court over her earlier statement under Section 164 Cr.P.C. He argued that in her first statement under Section 164 Cr.P.C before the Ld. Magistrate (Ex. PW-3/B), the victim S did not utter a word about penetration and had simply stated that the appellant had touched her private parts with his hand. Whereas, in her deposition before the Court, she stated about penetration. Same rendered the testimony of prosecution's star witness highly doubtful. In view of the same, the appellant could not have been convicted for penetrative sexual assault. It was also argued that no semen was found either on the appellant's underwear or that of the victim, which also raises serious doubt about any penetrative sexual assault.

6.0. Per contra, the Id. Prosecutor vehemently argued that the prosecution has been able to prove its case beyond reasonable doubt, in view of unimpeachable testimony of the victim child, who was hardly aged about 5-6 years old at the time of incident. Her testimony is corroborated by medical and forensic evidence, whereby it has come on record that she had suffered injuries in her private parts and blood was detected in her underwear. The extent of injuries she suffered is also evident from the fact that even repair of perineal injury (hymenal area) had to be carried out under anaesthesia. Prosecution version regarding the manner in which, the appellant took the victim child to the jungle and committed the heinous offence of penetrative sexual assault has also come on record vide testimony of another child witness/PW-14 and the parents of child victim S i.e. Smt. U PW-10 and Sh. M PW-11. Ld. Prosecutor also argued that as per bone age

determination report of medical board of SGM Hospital Ex. PW-15/A, it has come on record that the victim child's age at the time of incident was 5-6 years i.e. below 12 years. Hence, the appellant has rightly been convicted under Section 6 of POCSO Act.

7.0. We have duly considered the submissions made by both the sides and have perused the record.

8.0. PW-7, the child victim S deposed that the appellant, who used to visit a factory, took her to a jungle where she was made to lie down on thorny jungle/bushes causing injuries on her body ; she was hit with brick on her forehead and even given burn injury in her left armpit ; the appellant had removed his clothes as well as her clothes and sexually assaulted her per-vaginum (*pela-peli kiya*). She screamed but the appellant restrained her. She narrated the incident of jungle to her mother. Police came and beat up the appellant. She was got treated by a doctor. The child victim S even identified Dr. Priyanka Arora, who examined her and happened to be present in the court. She also duly identified the appellant/accused. PW-7 also stated that she had visited the court earlier also, when her statement was recorded. As PW-7 has deposed in vernacular using certain words peculiar to her native place, the relevant portion of her testimony is reproduced here for the benefit of reference.

“Q. Beta batao kya hua tha?”

Ans. Sagar mujhe jungle main pakad kar le gaya aur mere mathe per aur deh per kanta gada diya.

Q. Usne kahan-kahan per aapko kanta lagaya tha?

Ans. Yahan per (the witness has pointed towards her both hands and both legs).

Q. Beta Sagar ne aur kya kiya?

Ans. Usne apna kapda utara aur mera kapda bhi utara aur mujhe jungle main lita diya aur fir 'pela-peli' kiya (the witness is using slang in her native language suggesting of act of sexual assault per veginum).

Q. Beta Sagarne aur kya kiya?

Ans. Usne mera gala bhi dabaya tha aur yahan per mujhe enta (brick) mara (the witness is pointing towards her forehead above her eye) aur mujhe yahan se jalaya bhi tha (the witness is pointing towards her left armpit where she sustained burn injury).

Q. Beta fir kya hua?

Ans. Main chilla rahi thi aur mummy ko bula rahi thi per Sagar ne mujhe bolne nahi diya.

Q. Beta kya aap Sagar ko pehle se jaante the?

Ans. Haan, wo factory main aata rehta tha.

Q. Beta fir kya hua?

Ans. Maine mummy ko jungle ka poora baat bata diya tha.

Q. Beta fir kya hua?

Ans. Fir police aai aur Sagar ko bahut mara.

Q. Beta fir kya hua?

Ans. Mera Doctor se ilaz karwaya tha.

Q. Beta kya aap pehle bhi court main aaye the aur bayan diya tha ?

Ans. Haan, wo ek aunty thi unke kamre main unhone mujh se ghatna ke baare main puchha tha aur maine unhe bata diya tha.

.....”

During cross-examination, the victim S stated as under :-

“Maine apne mummy papa ki baat manti hu. Sagar ne mujhe 'pela-pali' shabd bataya tha.

Q. Beta pela-pali kya hota hain?

Court observation :- The child has exhibited expression of shyness.

Ans. Jo sagar ne apna kapda utara aur mera kapda utara aur mujhe lita diya.

Saara kapda utar diya tha, kachhi bhi utar di thi. Main jungle se apne aap paidal ghar aai thi.

Q. Beta galat kaam kya hota hai?

Ans. Pela-pali.”

8.1. Victim S PW-7 stood by her testimony in cross-examination and in response to a question what did she mean by *galat kaam*, she said ‘*pela-peli*’. In response to a further question as to what did she mean by *pela-peli*, she answered that :-

“Ans. Jo sagar ne apna kapda utara aur mera kapda utara aur mujhe lita diya. Saara kapda utar diya tha, kachhi bhi utar di thi. Main jungle se apne aap paidal ghar aai thi.”

8.1.1. PW-7 stated that the appellant had told her about the said word ‘*pela-peli*’. The Ld. Trial Court has even recorded the demeanour of the victim/PW-7 that she was shy, when she explained these words. Testimony of PW-7, a young child of about 5-6 years (as per the opinion of Medical Board) at the time of deposition, remained unimpeached.

9.0. PW-7 child victim S's deposition that she had narrated the incident of jungle to her mother, finds corroboration in the testimony of her mother/PW-10 Smt. U. PW-10 deposed (on 01.04.2016) that it was second day of 6th month of the previous year, at about 1.00 pm, her daughter S (PW-7) was kidnapped by the appellant and was taken to '*kante main*' (thorny bushes in jungle). She came to know about the same from a boy, with whom, S was playing in the gali ; said boy informed her that the appellant had taken her daughter S with him on the pretext of getting her some *cheez* (eatable). Despite efforts, she could not find her daughter S and when she reached near puliya, searching for her, the appellant was coming with her daughter and on seeing her, he fled away leaving her daughter at puliya. Her daughter S was in a very bad shape having injuries all over the body i.e. on both her arms, legs, back etc. and even had burn injury near her arm-pit and was shivering with fear and was constantly weeping. She was even bleeding from her private part and her underwear was soaked with blood. She raised alarm, on which, the appellant was apprehended by one of his neighbours, who was coming on his motorcycle from opposite direction. She also stated that the appellant was heavily drunk at that time. She further deposed that police was called and arrived and took her daughter S to hospital for medical examination and an inquiry was made from her and her statement Ex. PW-10/A was recorded in the hospital. She also testified that her daughter S became unconscious and remained admitted in hospital for treatment for two days. Subsequently, her daughter's statement was recorded by a lady judge in her room.

9.1. PW-10 stood by her version in her cross-examination and has stated

that on her raising alarm, the appellant/accused was apprehended by a passerby and not her neighbour at puliya and many people had gathered at that time at puliya. Her daughter S told her in the hospital about commission of sexual assault on her by the appellant. She also stated that she did not know the appellant/accused prior to the incident, but had seen him in the locality on several occasions, as he used to visit his relatives, who reside in her neighbourhood. She also stated that the appellant used to create scene in a drunken condition and on one occasion, she had objected to the same, on which the appellant had entered into an argument with her. She categorically denied that the appellant had been falsely implicated because of a previous quarrel. She further stated that when S went missing, she had informed her husband over phone, who arrived home within an hour. Her husband had made a call to the police, on which police officials had arrived.

10.0. PW-7's version that she was taken to Jungle by the appellant and PW-10's version that a boy in the neighbourhood had informed her about the appellant taking her daughter/S away on a pretext, is corroborated by a child witness V/PW-14, aged about 12 years. PW-14 testified that Victim S (PW-7) lives in his neighbourhood and plays with his younger brother M. He also stated that the appellant works in a nearby factory. He stated that on 08.06.2015, in the afternoon, when he was sitting near temple, the appellant was taking S(PW-7) holding her hand and when he inquired as to where was he going, the appellant told that he was taking her for getting her *cheez*. (*unhone kaha ki S ko chij dilane le ja raha hu*). He further deposed that sometime thereafter, mother of S (PW-10) came searching for S, on which

he informed her that '*Sagar uncle cheez dilane le kar gaye hai*'. PW-14 identified the appellant in the court. He stood by his deposition in cross-examination and stated that the incident took place, when it was their summer vacation ; he even described the location of the shop and stated that *cheej wali* shop is at a little distance from Durga Temple. He even explained that the shop is not visible from the temple, but one can see the articles displayed in the shop by hanging. He also stated that inquiry was made from him by the police aunty few days after the incident. He categorically denied that he had not seen the appellant taking S away and has deposed falsely at the instance of his mother, who accompanied him to the court. Nothing of substance could be extracted in his cross-examination so as to impeach his testimony.

11.0. PW-10's version that she had called up her husband, who also reached home is supported by PW-11 Sh. M. He has deposed that on 02.06.2015, while he was away for his work, he received a phone call from his wife at about 5.30 pm on the mobile phone of his co-worker informing that their daughter S was missing since 1 or 2 pm. On receiving the said call, he immediately rushed back home. On reaching near puliya near his house, he saw that the appellant had been apprehended by public persons and his wife/PW-10 and his daughter S/PW-7 were also present ; his daughter S was in a very bad shape having abrasions all over the body and injury on her forehead above her eye and was constantly crying. He was told by his wife that the appellant had sexually assaulted their daughter S. He then called police at number 100 from mobile phone of some public person. Consequent to which, police arrived and took all of them firstly to

police station and thereafter, he along with his daughter and wife were taken to hospital. Police made inquiries from him and his wife. His daughter was medically examined and remained admitted in the hospital for two days. PW-11 is stood by his deposition in cross-examination. He stated that he made a call to the police borrowing someone else's mobile phone as his own phone was switched off. He categorically denied that the appellant was not arrested in his presence. He, in his cross-examination, stated that the appellant used to visit his mama-mami, who resided in their neighbourhood, but he never talked with him. He also stated that the appellant is a drunkard and once, he was creating noise in inebriated condition, which was objected to by his wife, on which the appellant had verbal dual with her. PW-11 however, denied that the appellant has been falsely implicated on account of the previous quarrel between him and his wife.

12.0. Version of PW-11 that he had made a call to the police at number 100 through somebody else's mobile phone finds corroboration in the testimony of PW-13 W/Ct. Usha Yadav. PW-13 has deposed that on 02.06.2015, when she was posted as constable at CPCR, PHQ, at about 17:42:25 hours, she received an information from one Shiv Kumar through telephone number 9289112188 that *-caller kaha raha h ki ek aadmi ne ek ladki ke sath galat team kiya h. Us ladki ke family member bhi wahl par-The caller also mentioned the address i.e. place of Incident as "Kanjhawala Chowk Ke Pass Pani Ki tanki, Ladpur Road.*', on which she filled up PCR form Ex. PW-13/A. PW-13 was not cross-examined.

13.0. Ld. Counsel for the appellant argued that PW-7's testimony before the Court cannot be believed as it suffers from various discrepancies and material improvements over her earlier statement under Section 164 Cr.P.C Ex. PW-3/C. Victim/PW-7 has not stated anything about penetrative assault in her statement under Section 164 Cr.P.C, as deposed before the court. Further, she did not state before the Court that she was beaten up as has come in the deposition of her mother/PW-10. In this respect, it would be worthwhile to refer here to PW-7's statement under Section 164 (Ex. PW-3/C), which inter alia reads as under :-

“Q1 : Kya hua apke saath ?

*Ans. **Kanta main pakadkar le gaya tha.***

Q2. Kon lekar gaya tha ?

*Ans. **Sagar.***

Q. 3. Phir kya kiya ?

Ans. Innt (brick) se mara munh par. Gala dabaya.

Q. 4. Aur kya kiya ?

*Ans. **Galat kaam kiya.** Hamara kacha utara. Apna bhi Uttara.*

Q.5. Phir kya kiya ?

Ans. Haath lagaya. Su-su jagah par.

Q.6. Aur kuch kiya ?

Ans. Nahi. Bus.”

13.1. From the plain reading of PW-7's statement under Section 164 Cr.P.C, it is apparent that S, a child barely of age of 5-6 years has in her short statement given complete details about the appellant having taken her to 'thorny bushes/kanta mein pakad kar le gaya', hit her on her face with

brick and pressed her throat and also did ‘*galat kaam*’ with her after removing his as well as her underwear and even touched her *su-su wali jagah*. It cannot also be lost sight of that statement of the child victim was recorded on 05.06.2015 i.e. merely two days after the incident, while she was still undergoing unthinkable mental and physical trauma. There is hardly any inconsistency or material contradiction in her deposition before the court, which came to be recorded about nine months later, when she gave details of the incident in response to the questions put to her during her examination/cross-examination before the court. Moreover, PW-7’s testimony of penetrative sexual assault finds corroboration in medical evidence, which has come on record. Even otherwise, initial statement of a person much less of the child victim recorded under Sections 161 Cr.P.C/164 Cr.P.C can not be expected to be the encyclopedia of the entire incident. In this regard, reference may be made to the judgment of a Co-ordinate Bench of this Court in ‘**State (GNCT of Delhi) vs. Samay Chand**’ 2018 SCC OnLine Del 9609 (DB), wherein, in para 27, it was observed that :-

“27. It is well settled that the initial statement recorded under Section 161 Cr.P.C./ Rukka, or even the FIR, are not meant to be encyclopedia of the entire incident. It is the crux of the allegations made in the statement which are material and deserve attention.....”

14.0. PW-6 Dr. Priyanka Arora, SR Gyane, SGM Hospital, who examined the child victim S, deposed that on 02.06.2015, at about 8.45 pm, child victim S, aged about 3 years was brought to the hospital by woman

constable for medical examination and she examined her vide MLC Ex. PW-6/A. Said MLC inter alia reads as under :-

**“Name S..... D/O M..... Age 3 years Sex Female
Brought by w/ct Chitra Police station kanchawala**

• • • • •

Date and hour of arrival 02/06/2015

No. and name of constable w/ct chitra 1031/OD

Date of admission 02/06/2015

Brief description of the incident

Her mother caught him and they have punished him

He had been beaten by public and her mother reported to police. Acc to her mother when she came there was abrasion over her whole body and there was staining of her undergarments but she could not be able to tell anything What did happen with her

General history

Aged 3 years

General Physical Examination

I. Whether orientated in space and time oriented and conscious

II. Pulse 102/m BP_____Temp N

III. Clothing stains of blood /semen

Examination of injuries

1. abrasion over whole body

(as her mother is giving history of bruising her at some ...place)

Local examination of genital Parts:

● ● ● ● ● ● ● ● ● ●

B. External Genitalia

I. Labia Majora: any swelling, tears, edematous, bruises or

abrasion : abrasion over both side Labia majora

II. Labia Minora: scratch, bruising, fingernail marks tear, infection:

III. Fourchette: bleeding, tear: **tear seen, no acute bleeding**

IV. vulva injury, injury bleeding, discharge : hymenal tear seen

V. perineum : tear seen, no acute bleeding

C. Hymen-intact/torn: if torn-site, nature, extent of injury : **torn**

Injury-fresh or old/oedeme/congestion/tenderness : fresh, slight oozing from lower edge injury

D.Vagina & cervix (any bleeding/tear/discharge/oedema/tenderness)

Not done

E. Anus NAD (done by surgeon short HA/sedation)

CLINICAL OPINION

A) Consistent with recent sexual intercourse/assault

Date: 02/06/15 Time of Completion: 08:45 pm

14.1. PW-6, Dr. Priyanka Arora deposed that she found abrasions over whole body of the patient. During her internal examination, which was done under short general anesthesia, injuries were found over fourchette, hymen and abrasion over labia majora ; oozing was present from the hymeneal tear only. Repair of perineal injury (hymeneal area) and sampling was done. PW-6 in her cross-examination categorically denied that the kind of abrasion found on labia majora of the child was possible due to infection or itching of that area. She also stated that the hymeneal tear found suffered by the victim, was recent in nature as the blood was still oozing therefrom. She also stated that no infection at the vaginal area of the child was noticed.

14.2. Thus, from the MLC Ex. PW-6/A and testimony of PW-6 Dr. Priyanka Arora, it is established that there were abrasions all over the body of victim S, which corroborate her version that the appellant had taken her to jungle and caused injuries to her/’*mere mathe par aur deh par kanta gada diya*’. Further, torn hymen and fresh injuries in and around her genetelia and clinical opinion finding the said injuries to be consistent with recent sexual intercourse/assault further corroborates PW-7’s version of

penetrative sexual assault. It is also noteworthy that as per PW-6 Dr. Priyanka Arora, perineal injury/hymeneal area had to be repaired. It has come in the testimony of the parents of the victim S i.e. PW-10 Smt. U and PW-11 Sh. MP that the victim remained admitted in the hospital for two days. MLC Ex. PW-6/A records only the date of admission as 02.06.2015. However, the Ld. Prosecutor drew attention of this Court to the discharge card of the victim of SGMH Hospital, Mangolpuri, Delhi, which is part of her medical record filed along with charge sheet (page no. 173 of TCR), though not exhibited, to show that the victim was admitted in the hospital on 02.06.2015 and was discharged on 04.06.2015. Be that as it may. As per the MLC Ex. PW-6/A and testimony of PW-6, it has come on record that the victim S was examined internally and repair of perineal injury suffered by her, was carried out under short general anesthesia.

15.0. Testimony of PW-7, the victim, is also supported by forensic evidence. PW-4 Ms. Monika Chakravarty, Senior Scientific Assistant, (Biology) FSL, Rohini, Delhi. has deposed that on 04.06.2015, four sealed parcels were received in FSL Rohini, regarding this case and all the parcels on comparison with sample seal were found duly sealed. She, after examining the exhibits, had given detailed Biological and DNA examination report, Ex. PW-4/A and prepared a data allelic chart Ex. PW-4/B. PW-4 was not cross-examined, thus the said reports as well as her testimony, remained uncontroverted. As per report of biological analysis, blood was detected on exhibits '1c'(Cervical mucus collection), '1d1' (vulval swab), '1g' (washing from vagina), '1k' (underwear of victim) and 3 (underwear of appellant) However, semen could not be detected on any of the exhibits.

Existence of blood of the victim S on her underwear Ex. '1k' and also in the vaginal wash/vulval swab and cervical mucus read with her MLC Ex. PW-6/A further corroborate the version of the victim of penetrative sexual assault. It also supports the testimony of PW-10 mother of the victim that when the victim was recovered, she had noticed bleeding from her private parts and her underwear also had blood.

15.1. Ld. Counsel for the appellant argued that no semen was found either on the appellant's underwear or that of the victim, which raises serious doubt about any penetrative sexual assault. Suffice it to state that in view of the above medical evidence, absence of semen in the victim and appellant's respective underwears is of no consequence. In this respect, reference with benefit is made to the judgment of Hon'ble Supreme Court in "**Santosh Kumar vs State of M.P. 2006 (8) JT SC 171**" wherein in para 7, it was observed :

"7. The question, which arises for consideration, is whether the proved facts establish the offence of rape. It is not necessary for us to refer to various authorities as the said question has been examined in considerable detail in [Madan Gopal Kakkad v. Naval Dubey](#) (1992) 3 SCC 204 and paragraphs 37 to 39 of the said judgment are being reproduced below:-

" 37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

" Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen

and rupture of hymen. **Partial penetration of the penis** within the Labia majora or the vulva or pudenda **with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law.** It is therefore **quite possible to commit** legally the **offence of rape without** producing any injury to the genitals or **leaving any seminal stains.**

38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

" **Sexual intercourse: In law**, this term is held to mean **the slightest degree of penetration** of the vulva by the penis **with or without emission of semen.** It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

".....even slight penetration is sufficient and **emission is unnecessary.** "

.....”

15.2. As noted above, the victim suffered various injuries in her vaginal area including fresh hymeneal tear, which had to be repaired under anesthesia. Same leaves no doubt whatsoever, about penetrative sexual assault having been committed by the appellant, as also opined in victim's MLC Ex. PW-6/A.

16.0. In view of the above evidence on record, it is established beyond reasonable doubt that the appellant/accused had taken the victim child S aged about 5-6 years out of the keeping of her parents without their consent, to the nearby bushes and committed penetrative sexual assault on her. Not only that he even physically assaulted the Victim S.

17.0. Vide Ex. PW-15/A, Medical Examination for age determination report of Medical Board of SGM Hospital and testimony of PW-15 Dr. Rijul Saini, SR, Surgery, SGM Hospital, Delhi, it has come on record that age of the victim child as on 07.07.2015 on the basis of her physical, dental and x-ray examination, was found to be between 5 to 6 years. That is, the victim S was less than 12 years of age on 02/06/2015 on the date of sexual assault. Though, it was put to PW-15 that the child was not examined in his presence, which he admitted. When the said report (Ex. PW-15/A) was put to the appellant/accused during his statement under Section 313 Cr.P.C, the appellant only stated that it is a matter of record thus not disputing the same. Considering that the victim S was below 12 years of age at the time of commission of penetrative sexual assault by the appellant, same amounts to aggravated penetrative sexual assault in terms of Section 5 (m) of POCSO Act and is punishable under Section 6 of POCSO Act.

18.0. In view of the above, we find no merit in this appeal. The appeal is accordingly dismissed.

19.0. Copy of the judgment be uploaded on the website and be also sent to the Superintendent Jail for updation of record and intimation to the appellant.

(POONAM A. BAMBA)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 27th, 2023/csc