



\$~

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

%

Reserved on: 04.07.2024
Pronounced on: 26.07.2024

+ **CRL.A. 1/2024 & CRL.M.(BAIL) 1/2024****BHARAT JAINA**

.....Appellant

Through: Mr. Sunil Choudhary
 (DHCLSA) and Ms. Preeti
 Shah, Advocates

versus

STATE NCT OF DELHI

.....Respondent

Through: Mr. Naresh Kumar Chahar,
 APP for the State with SI
 Pinki, P.S. Nihal Vihar

CORAM:**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****J U D G M E N T****Index to the Judgment**

FACTUAL BACKGROUND	3
SUBMISSIONS BEFORE THE COURT	5
ANALYSIS & FINDINGS.....	9
i. Age of the Victim Child.....	9
ii. Statements and Testimonies of the Prosecution Witnesses	10
Child Victim's Statement under Section 164 of Cr.P.C.	10
Child Victim's Testimony	10
Mother's Testimony	12
Sister's Testimony	13
Father's Testimony	13



iii.	Defence Evidence: An Overview	14
	Statement of Accused.....	14
	Testimony of DW-1	14
	Testimony of DW-2	15
iv.	Offence under Sections 363 and 366 of IPC: Whether proved against the appellant?.....	16
	Appellant's conviction under Section 363 of IPC.....	17
	Appellant's conviction under Section 366 of IPC.....	19
	Appellant's Plea of Alibi.....	20
v.	Whether the offence of Rape or Aggravated Penetrative Sexual Assault has been proved against the appellant?.....	23
vi.	The Decision	30

SWARANA KANTA SHARMA, J.

1. The appellant Bharat Jaina has preferred this appeal under Section 374(2) read with Section 482 of the Code of Criminal Procedure, 1973 (**'Cr.P.C.'**) against the judgment dated 25.08.2023 and order on sentence dated 18.09.2023, passed by the learned Additional Sessions Judge (POCSO), West District, Tis Hazari Courts, Delhi (**'Trial Court'**), in CRN No. DLWT01-002433-2018, arising out of FIR No. 27/2018, registered at Police Station Nihal Vihar, for offences punishable under Sections 363/366/376 of the Indian Penal Code, 1860 (**'IPC'**) and Section 6 of Protection of Children from Sexual Offences Act, 2012 (**'POCSO Act'**).

2. The appellant has been convicted and sentenced by the learned Trial Court, in the present case, in the manner as follows:

- (i) to undergo twelve years of rigorous imprisonment with fine of Rs. 10,000/-, for offence under Section 6 of POCSO Act, and in default, to undergo simple imprisonment for one month



- (ii) to undergo two years of rigorous imprisonment with fine of Rs. 2,000/- under Section 363 of IPC, and in default, to undergo simple imprisonment for fifteen days; and
- (iii) to undergo five years of rigorous imprisonment with fine of Rs. 2,000/- under Section 366 of IPC, and in default, to undergo simple imprisonment for one month.

FACTUAL BACKGROUND

3. The present case originated from a complaint dated 14.01.2018, made by the victim's mother 'N'. She alleged that on 14.01.2018, at about 6 pm, when she was breastfeeding her 5 months old son and her three daughters were playing outside their house, her daughter 'Po' had informed her that the victim 'P' had been taken away by the appellant herein and he was not allowing her to return. The complainant had then gone to the house of the appellant and had seen that he had removed his pants and had also removed the *salwar* of her daughter 'P', who was about 6 years old, and he was lying on her. Upon seeing the mother of victim, the appellant had come out of the room and had asked for forgiveness. She further alleged that her daughter i.e. victim 'P' had told her that the appellant had removed her *salwar*, assaulted ('*chhed-chhaad*') her in her urinal area, and had laid on her. Based on this complaint, the FIR in question was registered on 14.01.2018. The minor victim was medically examined *vide* MLC No. 381/2018 at Sanjay Gandhi Hospital, Delhi. The statements of the victim 'P' and her mother 'N' were recorded under Section 164 of Cr.P.C. on 15.01.2018.



4. After investigation, a charge-sheet was filed under Sections 363/366/376 of IPC and Section 6 of POCSO Act, and cognizance was taken. Charges were also framed against the appellant under these sections by the learned Trial Court on 22.05.2018.

5. Thereafter, 08 witnesses were examined by the prosecution in Prosecution Evidence. The statement of accused under Section 313 of Cr.P.C. was recorded on 07.06.2022 and 02 witnesses were examined in Defence Evidence.

6. After hearing final arguments and upon conclusion of trial, the learned Trial Court held the appellant guilty for offences under Sections 363/366/376 of IPC and Section 6 of POCSO Act. The concluding portion of the impugned judgment records as under:

“103. In view of the discussion above, the evidence led by Prosecution is cogent, trustworthy, consistent, corroborative and inspires confidence. Thus, prosecution has proved its case beyond reasonable doubt for offences punishable Section 363/366/376 IPC and Section 6 of POCSO Act, 2012 (defined under Section S(m) of the Act) against accused Bharat Jaina.

CONCLUSION

104. In view of above discussions, accused Bharat Jaina is convicted for the offences punishable Section 363/366/376 IPC and Section 6 of POCSO Act, 2012.”

7. By way of present appeal, the appellant assails the aforesaid conclusion reached by the learned Trial Court, and prays that he be acquitted in the present case.



SUBMISSIONS BEFORE THE COURT

8. **Learned counsel appearing on behalf of the appellant,** while challenging the impugned judgment and order passed by the learned Trial Court, argues that the appellant herein has been falsely implicated in the present case, since there was a dispute relating to payment of money between the appellant and the mother of the victim. It is stated that no such incident, as deposed by the victim or her mother, had ever taken place. It is also stated that the learned Trial Court had put leading questions to the victim in this case, which was not permissible in law. Learned counsel for the appellant also draws attention of this Court to the testimony of the child victim recorded in the Court, and submits that the victim had in fact only nodded her head in affirmative or had denied by way of nodding her head, to the questions which were put to her by the learned Trial Court. He states that this would lead to a conclusion that the child victim either did not understand the questions or could not answer them properly, and therefore, the testimony of the child victim can be of no assistance to the prosecution.

9. Learned counsel for the appellant also draws attention of this Court to the MLC of the child victim and states that when the statement of the doctor concerned and especially her cross-examination is read, it will lead to a conclusion that no sexual assault had taken place on the victim. He states that since the victim child was only 6 years of age and the accused herein is more than 60 years of age, it would not be possible that neither the hymen was torn nor any injury was caused to the private part of the victim child. It is



further argued that the MLC which has been filed on record has not supported the prosecution's case in any manner, even for the purpose of drawing an inference against the present accused under the POCSO Act. Learned counsel, in this regard, draws attention of this Court to FSL report Ex.PW-8/B and states that the FSL report did not find any traces of semen on the clothes or on the person of the victim child. He also states that since neither the FSL report nor the MLC support the prosecution's case, the learned Trial Court has committed an error by holding that the prosecution has been able to prove its case beyond reasonable doubt.

10. Learned counsel for the appellant also argues that there is no other corroborative evidence on record which can corroborate the statement of the victim child. He states that there were two other children with whom the victim child was allegedly playing, but they have not been made witnesses in this case, and therefore, an adverse inference be drawn against the prosecution that though the witnesses were available, they were not examined, and in case they would have been examined, they would have deposed against the prosecution. He further states that the appellant herein has remained in judicial custody for about seven years and is presently aged about 67 years. Learned counsel for appellant also states that there are inconsistencies and discrepancies in the statement of the victim child as well as the mother and the sister of the victim child and therefore, the impugned judgment be set aside.

11. **Learned APP for the State** assisted by learned counsel for the victim, on the other hand, contests the contentions raised by learned



counsel for the appellant and states that the victim in this case was admittedly less than 6 years of age whereas the accused was 60 years of age. He states that under Section 29 of POCSO Act, a presumption against the accused is drawn in cases, such as the present one since the facts and circumstances of this case including the fact that the mother of victim child, sister of the victim child and the victim child herself have clearly deposed that the accused was lying over the victim, prove the commission of offence in question. The witnesses have, therefore, been able to depose clearly that the appellant herein was in the process of/was committing penetrative sexual assault of the victim child. It is stated that the victim child was taken away from her lawful guardian i.e. her mother from the spot. It is also submitted that after the matter was reported to the police, the victim was also medically examined. It is also stated that it was not essential that the hymen of the victim would have been torn since the child was of tender age, neither was it essential that the child victim should have suffered injuries to the extent that it would have revealed blood on her innerwear or on her person. In this regard, he draws the attention of this Court to the case of ***Chand Bibi v. State*** 2019 SCC OnLine Del 6393. Learned APP for the State also draws attention of this Court to a judgment of the Co-ordinate Bench of this Court in case of ***Rais v. State of NCT of Delhi*** 2020 SCC OnLine Del 2 regarding conviction under Section 6 of POCSO Act wherein it was observed that “it is apparent from the plain language of clause (a) of Section 3 of the POCSO that the penetration *to any extent* would constitute penetrative sexual assault. Thus, although the medical evidence



obtained in this case does not indicate that there was a complete penetrative assault, the same does not absolve the accused from committing a penetrative assault as described by the victim”.

12. Learned APP for the State, assisted by learned counsel for the victim, also argues that the ocular evidence is considered the best evidence, unless there are realms of doubt. It is also argued that the child in question has clearly mentioned as to what had transpired on the day of incident in question, between her and the appellant. The appellant has been clearly identified by the witnesses including the victim in question when she was examined by the learned Trial Court and upon seeing the appellant in the Court, the victim child had duly identified him.

13. It is also submitted by learned APP for the State that the contentions regarding putting leading questions to the child victim can be of no assistance or can in no way advance the case of the present appellant. In this regard, he states that considering the peculiar facts and circumstances of the case and the fact that the victim child in this case was of tender age, it was not possible to ascertain the truth of the matter without asking certain questions to the victim. It is pointed out that in case the conviction would have been recorded only on the solitary statement of the victim herein, the same could have been disputed. However, since the testimony of the child victim is duly corroborated by the medical evidence as well as the statement of PW-2 and PW-3, the learned Trial Court has correctly recorded in the impugned judgment that being corroborated by other evidence, the same can be read against the appellant. He



further argues that even the cross-examination of the victim is by way of nodding the head and not by answering anything, and no objection in this regard was raised by the learned defence counsel before the learned Trial Court.

14. It is also stated by learned APP for the State and as far as the contention of the learned counsel for the appellant regarding recording of incorrect address of the spot in question is concerned, he states that no such question was ever asked in the cross-examination of the witnesses by the learned defence counsel, before the learned Trial Court. Therefore, it is prayed that the present appeal be dismissed and the impugned judgment and order of conviction be upheld.

15. This Court has **heard** arguments addressed by learned counsel for the appellant and learned APP for the State and has perused material available on record.

ANALYSIS & FINDINGS

i. Age of the Victim Child

16. At the outset, this Court deems it necessary to note that in the FIR and MLC of the victim child, her age has been mentioned as six years. However, during the course of investigation, the school records pertaining to the victim child were obtained and as per the same, her date of birth is 01.02.2015, meaning thereby that on the date of the incident i.e. 14.01.2018, the victim child was less than three years of age and at the time of her deposition, she was about



three years and six months old. While recording the testimony of the victim child, the learned Trial Court had also recorded her age as four years.

17. Therefore, while some statements recorded in the present case may mention the age of victim as four years and some may mention six, the fact that the victim child in this case was below the age of twelve years, so as to charge the appellant for offence under Section 5/6 of POCSO Act, has not been disputed by the accused or the learned defence counsel, either before the learned Trial Court or before this Court.

ii. Statements and Testimonies of the Prosecution Witnesses

Child Victim's Statement under Section 164 of Cr.P.C.

18. In her statement recorded under Section 164 of Cr.P.C. on 15.01.2018, the child victim 'P' had stated that on the day of the incident, she was playing on the road and an uncle, whose name she did not know, had taken her somewhere. Thereafter, the said uncle had removed her underwear and also removed his clothes, and had then tried to insert his penis into her vagina, and after some time, her mother had come and saved her.

Child Victim's Testimony

19. The minor victim 'P' in the present case was examined by the prosecution as PW-1. This Court notes that her testimony was recorded in a question-answer format, considering her tender age.



Questions were asked to the victim, considering the fact that she was only about 4 years of age at that point of time.

20. As reflected from the trial court record and the impugned judgment, the victim 'P' had nodded her head in affirmation, to the following questions:

- I. whether a bad man had lifted and taken her away? (*koi gande uncle aapko uthha kar le kar gaye thhe?*)
- II. whether the appellant herein, who was shown to her on TV screen, had taken her away? (*kya yahi uncle aapko uthha kar le gaye thhe?*)
- III. whether the appellant had taken off her clothes as well as his clothes? (*kya inn uncle ne aapke kapde utaare the?; kya inn uncle ne apne kapde utaare thhe?*)
- IV. whether the appellant had attempted to insert, as well as actually inserted, his private part in the private part of the victim? (*kya inn uncle ne apna su-su aapke su-su mein daalne ki koshish ki thhi?; kya unhone apna su-su aapke su-su mein daal bhi diya thha?*), and
- v. whether her mother had come at that time? (*kya mummy aa gayi thhi uss samay?*).

21. However, the victim 'P' had nodded her head in negative, to the following questions:

- I. whether she had suffered any pain during the incident? (*kya aapko dard ho raha thha?*), and



II. whether anyone had come at that time or whether police had come to her house? (*kya uss samay koi aa gaya thha?; kya police bhi aayi thhi ghar par?*)

22. In her cross examination, the victim PW-1 had shaken her head in negative to the questions if she used to go to play with accused every day or if she used to go to the house of accused or if any aunt was there in his house at the time of incident.

Mother's Testimony

The mother of the child victim i.e. Ms. 'N' was examined during the course of trial as PW-2. She deposed that on 14.01.2018, she was feeding her 04 months old son, and her daughters namely 'P' i.e. the victim and 'Po' i.e. PW-3 were playing downstairs with the children of her landlord. After sometime, her daughter 'Po' had come running towards her and had informed her that the appellant had taken her daughter 'P' to his room. She had asked her daughter 'Po' to bring back 'P' from there, however, 'Po' had told her that the appellant was not allowing her daughter 'P' to come from his room. She further deposed that after this, she had immediately run towards the room of the appellant alongwith her daughter 'Po', and upon reaching the spot, she had seen her daughter 'P', lying in the bed and her clothes had been pulled down till her ankles and the pant of the appellant was also pulled down till his ankle and he was lying on her daughter 'P'. It was deposed by her that upon seeing her, the appellant had put on his pants and had run away from there. However, when PW-2 was taking her daughter in her arms out of the room of the appellant, he



had come there and had started touching her feet, saying that he had not done anything.

Sister's Testimony

23. Ms. 'Po', who is the sister of the victim 'P' and daughter of PW-2, was examined as PW-3 in the present case. She deposed that victim 'P' was her younger sister, and on the day of incident, at around 6:00 pm, she alongwith her sisters 'K' and 'P' and two children of their landlord, was playing in front of her house. The appellant had taken away her younger sister i.e. victim 'P' with him to his room. She has further deposed that she had followed them and had asked the appellant herein to send back her sister 'P', however, he had refused to do so. Thereafter, she had called her mother, who had come to the spot, and both of them had then gone to the room of the appellant to take back victim 'P'. Upon reaching there, PW-3 had seen her sister 'P' lying on the bed without her lower (*pyjama*) and that the appellant was lying on her sister, without his trousers. Thereafter, her mother had taken away the victim 'P' and the appellant had run away.

Father's Testimony

24. Sh. 'AK' i.e. the father of the victim 'P' was examined as PW-4 by the prosecution. In his testimony, he had deposed that he used to work as a labourer and on 14.01.2018, when he had returned to his house from work at about 6:30 p.m., his daughter 'Po' had informed him that the appellant herein had taken her sister i.e. victim 'P' inside his room. Her daughter 'Po' had further told him that when she had



gone to take victim 'P' from the room of appellant, she had seen him as well as her sister 'P' lying in naked condition. She had also informed that her mother i.e. wife of PW-4 had then taken the victim 'P' to the police station to report the matter.

iii. Defence Evidence: An Overview

Statement of Accused

25. In his statement recorded under Section 313 of Cr.P.C., the appellant had denied the incriminating evidence that has emerged on record, against him, by way of prosecution evidence. He stated that he was innocent and had been falsely implicated in this case. The reason for the same, as per the appellant, was that the mother of the victim i.e. PW-2 had been asking for Rs.4,500/- from the appellant as her dues for washing the clothes and cleaning the house of the appellant, however, the dues as per the appellant were only Rs.2,000/-. He further stated that on the day of alleged incident, the mother of the victim had asked him to return Rs.4,500/- at the police station, if he wanted her to withdraw the present complaint. In response to some questions, he also stated that he was not at his home at the time of alleged incident.

Testimony of DW-1

26. In his defence evidence, the appellant herein had first examined Sh. Damodar Patra, his son-in-law, as DW-1. He deposed that along with his children, his father-in-law i.e. the appellant, and mother-in-law, he used to live at RZG-61, Nihal Villar, Delhi for



more than two years, which was a one room house. He stated that on the day of alleged incident, he was present at the above-said house along with his wife and children. At about 1:45-2:00 pm, the appellant herein had come home for lunch and after having the same, he had left the house as he had some work, and thereafter, he had returned home at about 7-7:30 pm. He has further deposed that at about 9:00 pm, a phone call was received from P.S. Nihal Vihar, asking the appellant to come to the police station, and upon inquiring, they were told about a complaint received from victim's mother 'N'. It was deposed by DW-1 that he along with the appellant had gone to P.S. Nihal Vihar, where victim's mother 'N' was present and she had told the police officials that the appellant was not giving her Rs.4,500/-, and thereafter, the police officials had arrested the appellant. He also deposed that police officials had never visited their home for any enquiry, nor they had made any enquiry from any person of the locality.

Testimony of DW-2

27. One Sh. Vijay Bahadur was examined as DW-2. Who has deposed that on 14.01.2018 i.e. the day of incident, as he was facing problem in the drainage pipe of his house, he had gone to labour chowk near Naag Mandir, Prem Nagar, Delhi at about 9:30 am, and he had hired the appellant herein for Rs.700/- for the plumbing work, who had started the work at his house from 10:00 am. He deposed that he had bought a 4 inch plastic pipe of 7 ft length and other plumbing items from Jindal Hardware, Prem Nagar, Delhi and had



handed over the same to the appellant. The appellant had worked till 1:30 pm and left the house for lunch and had then come back at 3:30 pm and worked till 7:00 pm. He also deposed that he had paid Rs.700/- to him after completion of work. DW-2 also deposed that in the year 2020, he had called the appellant Jaina for some work, but the phone was picked by someone else, who informed him that the present appellant had been in jail, and thereafter, DW-2 had come to Court and had collected information about the case against him, from the Court staff and had also got the mobile number of the appellant's counsel from the Court staff.

iv. Offence under Sections 363 and 366 of IPC: Whether proved against the appellant?

28. In the present case, charges were framed, *inter alia*, under Sections 363 and 366 of IPC against the appellant. The learned Trial Court, *vide* the impugned judgment, held the appellant guilty for the offence of kidnapping the victim from lawful guardianship under Section 363, and kidnapping the victim to force or seduce her to illicit intercourse under Section 366. Therefore, it shall be appropriate to first take note of the law with respect to these offences and thereafter examine the facts of the present case, and the evidence produced before the learned Trial Court, on the anvil of essential ingredients of the offences in question.



Appellant's conviction under Section 363 of IPC

29. The offence of kidnapping from lawful guardianship has been defined under Section 361, and punishment thereof has been provided under Section 363 of IPC. These provisions are extracted hereunder:

“361. Kidnapping from lawful guardianship.— Whoever takes or entices any minor under sixteen years of age if a male, or under 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.

Exception.— This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

363. Punishment for kidnapping.— Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

30. From a perusal of the above-quoted provisions, the following essentials of Section 361 of IPC can be carved out:

- I. *Victim:* The victim is a male below 16 years of age, or a female below 18 years of age, or is a person of unsound mind.
- II. *Custody:* The victim was in the custody of a lawful guardian.
- III. *Action:* There is a taking or enticing of such a minor or person of unsound mind.



IV. *Consent*: The kidnapping is done without the consent of the guardian of the minor or person of unsound mind.

31. **In the case at hand**, after perusing the testimonies of the witnesses available on record, this Court is of the opinion that the appellant, Bharat Jaina, had taken the victim, who was a female child, aged about four years at the time of the offence, out of the custody of her parents without their consent while she was playing outside her house. In this regard, this Court has taken note of the fact that during the course of trial, the victim PW-1 had identified the appellant as the person who had taken her away on the day of incident. Further, the appellant had also been identified by PW-3 i.e. the sister of the victim, who had witnessed the appellant taking her sister i.e. the victim from the spot where she was playing with her. Thus, PW-3 is an eyewitness to the offence of kidnapping. The testimony of PW-1 is further corroborated by PW-2 i.e. her mother, who had gone to the house of the appellant and seen him with her daughter. PW-7, who is the investigating officer, also testified that PW-2 had reported to her that the appellant herein had taken her daughter from outside her house, to his house.

32. Therefore, in this Court's opinion, the essential elements of the offence, including the age of the victim, her custody under lawful guardianship, the act of taking or enticing of the victim by the appellant, and the absence of guardian's consent, have been clearly established through consistent and corroborated testimonies recorded during the course of trial. Thus, the learned Trial has rightly held that all the elements of kidnapping, as defined under Section 361 of IPC,



have been successfully proved by prosecution against the appellant, beyond a reasonable doubt.

Appellant's conviction under Section 366 of IPC

33. The appellant herein has also been convicted by the learned Trial Court for the offence of kidnapping, abducting or inducing a woman to compel her marriage, etc., as defined under Section 366 of IPC. The said provision reads as under:

“366. Kidnapping, abducting or inducing woman to compel her marriage, etc.— Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; And whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

34. The essential ingredients of Section 366 of IPC, can be summarised as follows:

- I. *Victim:* The victim is a woman.
- II. *Action:* Kidnapping, abducting, or inducing a woman
- III. *Intent:* To compel the victim to marry any person against her will, or knowing it is likely that she will be compelled to marry against her will; or to force or seduce her to illicit intercourse,



or knowing it is likely that she will be forced or seduced to illicit intercourse.

35. **In the present case**, this Court has held in the preceding discussion that the act of kidnapping the child victim herein has been proved beyond reasonable doubt by the prosecution. Further, from the testimonies of the witnesses examined before the learned Trial Court, it has also come on record that the victim 'P' was kidnapped by the appellant, in order to force or seduce her to illicit intercourse and the appellant knew that victim 'P' would likely be forced or seduced to illicit intercourse. The eye-witnesses PW-2 i.e. mother of the victim and PW-3 i.e. sister of the victim had seen the appellant lying naked over the victim 'P', whose clothes had also been removed by the appellant. The same is also corroborated by the testimony of the victim i.e. PW-1 herself.

36. Therefore, this Court is of the opinion that the learned Trial Court has rightly held the appellant guilty for offence under Section 366 of IPC, as the same has been proved beyond reasonable doubt.

Appellant's Plea of Alibi

37. During the course of trial, the appellant herein had raised a plea of *alibi*, in his statement recorded under Section 313 of Cr.P.C., and had sought to prove the same through examination of two defence witnesses i.e. DW-1 and DW-2.

38. Before this Court, it has been argued on behalf of the appellant that the learned Trial Court has failed to correctly appreciate the defence evidence, which in fact, proves that the appellant was not



present in his house at the time of incident, and thus, he could not have committed any of the offences in question.

39. To appreciate this argument, this Court has perused the defence evidence as well as the findings of the learned Trial Court in this regard.

40. As far as DW-1 i.e. son-in-law of appellant is concerned, he had deposed that he was present in the house of appellant on the day of alleged incident. He also deposed that in the afternoon, the appellant had come to the house for lunch and after having the same, he had left the house by saying that he had some work, and thereafter, he had returned home at about 7-7:30 pm. However, the learned Trial Court has held that the testimony of DW-1 does not inspire confidence and is insufficient to establish a plea of *alibi*, for the following reasons:

“95. DW-1 tried to prove the plea of alibi, but DW-1 had never approached the police or any Court with the same plea during investigation or during initial stage of trial or demanded any further investigation on this aspect and same has been admitted by him in his cross examination by Ld. Addl. PP for the State and the reason explained by him is that police officials told him to tell the facts before the Court. The reason given by DW-1 is difficult to accept as it is neither cogent nor reasonable.

96. DW-1 has exhibited his gas connection at his aforesaid address, Ex. DW-1/B, but the said connection was registered on 22.02.2018, i.e., after the incident and it is not clear as to when his Aadhaar Card, Ex. DW-1/A has been made of the said address and he has not deposed that at the time of incident, he was residing at the said address, rather he stated that he was present there. The evidence of DW-1 does not inspire confidence and he had been brought just to create an evidence in favour of the accused and, thus, unreliable as plea of alibi has to be established by accused as onus lies on him, but he failed to do so.”



41. This Court is unable to find any fault with the above mentioned reasons recorded by the learned Trial Court, more so since during the course of arguments before this Court, learned APP for the State had brought this Court's attention towards the statement of accused under Section 313 of Cr.P.C. wherein in response to question no. 06, the appellant had answered that he was not present at the house at the time of incident and rather his wife, daughter and grandson were present. Thus, the appellant had not stated about his son-in-law i.e. DW-1 being present in the house on the day of incident, however, to prove his plea of alibi, he had only examined his son-in-law before the learned Trial Court, and not his wife or daughter, who as per his statement under Section 313 of Cr.P.C., were present in the house.

42. Further, the learned Trial Court has held that the testimony of DW-2 is unreliable and appears to be tutored, due to the following reasons:

“100. It is apparent from the testimony of DW-2 that he was not acquainted with accused Bharat Jaina prior to 14.01.2018 and he had gone to labour chowk and randomly picked up the accused for some drainage work at his house, but DW-2 deposed that in the year 2020, he had called Bharat Jaina for some work, but he was told that accused was in jail and DW-2 came to the Court and collected information about the case from the Court staff. The version and testimony of DW-2 is unreliable, improbable, apparently false and tutored as it is improbable that a person who had picked up a labour randomly two years back would remember what he had done and his working hours and he would search him in Court after coming to know that he was in jail as he could have employed somebody else for the same work and particularly, when DW-2 has not stated that the work which he wanted to get done in



2020 from the accused, would not have been done by any other person than the accused. So, he is unreliable and his testimony is to be discarded and his cross examination by Ld. Addl. PP for the State further creates doubt on his testimony.”

43. For the reasons recorded by the learned Trial Court, for holding that the testimony of DW-2 is unreliable, improbable and apparently false, this Court finds no ground to adopt any different view than the one adopted by the learned Trial Court.

44. Therefore, this Court is also of the opinion that the appellant has failed to establish his plea of *alibi*, so as to render the evidence of prosecution witnesses unreliable or untrustworthy. Thus, the commission of offences punishable under Sections 363 and 366 of IPC stand proved, beyond reasonable doubt, against the appellant herein.

v. Whether the offence of Rape or Aggravated Penetrative Sexual Assault has been proved against the appellant?

45. In the present case, the learned Trial Court has convicted the appellant herein for offence of rape, punishable under Section 376 of IPC, and offence of aggravated penetrative sexual assault, punishable under Section 6 of POCSO Act.

46. The offence of rape has been defined under Section 375 of IPC, and the relevant portion of the said provision reads as under:

“375. Rape.—A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or



(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person..”

47. The offence of penetrative sexual assault is defined under Section 3 of POCSO Act, which reads as under:

“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.”

48. Though penetrative sexual assault is defined under Section 3 and punishable under Section 4 of POCSO Act, in certain circumstances, the act falls within the scope of ‘aggravated penetrative sexual assault’ which is defined under Section 5 of POCSO Act. The appellant herein was charged with the same since the alleged penetrative sexual assault was committed with a minor



below the age of 12 years. The relevant portion of Section 5 is extracted hereunder:

“5. Aggravated penetrative sexual assault.—

(m) whoever commits penetrative sexual assault on a child below twelve years;...”

49. This Court notes that during the course of trial, several witnesses were examined by the prosecution to prove its case, including the child victim, her sister, mother and father. However, a perusal of all the testimonies reveal that the only evidence that has emerged during the trial, in order to prove penetration, is the nodding of head in affirmative, by the child victim, to the following questions:

1. whether the appellant had attempted to insert his private part in the private part of the victim? (*kya inn uncle ne apna su-su aapke su-su mein daalne ki koshish ki thhi?*)
2. whether the appellant had actually inserted his private part in the private part of the victim? (*kya unhone apna su-su aapke su-su mein daal bhi diya thha?*)

50. Moreover, the child victim had answered in negative, to the following question: “whether she had suffered any pain during the incident? (*kya aapko dard ho raha thha?*)”

51. It is also crucial to note that the victim, being of tender age, was asked questions by the learned Trial Court, which were not objected to by the learned Defence Counsel. The questions put to the victim child, which were leading in nature, have been answered either in the affirmative or negative, only by way of the nod of the head either in yes or no. Admittedly, neither the accused nor his



counsel raised any objection to the questions put to the witness during the entire period of recording of evidence of the victim.

52. However, the learned Trial Court has rightly observed in paragraph no. 48 of the impugned judgment that since it had asked leading questions to the victim, who was a child of tender age, it was necessary to look for corroboration through other evidence placed on record and her sole testimony could not be relied upon.

53. Insofar as other material and evidence available on record for the purpose of corroboration is concerned, this Court does not agree with the conclusion arrived at by the learned Trial Court i.e. the commission of offence of rape and aggravated penetrative sexual assault being proved beyond reasonable doubt.

54. In this regard, it will be crucial and critical to look for ocular, forensic or medical evidence to corroborate the statement of the victim child. The Court will also, while doing so, take note of the fact that in the present case, no forensic evidence was lifted from the spot.

55. This Court notes that it is not the case of the prosecution that any incriminating material was found or recovered from the scene of crime. It is also not the case that the victim in this case was traced or the case was reported after much delay, which could have resulted in destruction of any evidence. Admittedly, the incident in question was reported immediately after the accused was allegedly caught red handed by the mother and sister of the child victim at the spot itself, while the accused was allegedly in the middle of commission of offence.



56. The testimonies of the mother of the victim i.e. PW-2 and the sister of the victim i.e. PW-3 reveal that they had only found the appellant herein lying on the victim, without clothes. PW-2 had deposed during the trial that upon reaching the spot, she had seen her daughter 'P' lying in the bed and her clothes were pulled down till her ankles and the pants of the appellant was also pulled down till his ankles and he was lying upon her daughter 'P', and on seeing her, the appellant had put on his pants and had run away from there. Similarly, PW-3 had deposed that she had seen her sister 'P' lying on the bed without her lower (*pyjama*) and that the appellant was lying on top of her sister, without his trousers. Thus, neither the victim's mother nor her sister deposed that the appellant herein had indulged in an actual act of penetration.

57. Though this Court notes that the victim's mother had stated in her statement recorded under Section 164 of Cr.P.C. that she had seen the appellant trying to insert his private part in the private part of her daughter and that he was not able to do so due to tender age of her daughter, no such fact was disclosed by her when she was examined as PW-2 before the learned Trial Court, even though she had otherwise disclosed much more details of the entire incident in her testimony as compared to her previous statements

58. In this regard, it is also significant to note that the FSL report in this case does not support the prosecution, and categorically rules out finding of semen on the clothes of the appellant or the victim. This fact has not been disputed by either side.



59. Moreover, the MLC of the victim records ‘no injury’ on any of the external genitalia of the victim, including (i) *labia majora*, (ii) *labia minora*, (iii) fourchette, or (iv) perineum. The hymen of the victim was also reported as intact, without any injury. Insofar as redness present over the vulva region is concerned, the categorical statement of the doctor concerned, who was examined as PW-6 before the learned Trial Court, does not support the prosecution’s case, which reads as under:

“I am an expert in Gynecology and Obstetrics. It is wrong to suggest that I never assisted / worked with Dr. Sonia. It is correct that MLC Ex.PW6/A was not prepared in my presence. Vulva vaginitis is a kind of infection and inflammation, in which there may be redness, swelling and discharge in the vulva region. It is correct that Vulva vaginitis may be caused due to bacteria or excess growth of yeast cells, which may accumulated due to unhygienic condition. It is correct that a vaginal infection may occur when there is a change in the normal balance of organisms in the vagina. Vulva vaginitis does not commonly occur due to use of soap or perfume. Vulva vaginitis does not occur by wearing excessive tight clothes, however, there may be rashes in vulva.”

60. The learned Trial Court, in paragraph no. 74 of the impugned judgment, has referred to decision of this Court in case of ***Chand Bibi (supra)***, which was also relied upon by the learned APP during the course of arguments before this Court, wherein it has been observed that in small children, the hymen is not usually ruptured due to penetration, but may become red and congested along with the inflammation and bruising of the *labia*. The learned Trial Court has also relied upon the judgment of Hon’ble Apex Court in case of ***Madan Gopal Kakkar v. Naval Dubey 1992 SCC (3) 204*** wherein



the accused was convicted for offence of rape of an eight-year old girl, where though the hymen had not ruptured, there was abrasion and redness around *labia minora*. The Learned Trial Court held that these judgments were squarely applicable to the facts of the present case. **However**, as noted in preceding paragraphs, in the present case, the MLC of the victim child specifically recorded there was no injury or abrasion or even redness on either *labia minora* or *labia majora*, as was the case in the decision relied upon by the learned Trial Court. The only redness reported in the MLC was in the vulva region, and in respect of the same, the doctor i.e. PW-6 who was examined before the learned Trial Court, admitted in the cross-examination that such redness could have been caused by an infection, inflammation or due to unhygienic conditions. Therefore, the medical evidence in this case was insufficient to prove that any act of even slightest penetration had taken place.

61. Further, the learned Trial Court, while holding that offence of rape and aggravate penetrative sexual assault had been committed upon the victim child, has observed that “*there is high probability that accused had inserted his penis at least in labia majora*”. However, in this Court’s considered view, an accused cannot be convicted on the basis of possibilities and probabilities, but only on the basis of evidence produced before the Court, during the course of trial, which proves that case of prosecution beyond reasonable doubt.

62. When the testimony of the doctor i.e. PW-6 is read along with FSL report on record, and the testimonies of the victim child, her mother and her sister that the appellant herein was caught red handed



in middle of the act in question, it leads to one conclusion that it is not a case of rape and aggravate penetrative sexual assault, but a case of ‘**attempt**’ to commit these offences.

vi. The Decision

63. For the reasons recorded in the foregoing discussion, the conviction of the appellant herein, under Sections 363 and 366 of the IPC is upheld. However, insofar as his conviction for offences punishable under Section 376 of IPC and Section 6 of POCSO is concerned, the same is modified to commission of offence of attempt to commit these offences, i.e. Section 376 read with Section 511 of IPC, and Section 6 read with Section 18 of POCSO Act.

64. Since the conviction of the appellant has been modified, this Court deems it appropriate that for the purpose of sentencing of the appellant and re-fixation of compensation to be awarded to the victim child, the matter be remanded back to the learned Trial Court. The learned Trial Court is directed to pass necessary orders within a period of one month from receipt of this judgment.

65. Accordingly, the present appeal is disposed of in above terms.

66. A copy of this judgment be forwarded to the concerned Trial Court forthwith for information and necessary action.

67. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

JULY 26, 2024/ns

(corrected & uploaded on 13.08.2024)