



2025:DHC:3643



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI*****Reserved on: 11th March, 2025******Pronounced on: 13th May, 2025***

+ CRL.A. 531/2024 & CRL.M.A. 37472/2024 (for modification)

SHIVA @ VIKAS

.....Appellant

Through: Mr. B. Badrinath, DHCLSC with Mr.
Dhruv Bhardwaj, Advocates.

versus

THE STATE & ANR.

.....Respondents

Through: Ms. Manjeet Arya, APP for the State.

CORAM:**HON'BLE MR. JUSTICE AMIT SHARMA****JUDGMENT****AMIT SHARMA, J.**

1. The present appeal under Section 374(2) read with Section 482 of the Cr.P.C. has been filed assailing the judgment of conviction dated 22.05.2023 and order on sentence dated 23.11.2023 passed by learned Additional Sessions Judge (FTSC)(POCSO)-01, Central District, Tis Hazari Courts, Delhi, whereby the appellant has been convicted in Sessions Case No. 575/2017 arising out of FIR No. 177/2017, under Sections 363/376/323 of the Indian Penal Code, 1860, (for short, 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act'), registered at Police Station Kashmere Gate.



2. The appellant by way of the impugned judgment of conviction and order on sentence has been convicted for the offences punishable under Section 376 read with Sections 323 and 363 of the IPC and Section 6 of the POCSO Act and *vide* the order on sentence dated 23.11.2023, the appellant was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.10,000/-, in default of payment of fine, he was further sentenced to undergo simple imprisonment of 6 months for committing the offence of aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Further, the appellant has been sentenced to undergo rigorous imprisonment for a period of 1 year for committing the offence punishable under Section 323 of the IPC. The appellant was also sentenced to undergo rigorous imprisonment for a period of 7 years, and to pay a fine of Rs.10,000/-, and in default of payment of fine, he was sentenced to undergo simple imprisonment of 6 months for committing the offence of kidnapping, punishable under Section 363 of IPC. Benefit of Section 428 of the Cr.P.C. was given to the appellant and all the sentences were directed to run concurrently.

FACTUAL BACKGROUND

3. The facts relevant for the purpose of present appeal are as follows: -

3.1 On 25.05.2017 on receipt of DD No. 4B, the Police officials of Police Station Kashmere Gate reached at Flyover, Yamuna Bazar, near Hanuman Mandir where Mahila Aayog Counsellor, Smt. Laxmi along with the parents of the survivor were present and the mother of the survivor gave a complaint, wherein, she alleged that she has been residing in the area of Hanuman



Mandir, Yamuna Vihar, and was surviving by way of begging. It was stated that on 20.05.2017, at about 10.30 P.M. she had left her 6 years old daughter (the 'survivor') who was sleeping on a footpath below the Flyover near Hanuman Mandir and had gone to get some mosquito repellent and around the same time, her husband had also gone somewhere. It is stated that when she returned after some time, her daughter was missing, and when she asked her husband about her whereabouts, he responded that he did not know and on account of the same there was a dispute between them. It is further stated that, thereafter, she asked other people residing there and started searching for her daughter.

3.2 It is alleged that after some time when she returned after searching for her daughter, she saw her husband sitting below the Flyover with her daughter in his lap, cleaning her and she saw that her daughter was bleeding from her vagina and also observed a bite mark on her right cheek as well as her swollen lips. It is stated that her daughter was crying and when she asked her husband about the same, she was informed that the appellant had left the child with her husband and then because of this, there was a dispute between the mother and the father of the survivor. It is further alleged that the mother of the survivor went searching for the appellant to find out as to what happened with her daughter, however, he could not be found. It is stated that her daughter also did not tell her anything and kept crying, however, on 24.05.2017 in the evening the survivor told her mother, that the appellant had beaten her and, therefore, she kept searching for the appellant, however, he was not found. It is alleged that she informed an NGO about the said incident and during the night, one Vasudha and the Police came to her and took the survivor to the



Hospital where the latter was treated. The mother of the survivor further stated that (*galat kaam* has been committed with her daughter) for which she wanted necessary action.

3.3 As per the case of the prosecution, and on receipt of the aforesaid complaint, the concerned police personnels did inquiries and FIR was registered. MLC No. 1521/2017 of the survivor was conducted (Ex. PW 8/A). Further, statement of the survivor under Section 164 of the Cr.P.C was recorded. Consequently, the present FIR was registered under Sections 323/363/354/376 of the IPC and Sections 4/6/10 of the POCSO Act. After completion of investigation, chargesheet was filed under Sections 323/354/363/376 of the IPC and Sections 4/6/10 of the POCSO Act.

3.4 Learned Trial Court *vide* order dated 23.09.2017 framed charges under Sections 363/376/323 of the IPC and Section 6 of the POCSO Act, against the appellant- Shiva @ Vikas, who pleaded not guilty and claimed trial. It is noted that during the course of trial, the appellant under Section 294 of the Cr.P.C. admitted the genuineness of the following documents:-

- “i. Factum of recording of statement of victim ‘R’ under Section 164 Cr.P.C. by Ld. Metropolitan Magistrate, which is already Ex.PW3/A.
- ii. Factum of recording of statement of mother of victim under Section 164 Cr.P.C. by Ld. Metropolitan Magistrate, which is already Ex.PW2/B.
- iii. Factum of taking exhibits from MHC(M) vide RC No.93/21/17 dated 03.07.2017 and deposition of the same in FSL by Ct. Amit Bhati vide acknowledgement of its acceptance vide FSL No.2017/BIO-4947 dated 03.07.2017 copy of RC and acknowledgement are exhibited as Ex. P-1 (colly.)



- iv. Factum of preparation and correctness of report of doctors dated 22.02.2020 bearing no.FO/BM-03/17/7507 prepared by Dr. Priya Kumar and Dr. J. Augustine relating to report of bite marks on the cheek of victim and its comparison with his denture as Ex. PX.
- v. Factum of preparation and correctness of FSL report no.2017/B-4947 dated 19.01.2018 as Ex.PY.”

3.5 The prosecution examined 10 witnesses, which was closed on 23.08.2022. The statement of the appellant under Section 313 of the Cr.P.C. was recorded and appellant did not opt to lead any evidence in his defence. After hearing final arguments on behalf of the parties, the impugned judgment of conviction dated 22.05.2023 and order on sentence dated 23.11.2023 was passed.

SUBMISSION ON BEHALF OF THE APPELLANT

4. Learned counsel appearing on behalf of the appellant submitted that there was an unexplained delay in lodging the FIR and recording the statement of the survivor. It is pointed out that the incident as per the case of the prosecution is dated 20.05.2017 at 10.30 P.M. yet the complaint was filed only on 25.05.2017. It is submitted that no explanation has been given with regards to the delay of 4 days in reporting the said incident. Similarly, it is argued that there is no cogent explanation as to why there is considerable delay in recording the statement of the survivor (PW-3) and the complainant (PW-2) under Section 164 of the Cr.P.C. As per the record, it is submitted, that PW-2/complainant's statement was recorded before the Magistrate on



14.07.2017 and of the survivor (PW-3) on 26.07.2017 after a delay of almost 2 months.

5. Reliance is placed on the judgment of the Hon'ble Supreme Court in **Sekaran v. State of Tamil Nadu**¹ to state that if the prosecution fails to explain the delay, the same would be fatal to their case. In the said case, it has been observed and held as under:

“14. We start with the FIR, to which exception has been taken by the appellant urging that there has been no satisfactory explanation for its belated registration. It is trite that merely because there is some delay in lodging an FIR, the same by itself and without anything more ought not to weigh in the mind of the courts in all cases as fatal for the prosecution. A realistic and pragmatic approach has to be adopted, keeping in mind the peculiarities of each particular case, to assess whether the unexplained delay in lodging the FIR is an afterthought to give a coloured version of the incident, which is sufficient to corrode the credibility of the prosecution version.

15. In cases where delay occurs, it has to be tested on the anvil of other attending circumstances. If on an overall consideration of all relevant circumstances it appears to the court that the delay in lodging the FIR has been explained, mere delay cannot be sufficient to disbelieve the prosecution case; however, if the delay is not satisfactorily explained and it appears to the court that cause for the delay had been necessitated to frame anyone as an accused, there is no reason as to why the delay should not be considered as fatal forming part of several factors to vitiate the conviction.”

6. Learned counsel for the appellant further submitted that the solitary evidence of the child survivor in the present case is insufficient to sustain the conviction. It is argued that the child witness of the tender age is easily susceptible to tutoring, and it is further submitted that the testimony of such a

¹ (2024) 2 SCC 176



witness cannot be considered probable, especially the when medical reports are not supporting the case of the prosecution.

7. Reliance is placed on **Pradeep v. State of Haryana**², wherein, it has been observed and held as under:

9. It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.

8. To highlight the discrepancy in the statement made by the survivor, it is pointed out that incident as per the child survivor (PW-3) had taken place under the flyover, however, the same is contrary to the statement of mother/complainant (PW-2), who stated that they used to reside under Hanuman Mandir Flyover and on finding her daughter missing, she looked for her in the vicinity but could not find her.

9. It is submitted that complainant (PW-2) in her testimony turned hostile and gave a voluntary statement that a false case was filed at the instance of Anita and Sunita as there was an enmity between them and the appellant. It is submitted that in the FIR, the complainant had given a statement to the effect that on the evening of 24.05.2017, her daughter had told her that the appellant had beaten her and there was no allegation of rape at that stage. It is further

² 2023 SCC OnLine SC 777



argued that the material witness in the present case., *i.e.*, the father of the survivor was never examined by the prosecution. It is argued that it was the case of the prosecution that the appellant had left the survivor with the father after the commission of offence, and therefore, his testimony was crucial to the case of the prosecution. It was, thus, argued that if a material witness is not examined, an adverse inference must be drawn against the case of the prosecution. To support his contention, reliance is placed on **Govindaraju v. State**³, wherein, it has been observed and held as under:

“63. There is certainly some content in the submissions made before us that non-production of material witnesses like the doctor, who performed the post-mortem and examined the victim before he was declared dead as well as of the Head Constable and the constable who reached the site immediately upon the occurrence and the other two witnesses turning hostile, creates a reasonable doubt in the case of the prosecution and the court should also draw adverse inference against the prosecution for not examining the material witnesses. We have already dwelled upon appreciation of evidence at some length in the facts and circumstances of the present case. There is deficiency in the case of the prosecution as it should have proved its case beyond reasonable doubt with the help of these witnesses, which it chose not to produce before the court, despite their availability.”

10. It was also argued that the investigation in the present case was faulty inasmuch as the survivor's blood-stained clothes which she was wearing at the time of the incident were not seized by the Investigating Officer. It is also argued that the expert opinion regarding the bite mark on the survivor's right cheek was inconclusive, stating that there is a possibility that it can be a bite mark of any other individual. Even the FSL report does not support the prosecution's case.

³ (2012) 4 SCC 722



11. In these circumstances, it was argued that the impugned judgment of conviction and order on sentence be set aside and the appellant be acquitted.

12. *Per contra*, learned APP for the State submitted that the prosecution has succeeded in proving his case against the appellant. It is submitted that the survivor examined as PW-3 has fully supported the case of the prosecution which was duly corroborated with her MLC (Ex. PW8/A) and the Forensic Odontology Report (Ex-PX). It is argued that the testimony of the survivor was unrebutted even after her cross-examination and the appellant had failed to rebut the presumption under Section 29 of the POCSO Act.

FINDINGS & ANALYSIS

13. Heard learned counsel for the parties and perused the records.

14. Before this Court proceeds to analyse the evidence of the survivor recorded before the learned Trial Court as PW-3, it may be recorded that there was no challenge or dispute with regard to the age of the survivor, who was stated to be about 6 years at the time of the incident and, therefore, the survivor would come under the definition of child under the meaning of Section 2(d) and Section 5(m) of the POCSO Act.

15. The statement of the survivor (Ex.PW-3/A) under Section 164 of the Cr.P.C. was recorded on 26.07.2017, in which she had stated that the appellant did '*galat kaam* with her' and on being asked with respect to the meaning of the aforesaid term, she answered that it was done by finger, and by pointing towards the vagina she stated that the finger was inserted there.



She also stated that the said act was done under the *pul* (bridge). In the MLC No. 1521/2017 of the survivor (Ex.PW-8/A), the following endorsement was made:-

“Bite Mark over Right Cheek
3rd degree perineal tear seen with slough in vagina
Nature of injury can't be commented upon. Sexual assault cannot be ruled out.”

16. The testimony of the survivor, who has been examined as PW-3 is being reproduced hereinunder for the sake of completeness: -

“Ms. Geeta Vohra, Mal-Advocate is present as Support Person. The victim is sitting with the support person in the witness deposition room separately and her statement is being recorded in Camera in Vulnerable Witnesses Deposition Room through live link. All precautions as per directions of Hon'ble High Court have been taken.

In order to ascertain that the witness is capable of deposing voluntarily, freely and rationally, certain preliminary questions are being put to the witness.

Q1. Do you go to school?

Ans. Yes. I go to school.

Q2. In which class are you studying?

Ans. In class first.

Q3. Do you watch TV ?

Ans. Yes. Q4. Which programmes do you like in TV ?

Ans. I like Chhota Bheem, Spider Man, Jadoo Pari, Ganesh.

Q5 Why have you come here today? Ans. The witness stated to the support person that she has come here to meet her.

Q6. Are you aware of speaking truth or false?

Ans. Yes, I am aware. One should speak truth and I will speak truly today.

Q7. Are you afraid of anyone?

Ans. No. Upon questioning with witness and answers given by him, I am of the opinion that witness is able to understand the question and give rational answers, However, considering her age, I deem it appropriate to examine her without oath. The witness is seated near the dias alongwith



the support person as she was not feeling comfortable in the witness deposition room.

Without Oath.

Q1. Kya apke sath kuch hua tha?

Ans. Mere sath kuch galat kam hua tha.

Q2. Apke sath galat kam kisne kiya?

Ans. Shiva ne.

Q3. Galat kam kya kiya tha?

Ans. The witness has pointed out towards her private part and stated that usne mere yaha per touch kiya tha. Usne mere gaal par kisi ki thi. She pointed out towards the chest and stated that usne yaha par touch kiya tha. Phir meri pant nikali thi. Usne mere yaha (pointed out towards her vagina) par finger dali thi or mera khoon nikla tha. Usne mere gaal par kata bhi tha (witness has pointed out towards her right cheek) our mere gaal se khoon nikla tha.

Q4. Usne ye gandi baat kaha ki thi?

Ans. Pul ke niche usne ye gandi baat ki thi.

Q5. Shiva Kaha par rehta hai. Ans. Hum pul ke niche rehte hai our shiva bhi pul ke niche rahta hai.

Q6. Apne yeh baat kisko bataee thi?

Ans. Yeh baat maine apni mummy ko bataee thi.

Q7. Kab bataee thi? Ans. Jaldi se bataee thi.

Q8. Kya apne yeh baat 4 ya 5 din baad bataee thi?

Ans. Maine yeh baat mummy ko baad me bataee thi.

Q9. Kya apko doctor ke pass aspatal me le gaye the?

Ans. Ha, mujhe aspatal le gaye the. Doctor uncle ne baat bhi ki thi.

Q10. Kya aap pahele bhi Court me aaye the?

Ans. Ha. Mai didi ke saath Court aayee thi (witness has pointed out towards IO).

Q11. Kya aap ne kisi madam ko Court me gandi baat ke bare me bataya tha?

Ans. Ha. Maine ek madam ko bataya tha. At this stage, statement of the prosecutrix u/s 164 Cr.P.C. sealed with the seal of 'SBT' is taken out from the file. Same is opened. The witness has correctly identified her thumb impression thereon at point A. Same is now Ex.PW3/A.

Q12. Kya aap Shiva ko pehchan sakte hai?

Ans. Yes.

(At this stage, the camera is slided and focused firstly on accused Shiva. On seeing him, witness states that the person on the screen of TV is Shiva who did gandi baat with me.)



XXXXX by Ms. Sadhana Bhatia, Learned counsel for accused Shiva.

Q1. Kya ye baat thik hai ki jaha aap rehte ho, vaha par aur log bhi rahte hai?

Ans. Ha. Ye baat thik hai.

Q2. Shiva kya park me rehta tha ya kahi aur?

Ans. Vo park me rehta hai. Again said, mujhe nahi pata.

Q3. Mera kehna hai ki Shiva ne aapko gaal par nahi kaata tha.

Ans. Kata tha.

Q4. Mera kehna hai ki Shiva ne apke saath koi galat baat nahi ki thi?

Ans. Usne galat baat ki thi.

Q5. Kya apko paas wale uncle ne Shiva ka naam lene ke liye kaha tha?

Ans. Nahi usne gandi baat ki thi.

Q6. Kya apne Shiva ko pahle bhi dekha tha?

Ans. Ha.

Jab usne mere saath galat kaam kiya tha to maine shor bhi machaya tha. Lekin vaha par koi nahi aaya tha.”

17. Mother of the survivor, who has been examined as PW-2, in her examination-in-chief which was recorded on 07.05.2018 deposed on the lines of the complaint. In her examination-in-chief, she had stated that when she returned to the footpath, her husband informed her that her daughter was left there by the appellant and when she made inquiries from her daughter, she repeatedly took the name of the appellant. She had further stated that blood was oozing from her vagina and there was also bite mark on her cheek and she had swollen lips. She stated that her husband also informed her that appellant had left her daughter there. It is stated that after 3-4 days her daughter informed her that the appellant had beaten her. The said witness was recalled for cross-examination on 05.02.2019, and on the said date, she gave a totally different version alleging that two women namely Anita and Sunita, who sold drugs had enmity with the appellant and they had kidnapped her



daughter and had falsely implicated the present appellant. She further stated to the court question put to her by the learned Trial Court, that she had given a statement on 07.05.2018 under pressure from the police.

18. The defense taken by the appellant in the statement under Section 313 of the Cr.P.C. was that he had been falsely implicated by the police officials as on that day he had consumed liquor with the father of the survivor and in drunken condition had slept under the bridge. He further stated that the survivor did not say that he had committed wrong act with her but was saying that some '*Chacha*' had done wrong act with her.

19. The learned Trial Court while convicting the present appellant has observed that the statements made by the survivor under Sections 161 and 164 of the Cr.P.C. as well as before the Court during trial were consistent on the material aspect of sexual assault at the hands of the appellant. It is observed that the survivor had deposed that the appellant had done '*galat kaam*' with her under the bridge by inserting his finger in her vagina after which blood started oozing out and further biting her on right cheek. On the suggestion being put to survivor to the effect that some other uncle had done the said act, the survivor categorically denied the same and asserted that it was that the appellant who did the act upon her. With respect to the mother of the survivor being hostile and not supporting the case of the prosecution in her cross-examination, the learned Trial Court observed as under:-

“42. It has been contended by Ld. Counsel for accused that the victim was tutored by her mother and that mother of victim had turned hostile during her cross examination. However the arguments advanced by Ld.



Defence Counsel are not sustainable. As per record Mother of victim had absconded with victim from hospital on 31.05.2017 and was traced after much efforts of TO on 13.07.2017. Father of victim also remained untraceable. When IO told complainant that victim's statement was to be recorded she told IO that her daughter can not speak clearly. However from the statements of victim U/S 164 CrPC and her testimony in Court it is evident that victim had narrated the incident clearly and consistently. Thus it appears that since the very beginning parents of victim were neither diligent nor interested in pursuing the case. It is worthwhile to mention here that mother of victim was examined prior to victim and mother of victim has been consistent during her examination in chief but later on gave inconsistent version during cross examination for reasons best known to herself. IO had to move application before CWC for keeping the victim at place of safety and thereafter victim was sent to children home PALNA. When statement of victim under 164 CrPC ex.PW3/A and her testimony in Court was being recorded, at that time victim was produced from place of safety PALNA and was not residing with her mother, thus question of victim being tutored does not arise. Statements under section 161 CrPC and Section 164 CrPC of Victim and her testimony in Court was throughout consistent and unshakeable during cross examination. The testimony of the victim thus is not based upon any tutoring, as contended but on the basis of incident which has happened with her. Furthermore, there is no ulterior motive of the victim who is aged about 6 years at the time of incident, to falsely implicate the accused."

20. As pointed out above, the MLC of the survivor (Ex.PW-8/A) duly notes "an old 3rd degree perineal tear with slough in the vagina" of the survivor. The case of the prosecution is that the appellant had inserted his finger in the vagina of the survivor and, therefore, the FSL report (Ex.PY), regarding DNA of the accused would not be of any help to the latter. It is also recorded in the MLC that the same was done after five days of the incident and her mother had already change her clothes. Thus, the absence of DNA in the exhibits of the survivor is self-explanatory and would not be of any help to the appellant. Similarly, the Forensic Odontology Report (Ex-PX) simply says that since the



bite mark injury was healed and scarred, the same was not clear enough to describe the individual's characteristics of the suspect's dentition on bite mark injury but at the same time it records that the appellant lower arch alignment is matching which suggest that the suspect cannot be excluded as a biter. The statement of the survivor is corroborated by the MLC (Ex. PW/8A), as pointed out hereinabove.

21. The non-examination of the father of the survivor would not materially affect the case of the prosecution. It is recorded in the impugned judgment, that despite several efforts, the father of the survivor could not be traced. Judicial notice can be taken of the fact that the survivor and her parents were homeless and were living under the flyover. In the present matter, as already noted hereinabove, the testimony of the survivor was recorded after the testimony of the mother. Appellant was obviously known to the survivor prior to the incident. The circumstances in which the survivor was brought to the court and her testimony was recorded, does not in any manner show that she was tutored by anyone to give the testimony. Even the case of the mother of the survivor, that the two women she had named as having enmity with the appellant has not been taken as defense by the appellant himself. The defense of the appellant, as pointed hereinabove, is that he had been falsely implicated as he had known the father of the survivor and was sleeping under the bridge on the date of the incident.

22. The law regarding conviction can be made on basis of the sole testimony of the survivor is now well settled.



23. In the case of **Phool Singh v. State of M.P.**⁴, the Hon'ble Supreme Court has observed and held as under:

“11. In *State of Punjab v. Gurmit Singh* [*State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 : 1996 SCC (Cri) 316], this Court held that in cases involving sexual harassment, molestation, etc. the court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under : (SCC pp. 394-96 & 403, paras 8 & 21)

21. ... The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

24. A Coordinate Bench of this Court, in cases with regard to child witnesses and broad principles regarding the evidentiary value of the same

⁴ (2022) 2 SCC 74



has discussed the same in detail in case of **Prem Bahadur @ Bhoj Bahadur v. State**⁵, and has observed and held as under: -

“63. The following guiding principles, governing the admissibility and reliability of the evidence of child witnesses, are readily discernible from the above cited judicial pronouncements:

(i) There is no absolute principle, to the effect that the evidence of child witnesses cannot inspire confidence, or be relied upon.

(ii) Section 118 of the Indian Evidence Act, 1872 discounts the competence, of persons of tender age, to testify, only where they are prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of their age.

(iii) If, therefore, the child witness is found competent to depose to the facts, and is reliable, his evidence can be relied upon and can constitute the basis of conviction.

(iv) The Court has to ascertain, for this purpose, whether (a) the witness is able to understand the questions put to him and give rational answers thereto, (b) the demeanour of the witness is similar to that of any other competent witness, (c) the witness possesses sufficient intelligence and comprehension, to depose, (d) the witness was not tutored, (e) the witness is in a position to discern between the right and wrong, truth and untruth, and (f) the witness fully understands the implications of what he says, as well as the sanctity that would attach to the evidence being given by him.

(v) The presumption is that every witness is competent to depose, unless the court considers that he is prevented from doing so, for one of the reasons set out under Section 118 of the Indian Evidence Act, 1987. It is, therefore, desirable that judges and Magistrates should always record their positive opinion that the child understands the duty of speaking the truth, as, otherwise, the credibility of the witness would be seriously affected, and may become liable to rejection altogether.

⁵ 2019:DHC:3513



(vi) Inasmuch as the Trial Court would have the child before it, and would be in a position to accurately assess the competence of the child to depose, the subjective decision of the Trial Court, in this regard, deserves to be accorded due respect. The appellate court would interfere, therewith, only where the record indicates, unambiguously, that the child was not competent to depose as a witness, or that his deposition was tutored. Twin, and to an extent mutually conflicting, considerations, have to be borne in mind, while ascertaining the competency of a child witness to justify. On the one hand, the evidence of the child witness has to be assessed with caution and circumspection, given the fact that children, especially of tender years, are open to influence and could possibly be tutored. On the other hand, the evidence of a competent child witness commands credibility, as children, classically, are assumed to bear no ill-will and malice against anyone, and it is, therefore, much more likely that their evidence would be unbiased and uninfluenced by any extraneous considerations.

(vi) It is always prudent to search for corroborative evidence, where conviction is sought to be based, to a greater or lesser extent, on the evidence of a child witness. The availability of any such corroborative evidence would lend additional credibility to the testimony of the witness.”

25. The ground taken with regards to the delay in filing the present complaint which has not been explained by the prosecution cannot be a ground to set aside the judgment of conviction. The delay is to be seen in the facts and circumstances of each case. Smt. Laxmi Devi, PW-4, has testified that when she was working as Mahila Helpline Counsellor at Abhivayakti Foundation, NGO, she received a call from her co-worker, Rashida, regarding rape of a minor girl. It is stated by her that, thereafter, she made enquiries from the parents of the survivor and then called the police. It is thus noted that only when the incident came to the knowledge of an NGO, the same was reported to the police. The survivor was six years old and her parents failed to report the offence. This failure on their part cannot be a reason to disbelieve



the survivor. It is pertinent to note that survivor was taken away by her parents from the hospital and only after they were traced, the survivor was given an opportunity to give her version before the learned Magistrate at the time of recording her statement under Section 164 of the Cr.P.C which remained consistent through the trial.

26. The judgment relied upon by the learned counsel for the appellant in **Sekaran (supra)**, is not applicable to the facts of the present case inasmuch as in the said case, the Hon'ble Supreme Court after examining the star witnesses *i.e.*, PW-2 and PW-3 came to the conclusion that the delay in reporting the incident could not be appropriately explained by them. In the present case, it is noted that there were no questions put to any of the witnesses to seek explanation of any delay. Be that as it may, even in the aforesaid judgment in **Sekaran (supra)**, the Hon'ble Supreme Court has observed in paragraph 14 that "a realistic and pragmatic approach has to be adopted, keeping in mind the peculiarities of each particular case, to assess whether the unexplained delay in lodging the FIR is an afterthought to give a coloured version to the incident, which is sufficient to prove the credibility of the prosecution case."

27. In the present case, the survivor, who has been examined as PW-3 has been consistent in the allegations against the appellant for the act committed by him upon her. She was 6 years old at that time and as pointed out hereinabove, even the learned Trial Court felt that the parents of the survivor were not interested in taking legal action for reasons best known to themselves.



28. Similarly, the judgment of the Hon'ble Supreme Court in **Pradeep (supra)** in paragraph 9 has clearly held that the testimony of the child witness has to be carefully scrutinised keeping in mind the question whether there is possibility of such a witness being tutored. As pointed out hereinabove, appropriate precautions were taken while recording the testimony of the survivor and, therefore, it cannot be stated that she could have been tutored in any manner. It may be noted that the testimony of the mother of the survivor, who had turned hostile, was prior in time to the examination of the survivor. Therefore, if the said witness was to be tutored, then a possibility of the mother, who was capable of doing so is the most. After her cross-examination before the learned Trial Court, she would have tried to help the appellant, however, the survivor gave her testimony in her own words and, therefore, this Court has no reason to disbelieve the same.

29. Similarly, in **Govindaraju (supra)**, it was held that the material witnesses, i.e., the doctor who performed the postmortem as well as the Head Constable and Constable who reached the spot immediately after the occurrence, had turned hostile, thus, creating a doubt in the case of the prosecution. In the present case, as already noted, the child witness has clearly deposed against the appellant and no uncertain and inconsistent statements have been made against the appellant.

30. Thus, the prosecution has clearly established that the appellant had committed aggravated penetrative sexual assault under Section 5(n) on the survivor which is punishable under Section 6 of the POCSO Act.



31. It is also noted that Section 29 of the POCSO Act raises a presumption against the appellant which reads as under: -

“29. Presumption as to certain offences.— Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.”

32. In the present case, the testimony of the survivor corroborated by the MLC (Ex. PW8/A) and circumstances as pointed out hereinabove, had clearly established the foundational grounds to raise the presumption in the aforesaid provision. However, the appellant could not rebut the same during course of the trial.

33. In view of the aforesaid evidence on record, this Court is of the considered opinion that the prosecution has been able to establish guilt of the appellant beyond reasonable doubt and no grounds to interfere with the judgment of conviction. The learned Trial Court has awarded the minimum prescribed punishment for the offence punishable under Section 6 of the POCSO Act (prior to the amendment which came into effect from 16.08.2019), and in view of the above, no interference is called for in the order on sentence as well.

34. In view of the above, the present appeal is dismissed and disposed of.

35. Pending application(s), if any, also stand disposed of.



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36. Copy of the judgment be communicated to the concerned Jail Superintendent for necessary information and compliance.

37. Copy of the judgment be also sent to the Secretary, Delhi High Court Legal Services Committee, who shall apprise the appellant regarding the legal remedy and assistance of legal aid counsel available to him in respect of the present judgment.

38. Judgement be uploaded on the website of this Court *forthwith*.

AMIT SHARMA, J.

MAY 13, 2025/nk