



2025:DHC:6717



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

% Reserved on : 04.08.2025
Pronounced on : 07.08.2025

+ **CRL.A. 1021/2024**

ARVIND KUMAR @ GAURAV Appellant
Through: Mr. Ashutosh Bhardwaj, Advocate

versus

STATE (GOVT. OF NCT OF DELHI) AND ANR. Respondents
Through: Ms. Shubhi Gupta, APP for State with
SI Meena Malik, P.S. Maurya
Enclave.
Mr.Chetan Lokur, Advocate for
DSLISA.
Ms.Vrinda Bhandari (DHCLSC) and
Ms. Anandita Rana, Advocates for
victim.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The present appeal has been filed under Section 374 of CrPC read with section 415 of BNSS, 2023 against the judgment of conviction dated 10.07.2024 and order on sentence dated 23.07.2024 in Session Case No. 86/2018 arising out of FIR No. 373/2017 registered under Section 354 IPC and Section 9/10 of POCSO Act, 2012 at P.S. Maurya Enclave, Delhi.

Vide order on sentence, the appellant was sentenced to undergo RI for seven years and a fine of Rs. 20,000/- under Sections 9 (1) and (m) read with



Section 10 POCSO Act and in default thereof, he was directed to undergo SI for three months. The Trial Court also awarded a compensation of Rs.3,00,000/- to the victim. All the sentences were directed to run concurrently and benefit of section 428 CrPC was also extended to the appellant.

2. The brief facts as noted by the Trial Court in its impugned judgment are as under:

“1. Accused is facing trial on the allegations that on 30.08.2017 on receiving DD no. 5IB IO/SI Vidya Rawat alongwith ASI Sandeep reached S School, where the mother of the victim CB alongwith the victim child P aged about 5 years were present. Mother of the victim produced the driver Gaurav i.e. the accused who was taken into custody by ASI Sandeep. The victim child alongwith her mother was taken by Ct. Monika to BSA hospital where victim P was medically examined but her mother refused for her internal medical examination. The victim child was counseled and inquiry was made from her in question answer form.

2. The statement of mother of victim was recorded wherein she deposed that she has two children, victim P aged about 5 years who was admitted in the school that year in UKG. As there was no direct school or private transport available from her residence to school. The other children from her colony were also going to S School. Three-four children used to go to school by van. Those children used to go to school in the van of one driver Amit, who used to take the children upto R School and thereafter the said driver Amit used to send her daughter to S School via other van. Similarly, after school, in the afternoon her daughter P was dropped upto R school by the other van and from there driver Amit used to bring her to her residence.

3. On 29.08.2017 after coming from school her daughter “P” informed that she is having burning sensation (jalan) in her vaginal area (susu wali jagah). On inquiry by her victim



“P” informed that the van bhaiya touched her vaginal area with his hand. On further inquiry, victim informed earlier also he had touched her vaginal area. Mother of the victim made a phone call to the class teacher in the school and tried to ask for the name of the driver to which the teacher informed that she will check from the record and inform the name of the driver in the morning. On the next day the mother of the victim alongwith her mother, husband and brother went to the school. When the driver took her daughter victim P from her school, she identified the driver. Two persons received victim P from the school and at that time they asked victim P, to which victim pointed out towards the driver Gaurav i.e., the accused by gesture that it is accused Gaurav who used to touch her vagina with his hand. Brother of mother of the victim called the police by dialing at 100 number. Police arrived and took the victim for medical examination to BSA hospital. Statement of the victim was recorded in question answer form in the presence of her mother. On the basis of the statement and medical examination, FIR u/s 354 IPC and 9, 10 POCSO Act was got registered.”

3. The charge was framed for the offence under Section 5(1) & (m) of POCSO Act punishable under Section 6 of POCSO Act to which the appellant pleaded not guilty and claimed trial. Prosecution has examined total 7 witnesses. The child victim was examined as PW1. The mother of the child victim was examined as PW2. W/SI (Retd.) Vidya Rawat who on receipt of DD No. 51B reached the school of the victim and arrested the accused, was examined as PW3. The father of the child victim was examined as PW4. ASI Sandeep was examined as PW5. Maternal uncle of the victim was examined as PW6. Dr. Aarushi Chaudhary, Assistant Professor, Obs & Gynae, Kalpana Chawla Govt. Medical College, Karnal, Haryana who examined the victim and prepared her MLC, was examined as PW7.



4. The appellant's preliminary contention revolves around the fact that his identification was not conclusively established in the trial. In this regard, reference is invited not only to the testimony of the child victim but also her mother and father who were examined as PW3 and PW4 respectively. It is contended that even in the MLC of the child victim, no observations were made which would support the case of the prosecution. Further, the charge was framed against the appellant for the offence under Section 5 (l) and (n) read with Section 6 of the POCSO Act. However, the testimony of the child victim is silent as to commission of a repeat offence.

5. *Per contra*, appellant's contentions are refuted by the learned APP as well as learned counsel representing the child victim. It is contended that appellant, who was a private van driver, during the recording of his statement under Section 313 Cr.P.C. admitted his presence and meeting the child victim on the day of the incident. Further, the appellant examined one *Amit*, another van driver, whose testimony rather supports the prosecution case.

6. The child victim was examined as PW1. The Trial Court before recording her statement (without oath) recorded its satisfaction as to the capability of the child victim to understand the questions and answer them. Being a child of tender age, her statement was recorded in question-answer form. The child victim in her statement deposed that she goes to school in a school van. She was asked as to who *Arvind* (the appellant) is to which the child replied that she did not know. The statement of the child victim recorded before the Trial Court is extracted hereinunder :

“Q. Aap ke papa ka kya naam hai ?

Ans. J.



Q. Aap ki mummy ka kya naam hai ?

Ans. C.

Q. Aap school jate ho ?

Ans. Haan, Mera School S School hai.

Q. Beta aap kon si class main padti ho?

Ans. 2nd mein.

Q. Beta aapki friends hain?

Ans Haan, Unka naam A and M hai.

Q. Apke aur bhai behan hai ?

Ans. Mere ek chhota bhai hai.

Q Kya Khana achha lagta hain?

Ans. Mujhe khane main Macroni achchi lagti hai.

Q . Sach bolna achchi baat hai ya jooth bolna ?

Ans. Sach bolna acha hota hai.

Q. Beta Arvind bhaiya kaun hain?

Ans. Mujhe nahin pata.

Q. Beta school kaise jaate ho?

Ans. Mein school van se jaati hoon.

Q. Beta van kaun chalata hai?

Ans. Driver, par wo wale nahin chalte ab Sanjay chalata hai.

Q . Beta kya wo wale driver aaj court main maujood hain?

Ans. Mujhe nahin pata.

Q. Beta wo wale driver kya karte the?

Ans. Unhone mere saath bad touch kiya tha.

Q. Beta kahan par kiya tha?

Ans. Shu shu main.

Q. Un hone bad touch kaise kiya tha?

Ans. Un hone meri shu shu main haath lagaya tha aur mujhe un uncle se bahut dar lagta hai.

Q. Beta aap ab Sanjay bhaiya ke van main kyon jaate ho?

Ans. Kyonki wo wale uncle ne bad touch kiya tha.

Q. Beta kya aap un uncle ko pahchan sakte ho?

Ans. Nahin. Mujhe dar lagta hai aur mein nahin dekhungi

(court observation: child is not even willing to look at the face of the accused).

Q. Ye bad touch wali baat apne kisi ko bataya thi?

Ans. Kisi ko nahin bas mummy papa ko bataya tha.

Q. Beta jinhone apke saath bad touch kiya unka naam Gaurav



bhaiya- tha?

Ans. Haan.

Q. Kya wo apke school se van main lekar ghar aate the?

Ans. Haan. Pahle mujhe ek uncle lekar jaate the aur fir wo baad main wo mujhe Gaurav bhaiya ki van main chhaud dete the.”

7. From the above, it is apparent that the child victim did not identify the appellant. Pertinently, the Court noted the demeanour of the child victim as she refused to look at the direction of the appellant. Concededly, the child victim was not cross-examined on behalf of the appellant.

8. Mother of the child victim (PW-2) during her deposition stated that her daughter had a speech problem and somewhere in August 2017, on a general enquiry, the child victim informed her that one ‘van wala bhaiya’ who used to pick her from home and drop her at ‘R’ School in another van had bad touched on her private part with his hand. She further stated that on coming to know this, she went to her daughter’s school and met the class teacher who informed that it was the appellant and another boy who used to pick the child victim from the school in their van. The child victim had identified the appellant as the one who had bad touched her private part. In her cross-examination, she had stated that her daughter had speech problem and it was difficult to understand her. A suggestion was given to her that the appellant had not committed any wrong act which was neither admitted nor denied. She rather admitted that it was possible that the appellant had not committed any wrong act with the child victim. She also admitted that she never observed any redness on the vaginal area of the child victim nor had the victim complained to her in this respect._

9. Father of the child victim (PW-4), during his testimony before court, deposed that the child victim used to go in a private cab which was driven



by the appellant. He stated that he was informed about the commission of the offence by his wife. He further stated that when he reached the school of his daughter, he saw that there were 3/4 van drivers as on different occasions and any one out of the said 3/4 drivers used to pick or drop his daughter from his residence to school and on the way back. On being asked, his daughter pointed towards the appellant as the one who bad touched her. He deposed that due to lapse of time, after about five years, he could not say with full assurance as to whether the appellant was the person who was identified by the child victim.

10. Interestingly, at this moment, the Trial Court asked the I.O., who was present in Court, to identify the appellant, who also expressed his inability to identify the appellant due to lapse of time. At this stage, the Trial Court asked the appellant to produce his photo I.D. The appellant produced his Aadhar Card to which Trial Court noted that in the photograph on Aadhar Card, the appellant was not having a beard and his hairline was upward whereas at the time of recording of the deposition, the appellant was having hair on his forehead and was also having beard. The witness was asked again to identify the appellant after he was asked to pull his hair upward to which the witness answered “*lag to aise hi raha hai but kuchh confirm nahi hai*”.

11. The prosecution also examined the maternal uncle of the child victim (PW-6), who stated that he accompanied his sister and brother-in-law to the school of the child victim, where on the pointing of the child victim, the present appellant was apprehended. Pertinently, as per the medical examination record of the child victim, the mother of the child victim had refused internal examination of the child victim. Though it has come out in



the testimony of the father (PW4) that the child victim had told her mother that she was having a burning sensation in her private part, however indisputably on local examination, no injury or redness in the vaginal area was noted in the MLC. Furthermore, though the MLC records mild pallor (yellowness of skin) however, Dr. Aarushi (PW7) in her deposition had explained that the same is mainly due to dietary deficiency in the children.

12. Much ado has been made by the learned APP and learned counsel for the child victim on the applicability of presumption under Section 29 of the POCSO Act and the stand taken by appellant in his statement recorded under Section 313, Cr.P.C. as well as testimony of the defence witness produced by him. However, it is not to be forgotten that prosecution has the onus to prove the foundational facts of the commission of the crime and the establishment of the appellant's identity through the evidence collected during the investigation before the presumption under Section 29 can come into effect. A 3 Judge Bench of the Supreme Court in Sambhubhai Raisangbhai Padhiyar v. State of Gujarat¹ has held that section 29 of the POCSO Act comes into play once the foundational facts are established. It holds as follows:-

35. It will be seen that presumption under Section 29 is available where the foundational facts exist for commission of offence under Section 5 of the POCSO Act. Section 5 of the POCSO Act deals with aggravated penetrative sexual assault and Section 6 speaks of punishment for aggravated penetrative sexual assault. Section 3 of the POCSO Act defines what penetrative sexual assault is.

13. Gainful reference in this regard may also be made to the decision of a

¹ (2025) 2 SCC 399



Co-ordinate Bench of this Court in Veerpal v. State², wherein it was held as under:-

20. Section 29 of POCSO Act provides that Court shall presume that the accused has committed the offence for which he is charged with, until contrary is proved. However, the presumption would operate only when the prosecution proves the foundational facts in the context of allegation against the accused beyond reasonable doubt. After the prosecution establishes the foundational facts, the presumption raised against the accused can be rebutted by discrediting the prosecution witnesses through cross-examination and demonstrating the gaps in prosecution version or improbability of the incident or lead defence evidence in order to rebut the presumption by way of preponderance of probability.

14. Coming to the facts of the present case, the child victim (PW1) has not identified the appellant during the recording of her statement in trial. She, however, stated that the van driver had touched on her private part. It has come in the deposition of the father of the child victim (PW4) that there were 3/4 drivers who used to pick and drop his daughter. It has also come in the cross examination of the mother of the child victim (PW2) that the child victim had a speech problem, and it was difficult to understand her. While the father could not positively identify the appellant as the one who was identified by the child victim, the mother was also doubtful as to commission of any wrong act by the appellant, as is evident from her cross examination.

15. The material placed on record would reflect that the child victim was initially picked up by one driver who used to take the child victim along with others to one spot from where another driver would take the children to the

² 2024 SCC OnLine Del 2686



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school where the child victim was studying. It is clearly not a scenario involving only one probable suspect as there were multiple drivers who were in proximity to the child victim. It was incumbent upon the prosecution to establish the foundational facts, before Section 29 of the POCSO Act could be made applicable on the appellant. Due to the failure of the child victim, his father and even the IO to identify the appellant as the one who was pointed out by the child victim in school, coupled with no supporting medical evidence recorded in the MLC, the foundational facts in the present case could not be held to be conclusively established.

16. This Court is of the considered opinion that in view of the abovesaid facts and considering that in absence of any other incriminating evidence against the appellant to connect him with the commission of offence, his conviction under Section 9 (l) and (m) read with Section 10 POCSO Act cannot be sustained and therefore, the appellant is acquitted for the commission of said offences.

17. Resultantly, the appeal is allowed.

18. The appellant be released forthwith if not required in any other case.

19. A copy of this judgment be communicated to the concerned Trial Court as well as to the concerned Jail Superintendent.

20. Copy of this judgment be also uploaded on the website forthwith.

MANOJ KUMAR OHRI
(JUDGE)

AUGUST 07, 2025

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