

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

Judgment Reserved on: July 10, 2017

% *Judgment Delivered on: July 18, 2017*

+ **CRL.A.816/2015**

BABU RAM Appellant

Through: Ms.Inderjeet Sidhu, Advocate

versus

STATE Respondent

Through: Ms.Kusum Dhalla, APP for the
State with Inspector Saroj Bala

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. This jail appeal has been filed by the appellant Babu Ram challenging his conviction and sentence for committing the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 in short 'POCSO'. Vide impugned judgment dated 12th March, 2015 and the order on sentence dated 30th March, 2015, the appellant Babu Ram has been convicted under Section 6 of POCSO Act, 2012 and ordered to undergo RI for 10 years and to pay a fine of ₹5,000/- in default to undergo SI for six months.

2. Investigation was set into motion on receipt of DD No.21-A dated 2nd March, 2014 (exhibited as PW-3/A) recorded at PS R.K.Puram, New Delhi. Vide this DD information was given about a 'galat kaam' being done by a person with a two years old girl near Church at Nanakpuri Camp, R.K.Puram, Sector 2 and that the said person had been apprehended. W/SI Saroj Bala along with SI Om

Prakash reached the spot where the complainant Amit Kumar Nimesh made his statement (exhibit PW-1/A) and handed over the appellant/accused Babu Ram along with a baby girl aged about one year. Sh.Hare Ram, maternal grandfather of the baby girl was also present at the spot. On the basis of the statement made by the complainant Amit Kumar Nimesh case FIR 174/2014 (Ex.PW/A-3) was registered at PS R.K.Puram, New Delhi. The child victim as well the appellant/convict were sent for medical examination. The child victim aged about one year was also produced before the learned Magistrate for getting her statement under Section 164 Cr.P.C. recorded. The statement of the child could not be recorded as a one year old child cannot speak.

3. Thereafter the statement of the complainant Sh.Amit Kumar Nimesh under Section 164 Cr.P.C. was recorded. After the charge-sheet was filed the appellant/convict pleaded not guilty to the charge. The prosecution examined the complainant Sh.Amit Kumar Nimesh as PW-1, Sh.Vishal, who informed the police, as PW-2 and IO W/SI Saroj Bala as PW-3. These witnesses were cross-examined on behalf of the accused by Sh.Rajat Agnihotri, Amicus Curie for the accused.

4. In his statement under Section 313 Cr.P.C. the convict admitted that the child was with him at the time when he was apprehended but stated that the child was of his neighbour and he was just making the child urinate when it was misunderstood by the passerby/complainant and he has been implicated in this case due to misunderstanding.

5. The learned ASJ has held that the offence against the appellant stands proved beyond reasonable doubt as PW-1 Amit Kumar Nimesh

had seen the appellant sitting on the footpath behind a car with a child in his lap and that he was inserting a stick (*Tilli*) in the private part of the baby and was revolving the stick (*Tilli*) inside her private part. He apprehended the appellant and by that time two-three other motorcyclists gathered there and assisted him and one of them informed the PCR. Learned Trial Court also held that the statement of PW-1 has been fully corroborated by PW-2 Vishal, the passerby and both of them have stated that '*kachhi*' of the child was pulled down by the appellant and he had done the '*galat harkat*'.

6. Learned ASJ though noted that as per the MLC of the child there was no internal or external injury on the whole body of the child to prove that a stick (*Tilli*) was inserted in her private part, no stick (*Tilli*) was recovered but these contentions have been rejected on the grounds that the cogent evidence of PW-1 Amit Kumar Nimesh cannot be overlooked or discarded.

7. Learned counsel from Delhi High Court Legal Services Committee appearing on behalf of the appellant/convict has submitted that keeping in view the tender age of the child, had there been any insertion of wooden stick or *Tilli* in her private part, the child was bound to suffer injuries which would have been revealed during her medical examination. It has been contended that absence of any injury on her body/private part is sufficient to discard the version of PW-1 Amit Kumar Nimesh and PW-2 Vishal.

8. The appearance of the appellant/convict was also procured by issuance of production warrant and the appellant/convict has also been heard. The appellant/convict has submitted that the baby girl was the

daughter of his co-labourer working at the construction site nearby and he had taken the child just to play with her. The undergarment of the child was pulled down by him only to make her pass urine. He has further submitted that his act has been misunderstood by the complainant and due to that reason he was apprehended and implicated in this case.

9. On behalf of the State Ms.Kusum Dhalla, learned APP has submitted that the judgment of the conviction and order on sentence suffer from no illegality for the reason that the act of the appellant/convict in inserting the wooden stick (*Tilli*) in the private part of a baby girl aged about one year and rotating it, amounts to aggravated penetrative sexual assault within the meaning of Section 3(b) of POCSO Act, 2012 and in view of the age of the child i.e. about one year, the act amounts to aggravated sexual assault within the meaning of Section 9(m) of POCSO Act and he has rightly been sentenced to undergo rigorous imprisonment for ten years.

10. With a view to understand the nature of the offence stated to have been committed by the appellant/convict through the testimony of PW1 Amit Kumar Nimesh, PW-2 Vishal and PW-3 W/SI Saroj Bala and the medical evidence, it is necessary to refer to the testimony of PW-1, PW-2 & PW-3 as well as the MLC. It is relevant to mention here that the parents of the baby girl remained untraceable. Since the baby girl of tender age i.e. one year could not have made any statement in respect of the occurrence, there was hardly any necessity to produce her before the learned Magistrate for purpose of getting her statement recorded under Section 164 Cr.P.C.

11. With a view to appreciate the rival contentions, the testimony of material witnesses and the documentary evidence has been perused.

Version of the complainant Sh.Amit Kumar Nimesh – PW-1

Version as recorded in the complaint Ex.PW1/A	Version as recorded in the statement recorded under Section 164 Cr.P.C. on 03.03.2014	Version as recorded before the Court on 30.06.2014.
(i) On 2 nd March, 2014 at about 11.00 am, he was going to feed a <i>roti</i> to a cow.	(i) A day before on Sunday at about 10.30/11.00 am, due to <i>Amavasya Pooja</i> at his house, he had gone to give <i>roti</i> to a cow.	(i) On 2 nd March, 2014 at about 11:00/ 11:30 AM he had gone to feed <i>roti</i> to a cow near Shani Mandir in front of a Church where construction was going on.
(ii) He saw one person sitting behind the car with a child.	(ii) Near <i>Shani Mandir</i> some vehicles were parked and in space between the footpath and car, he saw one person namely Babu Ram sitting with a one year old baby girl.	(ii) He noticed the accused sitting alone behind a car on footpath on the service road.
(iii) That person was under the influence of liquor	(iii) When he returned after feeding the cow he was surprised to see that the said person was still sitting with the baby girl.	(iii) While returning after feeding the cow, out of curiosity he went there.
(iv) That person had removed the underwear (<i>kachhi</i>) of the girl child and	(iv) On suspicion as to why he was sitting behind the vehicle when there was lot of space in the front, he	(iv) He found a female child in the lap of that accused and that the accused had inserted a stick (<i>Tilli</i>) in her

had inserted wooden piece (<i>lakdi ka tukda</i>) in her private part and was rotating it there. (v) He apprehended that person when that person was trying to flee. (vi) Somebody informed the police and the father of the girl child also reached the spot and informed that the child was his daughter.	went close to see that person. He saw that the said person had removed underwear of that girl child and something like <i>Jhadu Ki Tilli</i> has been put in the vagina of that child and that person was rotating it there. (v) On seeing him, that person pulled up the undergarment of baby girl and started running. (vi) However, that person was apprehended with the help of public person and somebody also informed the police. (vii) That person was claiming the baby girl to be his daughter. But all of them when went to the construction site where he resided, they met the mother of the baby girl and came to know that the baby girl was of some other neighbourer.	private part and was revolving the <i>Tilli</i> inside her private part. (v) On seeing him the accused tried to run away with the baby girl and was apprehended with the help of other public persons. (vi) PCR was informed. It was revealed that the baby girl was of the labourer working at the side behind the Church and was not the daughter of the accused.
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Version of PW2 Vishal.

- (i) On 2nd March, 2014 at 11:00 AM when he was going to R.K.Puram to Church where he used to teach Bible to the children near Shani Mandir.
- (ii) He saw the convict Babu Ram sitting behind a car parked on the road with a small girl with him and the '*kachhi*' of the child had been pulled down.
- (iii) One boy was standing there and he informed Babu Ram was doing some '*galat harkat*' with the child and that the child did not seem to be his child. Thereafter he informed the PCR from his mobile, police reached there and apprehended the accused.

Version of PW-3 W/SI Saroj Bala – the Investigating Officer :

- (i) On receipt of DD No.21-A at about 11:00 AM she reached the spot where she met the complainant Amit Kumar Nimesh, victim aged one year, her mother & maternal grandfather (*Nana*), the accused was also there.
- (ii) She made inquiry from the complainant and took the child victim along with her mother for examination to the Safdurjung Hospital.
- (iii) The accused was detained in the custody of Constable Mahender. She recorded the statement of the complainant and prepared Rukka (Ex-PW3/B) for registration of the case on the basis of which FIR was registered.
- (iv) The accused was arrested and he was also sent for medical examination at AIIMS Hospital. His medical examination was

conducted vide MLC (Ex.A1). The samples taken from the accused by the doctor were also seized.

(v) The complainant Amit Kumar Nimesh was also produced before the learned MM for getting his statement under Section 164 Cr.P.C. recorded.

The Investigating Officer W/SI Saroj Bala (PW-3) in her cross-examination stated that when she reached the spot she met the complainant, the child victim along with her mother and maternal grandfather (*nana*) and the accused. The *galat harkat* mentioned by the complainant was that he was rotating the wooden stick (match stick) in the private part of the child. The wooden stick (match stick) was not pointed out at the spot. The site-pan (Ex. PW-3/D) prepared by the IO shows the place of incident is on the service road at point A adjacent to Shani Mandir.

12. The MLC of the child aged about one year was prepared at Safdurjung Hospital by Dr.Akanksha Mangla, MBBS, MS, Senior Resident, Deptt. Of Obstetrics & Gyanaecology, VMMC & SJH, New Delhi-29. In the said MLC she has specifically mentioned that no injury was noted over the whole body, face and vulva internal region. The child was conscious, oriented and in playful condition.

13. The appellant/convict does not dispute the fact that the child victim was daughter of the co-labourer and was with him at the time when he was apprehended. He also does not dispute that when he was seen by the complainant, undergarment of the child had been lowered. However, he has an explanation to give that it was done to make the child pass urine.

14. A bare perusal of the statement of PW-2 Sh.Vishal when examined in the light of statement of the complainant PW-1 Sh.Amit Kumar Nimesh shows that he is not a witness to the occurrence. He was part of the public that gathered after the complainant Sh.Amit Kumar Nimesh (PW-1) was apprehending the appellant when he was trying to escape alongwith the baby girl. It has already been noted that as per PW-1 Sh.Amit Kumar Nimesh – the complainant, on seeing him the appellant pulled up the '*kachhi*' of the baby girl. Thus, PW-2 Sh.Vishal, who come to the spot when appellant was trying to escape, had no chance to witness the insertion of some wooden stick in the private part of the baby girl by the appellant and rotating the same there.

15. The complainant Sh.Amit Kumar Nimesh (PW-1), who has seen the appellant with the baby girl not only while going to feed the cow but also while returning, has not seen the baby girl crying in the lap of the appellant or thereafter. A child of one year cannot walk as at that stage the child learns to take steps. So she had to be in the lap of the appellant. In case of insertion of *Tilli of* broom in the private part and its rotation there, the child would have cried due to pain and in the process of rotation, she was bound to suffer informal injuries in her private part.

16. Thus, it is a case where there is a conflict between the ocular evidence and the medical evidence which has to be resolved on examination of the MLC prepared by Dr.Akanksha Mangla, MBBS/MS, Senior Resident, Deptt. Of Obstetrics & Gynaecology, VMMC & SJH. Even the MLC note the child to be playful and

having not even a scratch on any part of her body. The MLC of the appellant does not show him to be either a drug addict or under the influence of any intoxication/liquor. No doubt, PW-1 Sh.Amit Kumar Nimesh and PW-2 Sh.Vishal are independent public witnesses and had no axe to grind in the matter but at the same time, mere suspicion on their part that the child was being sexually assaulted cannot take place of proof. In case of insertion of any object like 'Tilli' howsoever thin or small it could be, being sharp at the tip its insertion in the private part of a child aged about one year, was bound to cause injuries which would have remained noticeable at the time of her medical examination which was soon after the apprehension of the appellant.

17. In the case Radhakrishna Nagesh vs. State of Andhra Pradesh (2013) 11 SCC 688 the Supreme Court has observed as under:-

'19. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more res integra and stands squarely answered by the recent judgment of this Court in the case of Dayal Singh and Ors. v. State of Uttaranchal MANU/SC/0622/2012 : (2012) 7 SCALE 165

29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be

proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In Kamaljit Singh v. State of Punjab MANU/SC/0824/2003 : 2004 Cri. LJ 28, the Court, while dealing with discrepancies between ocular and medical evidence, held, "It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.'

18. Modi in his Medical Jurisprudence and Toxicology, Eighteenth Edition, writes at page 325:

'In small children the hymen, being situated high up in the canal, is not usually ruptured but may become red and congested along with the inflammation and bruising of the labia, or, if considerable violence is used, there is often laceration of the fourchette and perinacum.'

19. Section 11 of POCSO Act defines sexual harassment, which reads as under:-

'11. Sexual harassment : *A person is said to commit sexual harassment upon a child when such person with sexual intent,-*
(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such

gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefor.

20. Section 12 of POCSO Act prescribes punishment for committing the offence punishable under Section 11 of POCSO Act as under:-

‘12. Punishment for sexual harassment: Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.’

21. When the testimony of PW-1 & PW-2 is examined in the light of the MLC Ex.A-1 of the child victim prepared at Safdarjung Hospital soon after the incident, on finding in the MLC that there was not even a scratch on her whole body including private part was noticed by the doctor, I am of the opinion that learned Trial Court had

erred in coming to the conclusion that prosecution had established the charge for the offence punishable under Section 6 of the POSCO Act, 2012. The testimony of PW-1 & PW-2 at the most proved that at the time when the convict was seen by PW-1 Sh.Amit Kumar Nimesh, the 'kachhi' of the child was lowered which could have been done by the convict only thereby making the child exhibit her private part so as to be seen by him or the other persons. Of course, he has tendered an explanation that the purpose was to make the child pass urine.

22. After going through the provisions of the POCSO Act, 2012, examining the testimony of the prosecution witnesses and the MLC, I am of the considered opinion that the prosecution has failed to prove the commission of offence under Section 6 of the POCSO Act, 2012.

23. In my opinion from the testimony of the prosecution witnesses only a case of sexual harassment, punishable under Section 12 of the POCSO Act, 2012 can be said to have been proved against the appellant/convict.

24. In the facts and circumstances, the conviction and sentence awarded to the appellant under Section 6 of the POCSO Act, 2012 is set aside. The appellant is convicted for committing the offence punishable under Section 12 of the POCSO Act, 2012 and sentenced to undergo rigorous imprisonment for a period of three years and also to pay a fine of ₹1,000. In default of payment of fine, he shall undergo simple imprisonment for seven days.

25. The appeal stands disposed of in above terms.

26. The appellant be set at liberty if not wanted in any other case.

27. TCR be sent back alongwith copy of this order.

28. A copy of this order be sent to the concerned Jail Superintendent for information and compliance.

**PRATIBHA RANI
(JUDGE)**

JULY 18, 2017
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