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

+ **CRL.A. 388/2018 & CrI.M.B.545/2018**

VINOD SOREN

..... Appellant

Through: Mr. Manu Sharma, Advocate with
Ms. Ridhima Mandhar, Advocate.

versus

STATE

..... Respondent

Through: Mr. Hirein Sharma, APP for State

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL**

JUDGMENT
11.07.2018

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1. This appeal is directed against the judgment dated 30th November 2017 passed by the learned Additional Sessions Judge-1/Special Judge (POCSO) in Sessions Case No.236/2016 arising out of FIR No.173/2014 registered at Police Station ('PS') Madhu Vihar convicting the Appellant for the offences punishable under Sections 363, 342, 377 Indian Penal Code (IPC) and Section 6 of the Prevention of Children from Sexual Offences Act, 2012 ('POCSO'). The appeal is also directed against the order on sentence dated 7th December 2017 whereby the trial Court sentenced the Appellant as under:-

- (i) For the offence under Section 363 IPC, to undergo rigorous imprisonment ('RI') for a period of 5 years with a fine of Rs.20,000/-, and in default of payment of fine to undergo simple imprisonment (SI) for a period of 6 months;
- (ii) For the offence punishable under Section 342 IPC, to undergo RI for 6

months with a fine of Rs.1,000/-, and in default of payment of fine to undergo SI for 10 days;

(iii) For the offence punishable under Section 6 of the POCSO, to undergo RI for life with a fine of Rs.20,000/-, and in default of payment of fine to undergo SI for 3 months.

(iv) The sentences were directed to run concurrently.

2. Additionally, the trial Court directed that compensation of Rs.7,50,000/- should be paid to the victim who is a three and a half year old male child in terms of Section 357(A) of Criminal Procedure Code (CrPC)

3. Amit Kumar (PW-1), the father of the child was working as the driver of a private vehicle. He stated that on 11th February 2014 at around 2pm, he was having lunch at his house. The victim was playing outside the house. When his son did not return even after half an hour, PW-1 asked his wife to search for him. Later, he too joined in the search as did his relatives and neighbours. Thereafter they went to PS Madhu Vihar to lodge the missing report (Ex.PW1/A).

4. By the time PW-1 provided a photograph of his son to the police, it was already 9 pm. Police officials also began to search for the missing boy in Madhu Vihar, Chander Vihar and adjoining areas. When the police asked him to provide a photocopy of the photograph of his son, he went to the photocopy shop nearby. Two persons present there informed PW-1 that they had seen a person going to the roof of the shop with a young boy matching the description in the photograph. PW-1 conveyed this to SI Amit Pratap

Singh (PW-14) who had accompanied PW-1 to the shop. Both PW-1 and PW-14 went to the room which was closed from the inside. On repeated knocking, one person opened the door of the room and they found the son of PW-1 confined there. The boy who opened the door disclosed his name as that of the Appellant. The crowd which had gathered there became violent and started beating the Appellant. PW-14 then called PS Madhu Vihar to send staff to the spot to control the situation. The Appellant was saved by Constable Dharmender Kumar (PW-10) and Constable Neeraj (PW-13). The Appellant was sent to the PS for his own safety in the custody of the said two constables.

5. The memo concerning the recovery of the child was prepared by PW-14. Thereafter along with the parents of the victim, that is, PW-1 and his wife, the victim was taken by PW-14 to Lal Bahadur Shastri (LBS) Hospital. The MLC of the examination of the victim boy (Ex.PW2/B) reveals that he was brought there at around 11 PM. He was immediately referred to a Senior Resident.

6. The MLC noted that the child had been brought with the complaint of sexual assault (sodomy). The comments of Dr. Ashok Sagar (PW-5), who was the Senior Resident at the LBS Hospital, have been set out in the same MLC (Ex.PW5/A). His opinion was that “after the examination I find that the possibility of sodomy (anal intercourse) by erecting penis of adults/any structure resembling it cannot be ruled out.” The MLC also noted on ‘rectal examination’ as under:

“Mucosal tear present (9 o’ clock position)
Redness present around anus.

No active bleeding.
Anal tone increased
Rectal swab taken for forensic examination
No any external injury
Underwear (reddish orange colour) sealed for forensic examination.”

7. The above samples, i.e., the underwear of the victim and the rectal swab were handed over by the doctor in a sealed condition with the seal of LBS along with the sample seal to Constable Omjeet Yadav (PW-15) who in turn handed it over to PW-14. They were seized under seizure memo (Ex.PW10/A). After coming back to PS Madhu Vihar, PW-14 deposited these articles to *malkhana*.

8. The Appellant was arrested and his personal search was conducted. The statements of the witnesses were recorded. The Appellant was also medically examined at the LBS Hospital on 12th February 2014 at 1:10 am. His blood sample was taken. It was noted that “there is nothing to suggest that the person examined is not capable of performing sexual activity.” The nature of injuries was noted as “simple/fresh”. At the end of the investigation, a charge sheet was filed and by an order dated 5th April 2014, charges were framed by the trial Court against the Appellant for the aforementioned offences.

9. On behalf of the prosecution 16 witnesses were examined. The Appellant denied the incriminating circumstances in the statement under Section 313 Cr PC. His defence was that he was doing his night duty on a dumper. On the date of the incident, at about 5 to 6 pm the child who was playing outside near the photocopier/mobile shop, was brought by the public persons to his

room and he was given beatings by them and later on the police came and saved him from them. He claimed that he had done no wrong act with the child and that he had been falsely implicated. No defence witnesses were examined.

10. In the impugned judgment, the trial Court, after analyzing the evidence, observed as under:

(i) The public witnesses were consistent about the recovery of the child from the room of the Appellant at around 10 pm on 11th February 2014. The inconsistency in the statement of Constable Dharmender Kumar (PW-10) that it was at 7:30 pm could, therefore, be safely ignored since all other witnesses as well as the IO were consistent about the time of the recovery being 10 pm.

(ii) The MLC of the Appellant noted that he had multiple linear abrasions over neck and left chest which corroborate his being beaten up by the public when the child was recovered from his room.

(iii) The child was too young to depose and, therefore, the failure to examine him was not fatal to the case of the prosecution. On the other hand, the prosecution had been able to prove convincingly that the Appellant was living in the house from where the child was recovered and that the said room was taken on rent by his employer. The prosecution was able to prove that the child victim was with the accused in a closed room where no one else was present. Further, the child victim was seen at around 7 pm with the

accused by some of the PWs.

(iv) The medical evidence pointed to the possibility of sodomy/anal intercourse. The FSL report confirmed that the DNA profile generated from the source of Exhibit 5 (the blood sample of the accused on gauze) were accounted in the mixed DNA profiles from the source of Exhibit 2 (anal swab of the victim). The DNA profile does, therefore, conclusively link the Appellant with the commission of anal intercourse since his semen was present in the anal swab of the victim.

(v) The commission of aggravated penetrated sexual assault upon the child was, therefore, established, and the offence under Section 6 of the POCSO Act was proved as was the crime of kidnapping the child from the lawful guardianship of his parents and confining him. The Appellant has been unable to establish his defence and has not led any evidence. There was also a presumption against the accused under Section 29 of the POCSO Act which he failed to rebut

11. For the above reasons, the trial Court convicted the Appellant for the offences aforementioned and sentenced him as noted hereinabove.

12. Mr. Manu Sharma, learned counsel for the Appellant, submitted that the victim, according to his father, was at the time when he was found to be missing not wearing any clothes below his shirt. He referred to the statement first given by PW1 to the police (Ex.PW-1/A) on the basis of which the *rukka* was drawn. It was accordingly submitted that the emergence of 'underwear/*pajami*', which was marked as Exhibit-1 and sent to the FSL for

testing was not explained by the prosecution. Even when the victim was recovered from the room of the Appellant, he was not found to be wearing any clothing below his shirt. It is accordingly submitted that it is a mystery how the doctor who examined the victim handed over to the Duty Constable (PW-15) the underwear of the victim. It is pointed out that it is this underwear on which blood was found and the failure to explain as to how this underwear suddenly emerged gives rise to suspicion with regard to the case of the prosecution.

13. Secondly, it was submitted by Mr. Sharma that although the anal swab of the victim indicated the presence of blood, the MLC of the Appellant did not show that there was any injury to his penis. Therefore, it could not safely be concluded that penetrative sexual assault was committed by the Appellant upon the victim. It was also pointed out that there was no external injury noticed on the victim, apart from the mucosal tear on the anus and there was no active bleeding. According to Mr. Sharma, the FSL report by itself was not a reliable piece of evidence to confirm the guilt of the Appellant.

14. As regards the submission regarding the underwear of the victim, the Court notices that PW-1 has stated in his cross examination that “On the date when my son was kidnapped, he was wearing t-shirt of green colour and half pant of green colour.” Further, in his cross-examination he states “At the time when I found my son, he was wearing green colour t-shirt, but he was not wearing half pant.” Jugal Kishore (PW-7) was a potter who sold his wares near the Madhu Vihar red light in front of Hanuman mandir and he identified the child being taken away by the Appellant on 11th February

2014 at around 3 pm. He further stated that he was able to recollect that the boy was “naked below the waist and was wearing only a t-shirt.” Constable Dharmender Kumar (PW-10) in his cross-examination stated “the victim child was wearing yellow cloth and he was naked below”. SI Anil Pratap Singh (PW-14) also in his cross examination stated that the child was “naked below waist”.

15. While these statements do make it seem that the victim was not wearing anything below his t-shirt, when seen in the context of what is stated by PW-1 and the fact that these answers given in the local language had to be translated by the trial Judge’s dictation, it cannot be stated with certainty that the child was ‘stark naked’ i.e. not even wearing underwear. It is possible that the t-shirt was covering the private parts of the child and, therefore, the absence of the half pant of the child could be described by these witnesses as nakedness. In the absence of supplementary questions to the witnesses whether they actually saw the child wearing underwear specifically, it would be unsafe to simply infer that the child was not even wearing any underwear.

16. In any event, the Court does not consider this aspect to be seriously problematic for the case of the prosecution. Even if the underwear of the victim and the blood stain found on the underwear were to be kept aside, the FSL report clearly indicates that human semen was detected on Exhibit-2, i.e., the anal swab of the victim and the DNA profile generated from the anal swab contained the alleles from the source of Exhibit-5 which was blood sample of the accused on gauze. It must be recalled that Exhibit-2 contained both blood and semen and it is for this reason that the conclusion in the FSL

report was as under:

“DNA profiling (STR analysis) performed on the exhibits provided is sufficient to conclude that the DNA profiles from the source of exhibit ‘5’ (Blood sample of accused on gauze) were accounted in the mixed DNA profiles from the source of exhibit ‘2 (Anal Swab)’ of victim.”

17. The correctness of the FSL report is not being questioned by the Appellant and the conclusion drawn by the trial Court that this is a clinching piece of evidence to connect the Appellant with the crime cannot possibly be faulted. Therefore, notwithstanding the fact that the recovery of the underwear of the victim may not have been adequately accounted for by the prosecution, the above scientific evidence coupled with the medical opinion which notes mucosal tear present at 9 o’clock position with redness present around anus is sufficient to conclude that the victim was subjected to penetrative sexual assault by the Appellant.

18. This is apart from the fact that the victim was recovered from the room of the Appellant which was locked from the inside and opened by the Appellant himself. When he was apprehended, the Appellant was in the company of the victim. The Appellant had in fact to be rescued by police officers from members of the public who naturally got agitated.

19. There is more than adequate evidence led by the prosecution to show that the victim was seen in the company of the accused during the day after he went missing from outside his house where he was playing at around 2 pm. The conclusions reached by the trial Court about the guilt of the Appellant as a result of each of the links in the chain of circumstances being

comprehensively and conclusively proved by the prosecution cannot be said to be suffering from any legal infirmity. The Court concurs with the conclusions reached by the trial Court on the analysis of the evidence led by the prosecution.

20. The victim was a young 3 ½ year old child and was subjected to traumatic and brutal sexual assault by the Appellant. In the circumstances, the Court does not find any reason whatsoever to interfere with the sentence awarded to the Appellant for the offence under Section 6 of the POCSO Act and for the offences under Sections 342 and 363 IPC.

21. The appeal and the pending application are accordingly dismissed. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

JULY 11, 2018
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