

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

% Decided on: January 17th, 2018

+ **CRL.A. 639/2017**

PAWAN KUMAR Appellant

Represented by: Mr. Neeraj Bhardwaj,
Advocate.

versus

STATE Respondent

Represented by: Mr. Hirein Sharma, APP for
the State with SI Ravinder
Singh, PS Bhalaswa Dairy.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. By the present appeal, the appellant challenges the impugned judgment dated 26th July, 2016 convicting him for the offence punishable under Section 4 of Protection of Children against Sexual Offences Act, 2012 (in short 'POCSO Act') and Sections 363/366A/376(1) IPC and the order on sentence dated 30th July, 2016 directing him to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹5,000/- and in default of payment of fine to undergo simple imprisonment for a period of 30 days for the offence punishable under Section 4 of POCSO Act and rigorous imprisonment for a period of seven years and to pay a fine of ₹5,000/- each and in default whereof to undergo simple imprisonment for a period of 30 days for the offences punishable under Sections 363/366A IPC. No separate sentence was awarded for the offence punishable under Section 376(1) IPC.

2. Learned counsel for the appellant submits that neither the statement of the victim was recorded under Section 164 Cr.P.C. nor in Court, thus, the appellant deserves to be acquitted. Further, conviction cannot be based on the sole testimony of the mother of the victim who is an interested witness.
3. Learned APP for the State on the other hand contends that there is no illegality in the impugned judgment and order on sentence. Prosecution case stands proved beyond reasonable doubt on the basis of the testimony of mother of victim coupled with the MLC of the victim and DNA analysis report.
4. Process of law was set into motion on 21st April, 2013 around 1:07 P.M. when a PCR call was received regarding the rape of a 12 year old girl at House No. 82, Gali No. 7, Shradha Nand Colony, Rajeev Nagar. Aforesaid information was recorded vide DD No. 37B (Ex.PW-5/A) and was entrusted to SI Sangeeta (PW-19) who along with Ct. Jony (PW-18) and W/Ct. Ruma (PW-10) reached the spot. They met the victim and the mother of victim. Statement of mother of victim was recorded wherein she stated that she works as a house maid and her husband works in a factory. On 21st April, 2013, she was present in the house and around 11:00 A.M., her daughter (victim herein) was playing outside the house. Her neighbour Pawan Kumar (appellant herein) lured the victim by giving her chocolate and took her to his house. He committed rape upon the victim at his house. Victim came back weeping and narrated the incident to her mother. She further stated that in the meantime, somebody informed the police. On the basis of the aforesaid statement (Ex.PW-2/A), FIR No. 118/2013 (Ex.PW-4/A) was registered at PS Bhalswa Dairy for the offences punishable under Sections 4/6 of POCSO Act, Sections 363/376 IPC and Section 23 of

Juvenile Justice (Care and Protection of Children) Act, 2000.

5. SI Sangeeta along with the victim and her mother went to the house of Pawan Kumar. At the instance of the victim, Pawan Kumar was apprehended from his house. Ct. Jony (PW-18) and Ct. Sokinder (PW-16) took Pawan Kumar to BJRM Hospital for his medical examination. Victim was also taken to BJRM Hospital for her medical examination. Pawan Kumar was arrested in the hospital vide memo Ex. PW-18/A. His personal search was conducted vide memo Ex. PW-18/B. Exhibits of Pawan Kumar, after his medical examination, were seized vide memo Ex.PW-18/C. SI Sangeeta prepared the site plan (Ex.PW-19/A). Clothes of the victim i.e. frock (Ex.P-16) and underwear (Ex.P-17) lying in front of the shutter of the shop were seized at the instance of mother of victim, vide seizure memo Ex.PW-10/B. Samples of the victim were also taken vide seizure memo Ex.PW-10/A. One dark grey colour pant (Ex.P-11), two blankets (Ex.P-12 and P-13), one box containing one quarter bottle marked Mcdwell's No.1 (Ex.P-14) and one half bottle marked Murthal No.1 country made liquor (Ex.P-15) were seized from the room of Pawan Kumar. After the completion of investigation, charge sheet was filed for offences punishable under Sections 366A/376(1) IPC and Section 6 POCSO Act.

6. After putting preliminary questions to the victim (PW-1), learned Court observed that the victim was not capable of understanding the questions put to her and giving rational answers thereof. Therefore, the Court was satisfied that the victim was not a competent witness and hence could not be examined as a witness.

7. Mother of the victim was examined in Court as PW-2. She deposed in conformity with her statement made before the police. She also stated that

the victim was around 11 years old at the time of incident. During her cross-examination, she stated that the victim was suffering from fits and was taking medicines for the same. Victim was mentally weak and when victim gets fits, she becomes unconscious.

8. Dr. R.S. Mishra, CMO, BJRM Hospital was examined as PW-7. He stated that he was deputed to depose on behalf of Dr. Sudesh Kumar who had medically examined the victim. He stated that he was acquainted with the handwriting and signature of Dr. Sudesh Kumar. He proved the MLC (Ex.PW-7/A) of the victim signed by Dr. Sudesh Kumar, wherein victim was referred to Gynae SR for further evaluation.

9. Dr. R. Kappu, MO, BJRM Hospital (PW-11) stated that he was deputed to depose on behalf of Dr. Kanika who had given her observations on the MLC of the victim. As per the observations, on local examination, a midline perineal tear 2 X 2 cms was seen with minimal bleeding per vagina present, fourchette found torn, hymen was torn and admitting one finger, all indicating fresh assault.

10. Sh. Umesh Kumar (PW-12) who was working as a coordinator in GRC/Suvidha Kendra stated that he had given free classes to the victim and for that purpose he had obtained an affidavit from the father of the victim in which the date of birth of the victim was mentioned. Copy of the affidavit is Ex.PW-12/B and his letter is Ex. PW-12/A. As per the affidavit, the date of birth of victim is 1st January, 2002.

11. As per Ex. PW-19/B which is the age determination report of the victim, estimated age of victim was opined to between 14-16 years.

12. ASI Nag Singh (PW-8) deposed that he had taken the victim and mother of the victim to Rohini Court for recording of the statement of the

victim under Section 164 Cr.P.C., however, the statement could not be recorded as the victim was unable to speak.

13. Sh. Manish Khurana, ASCJ, Rohini Courts, (PW-14) stated that the victim and mother of victim had appeared before him for recording of statement of Section 164 Cr.P.C. He found that the victim was not in a position to depose.

14. As per the FSL report (Ex.F-1), human semen was detected on rectal swab of victim, two micro slides kept in a plastic case (of rectal examination), frock, underwear of the victim and underwear of Pawan Kumar. As per DNA examination, alleles from the source of blood gauze of Pawan Kumar were accounted in the source of rectal swab of victim, frock and underwear of victim.

15. From the ossification test report Ex. PW-19/B it is proved that the prosecutrix was a minor aged 14-16 years, being a mentally weak child, she was not in a position to depose in Court however, soon after the incident she narrated the incident to her mother who appeared as a witness and stated the facts which are duly corroborated by the MLC of the prosecutrix (Ex. PW-7/A) noting a midline perineal tear with minimal bleeding per vagina, fourchette and hymen torn indicating fresh assault coupled with the report of the FSL accounting for human semen in the rectal swab of the victim, micro slides, frock, underwear of the victim and the DNA thereon tallying with that of the appellant proving the offence committed by the appellant Pawan Kumar beyond reasonable doubt. Hence there is no illegality in the impugned judgment of conviction and order on sentence.

16. Appeal is accordingly dismissed.

17. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

18. TCR be returned.

(MUKTA GUPTA)
JUDGE

JANUARY 17, 2018

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