

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Crl.A.No. 996/2016**

Judgment reserved on : 26.10.2018

Date of decision : 30.11.2018

AFZAL

..... Appellant

Through: Ms. Naomi Chandra, Advocate
versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Ms. Kusum Dhalla, Addl. PP for
the State.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The appellant, Afzal S/o Abdul Rehman, vide the present appeal under Section 374(2) of the Code of Criminal Procedure, 1973, assails the impugned judgment dated 26.8.2016 and also the impugned order on sentence of the learned Additional Sessions Judge-01 (North-East), Karkardooma Courts, Delhi in SC No. 44297/2015 in relation to FIR No. 161/2013, Police Station Gokalpuri, registered under Sections 363/377/323 of the Indian Penal Code, 1860, and Section 6 of the POCSO Act whereby the appellant herein was convicted for the offences punishable under Sections 363/377 of the Indian Penal Code, 1860, and Section 6 of the POCSO Act, 2012 and was sentenced to rigorous imprisonment for a period of five years for the offence punishable under Section 363 of the Indian Penal Code, 1860 and to pay a fine of Rs.1000/- failing which he would further undergo simple

imprisonment for a period of fifteen days. The convict, i.e., the appellant herein was further sentenced to rigorous imprisonment for a period of 10 years for the offence punishable under Section 377 Indian Penal Code, 1860, and to pay a fine of Rs. 1000/- failing which to undergo simple imprisonment for 15 days and also sentenced to rigorous imprisonment for a period of ten years for the offence punishable under Section 6 of the POCSO Act and to pay a fine of Rs.1000/- failing which to undergo simple imprisonment for fifteen days and all the three sentences were to run concurrently with the benefit under Section 428 Code of Criminal Procedure, 1973 having been extended to the convict. Further more, a sum of Rs.50,000/- was directed to be paid as compensation to the victim through the Delhi Legal Services Authority under the Delhi Victim's Compensation Scheme.

2. The impugned judgment indicates that the charge under Section 323 of the Indian Penal Code, 1860, against the accused/convict, i.e., the appellant herein was held to have not been proved.

3. In terms of order dated 7.8.2018, the appellant was produced from the judicial custody and his nominal roll received from the Superintendent, Prison, Central Jail No.12 Mandoli, Delhi, indicates that the convict, i.e., the appellant herein has undergone 5 years 2 months and 2 days of incarceration from the period 16.5.2013 and has earned remission of 2 months and 6 days with the unexpired portion of the sentence being 4 years 7 months and 22 days as on the date of the report, i.e., 18.7.2018.

4. Arguments were addressed on behalf of the appellant by the learned legal aid counsel Ms. Naomi Chandra and on behalf of the State by the learned Addl. PP for the State Ms. Kusum Dhalla.

5. Crl. M. A. 16473/2016 is an application seeking condonation of delay of about seven days' delay in filing the appeal. For the reasons explained therein that the appeal could be filed only when the legal aid counsel visited the Tihar Jail No.4, the same is allowed in the circumstances of the case.

6. As per the prosecution version, through the said report of the police station Gokalpuri on 29.4.2013, a PCR call vide DD No. 25 A in relation to an eight year old boy being missing was received which was marked to ASI Ram Kishore for necessary action and investigation and on his reaching the spot, the complainant, namely, Shokeen r/o H. No. 2133, Gali No.2, Mustafabad, Delhi met him and informed that his eight year old son had gone to school in the morning and had not returned home as a consequence of which the FIR No. 161/2013, Police Station Gokalpuri, under Section 363 Indian Penal Code, 1860, dated 29.4.2013 was registered and the search of the missing child was carried out.

7. The complainant raised suspicion on his tenant named Afzal, i.e., the appellant herein who was also not found present at his house. During the course of investigation, the suspect Afzal made a call to his brother Mohd.Shoaib on 15.5.2013 from mobile No.07665597625 after which the location of the suspect was found out to be at village Sabrada, District Jaipur, Rajasthan and thereafter the team immediately rushed to the said place and reached a person named

Mohan S/o Kana Ram, whose mobile phone had been used by the accused/convict Afzal, i.e. the appellant herein, to call his brother. The said Mohan on being shown the photographs of the missing child and the suspect Afzal, i.e. the appellant herein, stated that both of them had met him around 4 p.m. on 15.5.2013 and had left for Jaipur and on the clue provided by the witness Mohan, the police team straightaway went towards the said direction and after reaching 2-3 Kms, the police found the suspect Afzal and the missing child i.e. the victim, walking on the road. The child was recovered and stated that he had been kidnapped by the accused/convict Afzal uncle who had taken him to Ajmer where he continuously did unnatural sex with the minor child several times. Both the accused/convict, i.e., the appellant herein, and the minor child were got medically examined at the GTB hospital vide MLC No.A 1883/13 and P-116/13. The accused/convict, i.e., the appellant herein was arrested on 16.5.2013 and the statement of the minor victim was recorded under Section 164 of the Code of Criminal Procedure, 1973 on 18.5.2013.

8. After the recording of the statement under Section 164 Code of Criminal Procedure, 1973, the minor child was produced before the CWC and was handed over into the custody of his father. The charge sheet indicates that the exhibits were sent to the FSL (Rohini) on 20.5.2013 vide RC No. 78/21/13 and the mobile phone No. 9891099861 (the subscriber of which was Mohd. Shahid PW-12, and which SIM card was given to PW-2 Mohd. Shoaib, brother of the accused/appellant herein) and the call details report thereof were obtained and the subscriber details of the phone No. 07665597625 of

Mohan were also obtained and after the institution of the charge sheet, the charge of allegations was framed against the accused/convict, i.e., the appellant herein on 13.12.2013 under Section 363/323 of the Indian Penal Code, 1860, and Section 6 of the POCSO Act, 2012 to which the accused/convict, i.e., the appellant herein pleaded not guilty and claimed trial and an additional charge is also indicated to have been framed on 9.9.2014 against the accused/convict, i.e., the appellant herein, qua the offence punishable under Section 377 of the Indian Penal Code, 1860.

9. Seventeen witnesses were examined by the prosecution, the details of which have been set forth by the learned Trial Court in para 3 of the impugned verdict to the effect:

“ PW1 Shokeen Ahmed was the father of the victim and complainant of this case.

PW2 Ct. Anand Kumar deposited the exhibits of this case at FSL

PW3 was the victim and he deposed about the incident.

PW4 Mohan was an independent witness, having a tyre puncture shop at Main Highway Road, Ajmer Highway, from whose mobile phone accused made call to his brother.

PW5 ASI Ram Kishore was the initial IO who prepared ruqqa on the statement of Shokeen Ahmed and got the present FIR registered.

PW6 Ct. Narender Kumar joined the raiding party and was a witness to the recovery of the victim and arrest of accused.

PW7 Mohsin @ Bhura was the brother of complainant/PW1. He deposed that he had a quarrel with the accused on 29.4.2013 and the accused had extended threats to him to see him in future.

PW8 Mohd. Shoiab was the brother of accused to whom accused had made a call and he accordingly informed the IO about it.

PW9 HC Sanjay Kumar was the Duty Officer who proved the FIR.

PW10 Ct. Budh Prakash handed over rugqa and copy of FIR to the IO.

PW11 Ct. Feru Bhagat took the victim and the accused to GTB Hospital where they both were medically examined.

PW12 Mohd. Shahid was the registered subscriber of mobile number 9891099861, which was used by Shoaib on which accused made call.

PW13 Dr.Manish Narang proved the MLC of the victim.

PW14 Ins. Jaswant Singh was the IO and he deposed about the investigation conducted by him and proved the relevant documents.

PW15 Shri Amrender Patel— Nodal Officer proved the call detail records of mobile number 9891099861.

PW16 HC Ashok Pal was the MHC(M) who proved the entries made in Register No.19.

PW17 Dr. Abhay Kumar medically examined the victim in the Surgery Department of GTB Hospital.”

10. Through his statement under Section 313 Code of Criminal Procedure, 1973, the appellant herein denied the incriminating evidence led against him and stated that he had been falsely implicated in the case by the PW-1, the father of the minor child as there was some dispute of a tenancy between them and that the child had been tutored by his parents. The appellant also denied that he ever kidnapped the victim and or committed any carnal intercourse with him and also stated that Mohan was a fabricated and stock witness of the police and had deposed in several other matters at the instance of the police. No evidence in relation to that effect howsoever was led by the accused/convict, i.e., the appellant herein.

11. A contention that was raised on behalf of the appellant was to the effect that the appellant has been falsely implicated because of the quarrel between the brother of the complainant and the accused/convict, i.e., the appellant herein, and the statement in the cross-examination of Mohsin vide which he admitted that there had been an incident for which PW-7 did not make any complaint to the police and it was also contended on behalf of the appellant that the testimony of PW-4 Mohan, whose mobile phone was allegedly utilized by the accused/convict, i.e., the appellant herein, to make a call to his brother which call details stand confirmed, as per the record,

is wholly inconclusive, in as much as it has been mentioned that the first call was made to PW8 (brother of the accused/convict, i.e., the appellant herein on 15.5.2013 at about 09:41 p.m. and the second call was made on 16.05.2013 at about 07:37 a.m. and that the mention of a second call on 16.05.2013 to PW8 from the cell of PW4 creates an impregnable doubt on the theory of the prosecution.

12. A perusal of the testimonies of the father of the victim Shokeen Ahmed examined as PW-1, the testimony of PW-7 Mohsin, the uncle of the victim as also the brother of PW-1, and the testimony of PW-8 Mohd. Shoiab, the brother of the accused/convict, i.e., the appellant herein and the testimony of PW-4 Mohan s/o Kana Ram whose mobile phone bearing No. 0766559765 was used by the accused/convict, i.e., the appellant herein, to call his brother, coupled with the statement under Section 164 of the Code of Criminal Procedure, 1973 of the victim Master X and the testimony of the victim Master X examined as PW-3 corroborate the prosecution version in *toto* for though there are minor discrepancies in the testimonies of the prosecution witnesses, the testimonies of all the witnesses are consistent in relation to all material particulars.

13. A contention was raised on behalf of the appellant that the testimony of PW-4 Mohan had falsely implicated the appellant herein in as much as he was a stock witness as admitted by him also in his cross-examination. It is essential to observe that PW4 Mohan in his cross-examination has stated to the effect that he has deposed in several other matters like accidents and the police had taken his

statement but categorically denied that he had identified the accused at the instance of the police.

14. It is essential to observe that PW-15 Mr.Amrender Patel— Nodal Officer, Idea Cellular Limited, indicates that he had brought the CDR of the said mobile Phone numbers from 14.5.2013 to 16.5.2013 EX.PW-15/C and also issued a certificate under Section 65-B of the Evidence Act, in relation to the said call details Ex.PW-15/D and though he stated that he could not tell the exact location or place of the mobile phone by the call details but he could tell the location of the tower which is stated to be at about 2-3 kms in the surrounding area. The call details placed on record as Ex.PW-14/D reflect both numbers, i.e., the number of Mohan Lal and the number of the brother of the accused/convict, i.e., the appellant herein Shoiab Ali. The said call detail reports at serial No. 24 to 35 are as under:

24.	919891099861	308309837861343	16:05:13	7:40:04	84	31602	New Seelampur	MOC	358310043686300
25.	919891099861	3025917665597625	16:05:13	7:37:20	48	31602	New Seelampur	MOC	358310043686300
26.	919891099861	8860546998	16:05:13	6:59:07	42	16351	#N/A	MTC	358310043686300
27.	919891099861	8860546998	16:05:13	0:08:33	65	31602	New Seelampur	MTC	358310043686300
28.	919891099861	3025917665597625	15:05:13	21:41:45	116	31481	Dayalpur	MOC	358310043686300
29.	919891099861	8860546998	15:05:13	20:04:57	97	31602	New Seelampur	MTC	358310043686300
30.	919891099861	3025917665597625	15:05:13	19:53:38	302	31601	New Seelampur	MOC	358310043686300
31.	919891099861	3025917665597625	15:05:13	19:47:19	51	31602	New Seelampur	MOC	358310043686300
32.	919891099861	4108918860546998	15:05:13	19:42:50	74	31602	New Seelampur	MOC	358310043686300
33.	919891099861	919891030955	15:05:13	19:39:11	0	31602	New Seelampur	SMT	358310043686300
34.	919891099861	30257665597625	15:05:13	19:08:05	229	31602	New Seelampur	MTC	358310043686300

the same itself thus negates the contention of the appellant that the witness Mohan was examined in the instant case as a stock witness even if he has been examined in several other accident cases by the police.

15. Another contention raised on behalf of the appellant was that there were several discrepancies in the testimonies of the prosecution witnesses including that of the minor child who had stated that he had not been taken by the police to the place where the appellant had committed sodomy on him, in contrast with what was stated by the Investigating Officer.

16. A bare perusal of the testimony of the child victim PW3 Master X and his statement under Section 164 of the Code of Criminal Procedure, 1973 also makes it apparent that there is nothing on record to indicate any inherent consistency in the testimony of the child witness for the statement under Section 164 of the Code of Criminal Procedure, 1973 of the child and his testimony in Court are consistent qua the incident as testified by the child victim of his having been kidnapped by the appellant on 29.4.2013 and of carnal intercourse committed by the appellant against the child which offences thus stand conclusively established against the appellant herein. The same however does not suffice to negate the categorical testimony of the minor child which is consistent in relation to all material particulars qua his having been kidnapped by the appellant herein and having been taken away in a rickshaw by the appellant and taken thereafter to Ajmer on foot and of the appellant having committed carnal intercourse on the minor child on a hill at Ajmer which he continued

to do so and even went to the extent of making the minor child beg on the false pretext that his mother has expired. The minor child was also categorical that the accused/convict, i.e., the appellant herein, apart from committing carnal intercourse also inserted his penis into his mouth. That the minor child did not complain to anyone during the period he remained in the company of the appellant however does not reflect on the veracity of the testimony of the minor child and there is nothing to indicate that the minor child had in any manner been tutored.

17. The absence of any injuries on the person of the minor child also in the facts and circumstances of the instant case in view of the consistent evidence on record does not assist the appellant in any manner.

18. In the circumstances thus of the instant case, the reliance placed on behalf of the appellant on the verdict of the Hon'ble Division Bench of this Court in ***State (Govt. of NCT of Delhi) v. Mullah Muzib***; Criminal Leave Petition No. 62/2015 a verdict dated 9.2.2015 to contend that the testimony of the minor necessarily needs to be corroborated, is misplaced in as much as the reliance placed on behalf of the appellant on the observations in para 24 of the said verdict itself brings forth the observation in the verdicts in ***Dattu Ramrao Sakhare v. State of Maharashtra***; (1997) 5 SCC 341 , ***Panchhi vs. State of UP***; (1998) 7 SCC 177 and ***Hamza v. Muhammedkutty***; (2013) 11 SCC 150; which nowhere lay down that the testimony of the minor child cannot be relied upon without corroboration and only spell forth that as a rule of prudence the Court always finds it desirable to have

the corroboration of such evidence from the testimonies of the witnesses and that it is not the law that if a witness is child, his evidence shall be rejected, even if it is found reliable.

19. As already observed herein in the facts and circumstances of the instant case, the testimony of the prosecution witnesses are categorical and consistent in relation to the recovery of the minor child from the accused/convict, i.e., the appellant herein, of the conversation between the mobile numbers of PW-4 Mohan whose mobile was utilized by the Appellant to talk to PW-8 Mohd. Shoiab, the brother of the accused/convict, i.e., the appellant herein after the occurrence of the incident and of the apprehension of the /convict, i.e., the appellant herein soon after the stated conversation and of the recovery of the minor child in the presence of the police officials. In the facts and circumstances of the instant case, it is apparent thus that there is no infirmity in the impugned judgment.

20. The learned Trial Court has thus rightly convicted the appellant for the proved commission of the offences punishable under Sections 363/377 Indian Penal Code, 1860, and under Section 6 of the POCSO Act, 2012.

21. In terms of Section 5 (m) of the POCSO Act, 2012, the accused/convict, i.e., the appellant herein having committed the penetrative sexual assault on a child below the age of 12 years, the offence falls within the ambit of the appellant having committed aggravated penetrative sexual assault on the child and he thus is liable for punishment in terms of Section 6 of the POCSO Act, 2012 which provides for the punishment to the effect:

“ 6. Punishment for aggravated penetrative sexual assault.- Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.”

22. The appellant having been proved to have sodomized the minor child in terms of Section 377 Indian Penal Code, 1860, punishable thereunder, which proves as follows:

“ Section 377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

23. In terms of Section 363 Indian Penal Code, 1860, for the commission of such offence kidnapping, the appellant has been rightly held to have been convicted is punishable as under:

“363. Punishment for kidnapping.—Whoever kidnaps any person from 1[India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

24. The learned Trial Court has categorically observed to the effect that the minor child apart from having been kidnapped and sexually abused was tormented and forced to beg for food and money and the same was also so done to take revenge from the victims uncle without

realizing the damage that could be caused to the psyche and future of the minor child and that the accused/convict, i.e., the appellant herein deserved no leniency or mercy especially when he was also facing trial for a similar offence which the nominal roll also so indicate that the appellant was also in judicial custody in relation to the FIR No.496/06 Police Station Bhajan Pura for the offences punishable under Sections 368/363 Indian Penal Code, 1860. There is thus no infirmity in the impugned order on sentence dated 26.8.2016 and the Crl.A.996/2016 is thus dismissed.

25. The medical status of the appellant as per the report attached with the nominal roll however indicates that the appellant has been suffering from psychiatric and behavioral disorder and has been referred to the IHBAS multiple times for his further management and follow up and that he has been attempting to commit suicide inside the Mandoli Jail and has also injured himself with self inflicted injuries on multiple occasions, though he is otherwise physically and mentally stable and was so on 19.7.2018.

26. In the circumstances, whilst upholding the impugned judgment dated 26.8.2016 and the impugned order on sentence dated 26.8.2016 passed by the learned Trial Court in relation to the FIR No. 161/2013, Police Station Gokalpuri under Sections 363/377/323 Indian Penal Code, 1860, and Section 6 of the POCSO Act, 2012, it is considered appropriate that the carceral period reforms the appellant in terms of the verdict of Supreme Court in ***Phul Singh Vs. State of Haryana in Criminal Appeal No. 506/1979 decided on 10.09.1979*** and directions laid down by us in Sanjay vs. State 2017 III AD (Delhi) 24, dated

20.02.2017 it is essential that the following directives detailed hereunder are given qua the remaining sentence of imprisonment so that the sentence acts as a deterrent and is simultaneously reformatory with a prospect of rehabilitation. The Superintendent, Central Jail, Mandoli where the appellant shall be incarcerated for the remainder of the term of imprisonment as hereinabove directed shall consider an appropriate programme for the appellant ensuring, if feasible:

- **appropriate correctional courses through meditational therapy;**
- **educational opportunity, vocational training and skill development programme to enable a livelihood option and an occupational status;**
- **shaping of post release rehabilitation programme for the appellant well in advance before the date of his release to make him self-dependent,**
- **ensuring in terms of Chapter 22 clause 22.22 (II) Model Prison Manual 2016, protection of the appellant from getting associated with anti – social groups, agencies of moral hazards (like gambling dens, drinking places and brothels) and with demoralised and deprived persons;**
- **adequate counselling being provided to the appellant to be sensitized to understand why he is in prison;**
- **conducting of Psychometric tests to measure the reformation taking place; and**

- that the appellant may be allowed to keep contact with his family members as per the Jail rules and in accordance with the Model Prison Manual.

27. Furthermore, it is directed that a Bi-annual report is submitted by the Superintendent, Central Jail, Mandoli, New Delhi to this Court till the date of release, of the measures being adopted for reformation and rehabilitation of the appellant.

28. Copy of this judgment be also sent to the Director General, Prisons, Delhi and to the Secretary, Law, Justice and Legislative Affairs, GNCTD, Delhi to ensure compliance of the above directions. The copy of this judgment be supplied to the appellant and be sent to the Superintendent Jail, Tihar.

29. The record of the Trial Court be returned forthwith.

ANU MALHOTRA, J.

NOVEMBER 30, 2018/SV/vm