

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Crl.A.No. 957/2017, Crl. M.(Bail) 444/2017 & Crl. M.A. No. 4688/2018**

Judgment reserved on : 26.4.2018
Date of decision : 20.02.2019

SITAB SINGH

.....Appellant

Through: **Mr.Ankur Sood and Ms.Romila Mandal, Advocates with Appellant in JC.**

versus

STATE

..... Respondents

Through: **Mr.Sanjeev Sabharwal, APP for State.**

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The appellant Sitab Singh S/o Chander Singh convicted vide judgment dated 6.5.2017 of the learned Additional Sessions Judge-01, Patiala House Courts, under Section 11(ii) of the Prevention of Child from Sexual Offences Act, 2012 punishable under Section 12 thereof and sentenced vide order on sentence dated 10.7.2017 to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.3000/- and in default of payment of fine to further undergo simple imprisonment for a period of one month with the benefit of Section 428 Code of Criminal Procedure, 1973, seeks the setting aside of the said conviction and sentence imposed submitting that he has been convicted erroneously on the basis of presumptions and assumptions without the

charge of allegations levelled against him having been established beyond a reasonable doubt. The appellant has also claimed that he has been falsely implicated in the instant case and has submitted that the prosecution version levelled against him was not probable and that the testimony of the prosecutrix PW-4 was a wholly tutored testimony and that there had been non-compliance of the provisions of Section 24 (2) of the POCSO Act, 2012.

2. Notice of the appeal was issued to the State and vide order dated 17.10.2017 qua Criminal M. B. 1812/2017 vide which it was held that there was no case for suspension of sentence made out during the pendency of the present appeal and the Trial Court Record was requisitioned which has been received and perused.

3. The prosecution version set forth through the charge sheet filed under Section 173 Code of Criminal Procedure, 1973, before the learned Trial Court is to the effect that SI Ram Pratap who was on emergency duty on 6.3.2015 at Police Station Delhi Cantt., on receipt of DD No. 61 A at 11:05 p.m. i.e. EX.PW-8/D which was to the effect that as per the information received at Servant Quarter No.165, Old Pratap Chowk, a boy had committed eve teasing with a lady as informed by the Lady Constable Anu 8552 of the PCR, and thus SI Ram Pratap along with Lady Constable Mukesh 2741 S-W reached the spot at quarter No. 165, Servant Quarters, Gopinath Bazar, where the prosecutrix Ms. 'X' in the presence of her mother Manju and Lady Constable Mukesh, gave a statement to the effect that her father's name was Virender Singh, that she was aged 9 years with her date of birth being 10.9.2005 and that she herself studied in the Standard IV at the

Sarvodaya Kanya Vidyalaya, Sadar Bazar and that on that day at about 9:30 p.m. she was playing in the gallery outside her house and that her parents had gone with her brother to Dwarka and at that time the accused Sitab Singh, i.e., the appellant herein whom the prosecutrix referred to as 'uncle' who used to live in house No. 152 which house is opposite to her house had called out to her and when she looked outside her house, she saw uncle Sitab Singh standing outside his house and that he had opened the zip of his pant and showed her his penis and asked her to come to him and that she should not tell her mother, as a consequence of which she ran back into her house and closed her house from inside and that she informed her father about the same telephonically and thus her parents came home and she told them everything in detail whereafter her father telephoned the police at No.100. She further stated that she had given the statement to the police in the presence of her mother Smt.Manju and she sought legal action.

4. As per the charge sheet on the basis of this statement of the prosecutrix EX.PW-4/A, the FIR No. 107/2015, Police Station Delhi Cantt. was got registered by SI Ram Pratap, Under Section 12 of the POCSO Act, 2012 by sending the rukka through Ct. Naveen 1541/S-W whereafter, further investigation was entrusted to WSI Sunita Kumari. WSI Sunita Kumari as per the charge sheet during the course of investigation went to the spot, i.e., Quarter No. 165, Servant Quarter, Pratap Chowk, Gopinath Bazar where SI Pratap, the prosecutrix and her father Virender, mother of the prosecutrix Manju and W/Ct. Mukesh were present and during the course of investigation conducted, the WSI Sunita prepared the site plan at the pointing out of Ms. 'X' and the

Investigating Officer went in search of the accused Sitab Singh, i.e., the appellant herein, who after some time came back to his house whereafter the accused/the appellant herein was apprehended when he was going towards his house.

5. As per the charge sheet, during the course of investigation conducted and interrogation of Sitab Singh, the appellant herein, made a disclosure statement in relation to the commission of the offence punishable under Section 12 of the POCSO Act, 2012 qua the prosecutrix Ms. 'X' whereafter the accused, i.e., the appellant herein was arrested whereafter the Counselling Officer from the CIC was called and the Prosecutrix was counselled, the formal medical examination of the accused, i.e., the appellant herein was got conducted in the Deen Dayal Upadhyay Hospital whereafter the accused, i.e., the appellant herein was produced before the Court. The date of birth of the prosecutrix was got verified from the Sub-Registrar's office which intimated that the date of birth of the prosecutrix as put forth by her as being 10.9.2005 was found correct and thus the statement of the prosecutrix under Section 164 Code of Criminal Procedure, 1973 was recorded whereafter on 30.5.2015 the accused, i.e., the appellant herein was released on bail and appears to have been on bail during the trial before the learned Trial Court. Vide order dated 5.8.2015, the charge of allegations was framed against the accused, i.e., the appellant herein, alleging commission of an offence under Section 12 of the POCSO Act, 2012 to which the accused, i.e., the appellant herein pleaded not guilty and claimed trial.

6. In support of the prosecution version, the State has examined nine witnesses. The accused, i.e., the appellant herein, led no evidence in defence but claimed through his statement under Section 313 Code of Criminal Procedure, 1973, recorded on 2.12.2016 that he was innocent and that the evidence led against him was incorrect and stated that his signatures were taken on some blank papers when confronted with Ex.PW6/B his disclosure statement though the accused, i.e., the appellant herein admitted that he was got medically examined but claimed that he had been falsely implicated in the case.

7. The prosecutrix examined as PW-4 was first examined by the learned Trial Court to ascertain her social, educational and psychological background and to make her comfortable and put thus those queries to which she responded that she was studying in class-V, she could read Hindi and can understand the same and further stated that she could write English and could read the same. The prosecutrix stated that her family consisted of her parents and one brother. The prosecutrix could not say where she had come i.e. to the Court and she also claimed ignorance before whom she had appeared but stated that she had come to give her statement with her father and mother and also stated that one should always speak the truth and she had not been tutored by anyone to tell anything in the Court and on enquiry she stated that she was not under any kind of fear or coercion.

8. The learned Trial Court, thus observed to the effect that in view of the answers given by the prosecutrix to the questions which were put to her in Hindi, the Court was of the considered opinion that the witness was capable and competent to give rational answers and that she

understood the duty of speaking the truth though she did not understand the sanctity of oath and thus her statement was recorded without oath.

9. The prosecutrix stated in her examination before the Court that on 6.3.2015, her parents along with her younger brother went to Dwarka to meet her Tau (uncle) at about 8 p.m. and as she herself had an exam the next day she did not accompany her parents and was playing in the gallery of her house and at that time, the accused, i.e., the appellant herein, called her by her name. The accused, i.e., the appellant herein, who had been made to sit behind the one side view mirror screen so that he was not visible to the witness but could watch the proceedings from behind it and could also communicate to his counsel, if required, was as per the testimony of the prosecutrix recorded by the learned Trial Court thus asked to come out from behind, i.e. one side view mirror screen when the witness correctly identified him and the accused, i.e., the appellant herein was then made to sit behind the one side view mirror screen. The prosecutrix through her examination corroborated the prosecution version in relation to all material particulars and stated that the accused, i.e., the appellant herein was residing near her house at the time of the incident and she saw the accused, i.e., the appellant herein the 'uncle' standing outside the house, he opened the zip of his pant and showed her his private part and asked her to come in a room and the accused, i.e., the appellant herein further asked her not to disclose anything to her mother. The prosecutrix further stated that she was terrified and entered the room of her house and bolted the door from inside. She further stated that she then called her father and told all the facts to her parents and her parents reached the house and she told all

the facts to her parents and her father called at no. 100 and the police reached there and she made her statement EX.PW-4/A which was recorded by the police in the presence of her mother. *Inter alia* the prosecutrix also stated that she had also shown the place of the incident to the police and that the police prepared the site plan at her instance. She stated that the said site plan is Ex.PW-4/B and that it bears her signatures at point A. The prosecutrix stated that her date of birth was 10.9.2005 and after three to four days she came to the Court along with her parents where her statement EX.PW-4/C was recorded by the Magistrate. As per the examination conducted by the learned Metropolitan Magistrate before the statement of the child was recorded, it is indicated that the child had stated that it was good to tell the truth and that she was comfortable in making her statement of her own and that she had not been put under any fear by any person. The prosecutrix stated in her statement EX.PW-4/C that it was the night of Holi and her parents had gone out and her brother had also gone with them and she was playing in the gallery and beneath her house one uncle Sitab Singh used to reside who called her and when she saw him he opened the zip of his pant and showed to her that from where *susu* (urine) is done and told her not to tell her mother about the same and asked her to come down and that she got frightened and immediately went inside and bolted the door and then rang her parents and then her parents came and made a complaint to the police.

10. On being cross-examined by the counsel for the accused i.e. the appellant herein, the child stated that her father was not at home at the time of incident and one tenant was residing in their house along with

his wife and three children. She also stated that the said tenant along with his family was not present in the house at the time when the incident took place and on the next day she had her science examination but she had not given the date sheet to the Investigating Officer. She further stated that she did not recall the time when the accused, i.e., the appellant herein, had called her though it was night time. She also stated that from the gesture of the accused i.e. the appellant herein it did not reveal that the accused was under the influence of liquor. The prosecutrix stated in her cross-examination that the accused, i.e., the appellant herein asked her to come to his house and the accused, i.e., the appellant herein opened his zip and showed his private part to her whilst standing outside his house. The prosecutrix further stated that there were many other houses in the locality and she did not see any other public person outside the house and the accused, i.e., the appellant herein was residing with his wife and children in one room and other persons were also residing in the same house. The prosecutrix denied that there was any dispute between her father and the accused, i.e., the appellant herein on petty matters and also denied that her father was having enmity with the accused, i.e., the appellant herein and denied that a false story had been created by her parents in order to falsely implicate the accused, i.e., the appellant herein and denied that she was used as a tool by her parents. She further denied that no such incident as stated by her had taken place and denied that she had given her statement before the police and before the Magistrate on the tutoring of her parents and also denied that she was deposing falsely.

11. PW-1 Virender Singh, the father of the prosecutrix, supported the prosecution version and stated that he along with wife Manju and son had gone to meet his brother who was residing at Dwarka on the festival of Holi on 6.3.2015. He further stated that he had not taken his daughter with them as his daughter had an exam on the next day and his daughter was alone at their residence at his house as she was studying and on the same day at about 9:30 p.m. his daughter called on his telephone No. 9654646745 from his mobile No. 8447380590 which had been left by him with his daughter as she was alone at that time. He further stated his daughter was crying and told him that *“Babu Ke papa Sitab Singh ne apne pant ki zip khol kar apni use lulli dikhayi aur apne pass bulaya aur bola ki mummy ko mat batana”*. PW-1 further stated that his daughter had told him that she had come inside the room and bolted the door from inside and further told him that she was afraid and she called him at the house and again started crying. He stated that he along with his family reached their house at about 10 p.m. and spoke to his daughter and also called Sitab Singh i.e., the accused, i.e., the appellant herein and made enquiries from the accused, i.e., the appellant herein and that the accused i.e. the appellant herein started quarrelling with them and then he PW-1 called at 100 number and one Sub Inspector along with one lady constable and one constable came to their residence and recorded the statement of his daughter aged about 9 years at that time at the instance of his daughter, the accused, i.e., the appellant herein was apprehended and was arrested and his statement was recorded by the Investigating Officer. He *inter alia*, stated that he along

with his daughter and wife had gone to the Court where the statement of his daughter was recorded by the Magistrate.

12. On being cross-examined by the counsel for the accused, i.e., the appellant herein, PW-1 stated that he was residing in the servant quarter along with his family and other servant quarters were also situated near his quarter and other persons were also residing those servant quarter and the accused i.e. the appellant herein Sitab Singh was also residing in the servant quarter along with his family. He further stated that the distance between his house and the house of the accused, i.e., the appellant herein was about 8 -10 feet and he was residing on the first floor and the accused, i.e., the appellant herein was residing on the ground floor. PW-1 further stated that he had not given any proof regarding the mobile phones bearing No. 9654646745 and 8447380590 and the incident had not taken in place in his presence. He further stated that he had called the police at about 10 p.m. and the victim i.e. his daughter was not taken to hospital for her medical examination. He further denied that there was a dispute between him and the accused, i.e., the appellant herein on petty matters or that he had any enmity with the accused, i.e., the appellant herein and denied that a false story was created by him in order to falsely implicate the accused, i.e., the appellant herein or that he used his victim daughter as a tool. He further denied that no such incident had taken place or that his daughter had given her statement before the police or before the Magistrate on their tutoring or that he had deposed falsely.

13. PW-2 Captain Sunil Yadav, from the Base Hospital, Delhi Cantt. testified that he had medically examined the accused, i.e., the appellant

herein vide MLC No. 3138/15 EX.PW-2/A. when he was working as a Junior Resident at DDU Hospital and that there were abrasions over his nose and behind the left pinna which injury was simple caused by a blunt object. The testimony of this witness was not challenged by the accused, i.e., the appellant herein.

14. PW-3 Smt. Manju, the mother of the minor prosecutrix corroborated the prosecution version as set forth through the FIR and through the statement of her spouse PW-1.

15. *Inter alia*, this witness identified the accused, i.e., the appellant herein as being Sitab Singh against whom her daughter had made the complaint and stated that on the statement of her daughter the FIR was registered and at the instance of her daughter, the accused, i.e., the appellant herein was apprehended and arrested. She also stated that her daughter's statement was record in the Court after about three days of the incident by the Magistrate. She denied through her cross-examination that she had deposed falsely and denied that she had falsely implicated the accused, i.e., the appellant herein in any manner.

16. PW-5 is Ct. Naveen Kumar No. 1549/SW, who testified to having accompanied SI Ram Pratap and W/Ct. Mukesh to the spot on receipt of DD No. 61 A on the night intervening 6/7.03.2015. He *inter alia* stated that the Investigating Officer recorded the statement of the victim in the presence of her mother and that in the meantime, W/SI Sunita had also reached the spot and SI Ram Pratap prepared the rukka and the same was handed over to him to get the FIR registered which he took to the police station and came back at the spot with the copy of the FIR and rukka and the same were handed over to W/SI Sunita to

whom the further investigation of this case was entrusted. He also testified that the Investigating Officer prepared the site plan at the instance of the victim and the accused, i.e., the appellant herein was arrested who made a disclosure statement Ex.PW-5/A and whose personal search was also got conducted vide Ex.PW-5/B.

17. On being cross-examined on behalf of the accused, the witness stated that the DD No. 61A was received at about 11:00 midnight and they reached the spot at about 11:30 p.m. but he could not recollect how he reached the spot and at the spot the victim and the mother of the victim were present. He further testified that W/SI Sunita reached the spot at about 12:00 midnight and he took the rukka at about 1:00 a.m. and came back at the spot at about 2:00 am, after getting the FIR registered, that he did not remember what was the mode of transport, that he went to the Police station and came back at the spot and no independent person had joined the investigation at the time of arrest of the accused, i.e., the appellant herein and the accused was arrested at about 3 a.m. from near his house and that he did not remember the exact address of the accused Sitab Singh, i.e., the appellant herein and denied that he had never joined the investigation or that the accused was not arrested in the manner as stated by him or that he was falsely implicated in the case at the instance of mother of the victim and he also denied that the accused, i.e., the appellant herein made no disclosure statement or that he had deposed falsely.

18. PW-6, SI Ram Pratap, No.4215 PS Delhi Cantt. also supported the prosecution version in *toto*.

19. On being cross examined by the counsel for the accused PW-6 stated that DD No. 61A was received by him at about 11:05 p.m. and at that time he was present in the Police Station. He stated that he did not record the departure entry in the DD register. He further stated that all the police officials i.e. lady Ct. Mukesh and Ct. Naveen reached to the spot by his motorcycle being driven by him and they reached the spot within 20 minutes. He further stated that two-three public persons were present when he reached there but he could not give the names and addresses. He stated that it took about 1 ½ hours to enquire from the victim for recording her statement whereafter Ct. Naveen had taken the rukka at about 1:15 a.m. on the motorcycle of SI Ram Pratap to the police station. He further stated that he did not remember the time when he came to the spot and stated that W/SI Sunita came at the spot at about 12:30 mid night and W/SI Sunita had also made inquiries from the victim. He further stated that the accused, i.e., the appellant herein was arrested at about 9:30 a.m. from his house.

20. PW-7 examined was W/SI Sunita the Investigating Officer of the case who corroborated the prosecution version and *inter alia* stated that she recorded the statement of the parents of the victim and that the accused, i.e., the appellant herein was taken to the police station and sent for his medical examination and she seized the birth certificate of the victim Ex.P-1 and took the same into possession vide memo Ex.PW-7/A and prepared the check list EX.PW-7/B. She also testified to having produced the victim before the learned Magistrate on 10.3.2015 for the recording of her statement under Section 164 Code of Criminal Procedure, 1973 which was so recorded as EX.P-2.

21. On being cross-examined on behalf of the accused, i.e., the appellant herein she denied that she had not investigated the case in a fair and proper manner and denied that she had testified falsely in connivance with the parents of the victim.

22. PW-8 HC Kapur Singh No. 2482/SW was the Duty Officer at PS Delhi Cantt. on the night intervening 6/7.03.2015, testified to having recorded the FIR No. 107/15 under Section 12 POCSO Act on the basis of the rukka, the copy of which was testified to be Ex.PW-8/A, and stated that the computer copy thereof was Ex.PW-8/B and he stated that he had also issued a certificate under Section 65B of the Indian Evidence Act i.e. EX.PW-8/C. He also testified to having produced the original 'daily diary register which indicated that on 06.03.2015 at about 11:05 p.m. an information was received regarding the eve teasing by a boy with a lady at servant quarter No. 165 Old Pratap Chowk and on this information DD No. 61 A was recorded by him and was marked to SI Ram Pratap for inquiry. This witness denied that the FIR was ante timed and ante dated and also denied that a false complaint has been got registered against the accused, i.e., the appellant herein and denied that he had deposed falsely.

23. PW-9 is W/Ct. Mukesh No. 2741/SW who had accompanied the Investigating Officer to the spot on receipt of DD No. 61A. In her testimony she corroborated the prosecution version in *toto*.

24. On being cross-examined she stated that they had left the police station at about 11:05 p.m. by an ERV vehicle being driven by the private driver whose name she did not remember and they reached the spot at about 11:20 to 11:25 p.m.

25. The accused in his statement without oath on 28.10.2015 stated that he did not dispute the genuineness of the birth certificate of the victim i.e. EX.P-1 nor did he dispute the proceedings under Section 164 Code of Criminal Procedure, 1973 i.e. Ex.P-2.

26. The learned Trial Court vide its impugned judgment observed as follows:

“16. Before reaching at any conclusion let the relevant sections 11 and 12 of POCSO Act be re-produced verbatim which is 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 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.

***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.*

Explanation.—Any question which involves "sexual intent" shall be a question of fact and also be liable to fine.”,

and concluded to the effect:

17. In the case in hand, it has categorically come on record in the deposition of PW4 prosecutrix that on 06.03.2015 her parents along with his younger brother went to Dwarka to meet her Tau at about 8 p.m. She was having her exam on next day so she did not accompany her parents. She was alone at her house. She was playing in the gallery of his house. She categorically testified that accused Sitab singh [neighbor] called by calling her name and after opened his zip of his pant showed his private part to her and asked her to come in a room and he also asked her not to disclose anything to her mother. She terrified and entered in the room of her house. She bolted the door from Inside. She called her father and told all the facts to him. She further deposed that her parents came at the house and called the police at 100 number. Police came and recorded her statement vide EX.PW4/A. She has also got exhibited the site plan as Ex.PW4/B. She further stated that her date of birth is 10.09.2005. She has got exhibited her statement, which was recorded u/s 164 Cr. PC vide EX.PW4/C. Testimony of PW4 prosecutrix has been corroborated by PW1 Virender and PW3 Manju and the IO. Besides, all the material documents have also been proved on record. Therefore, in light of the above discussed facts and circumstances of the case, I am of the view that indecent exposure of private part by the accused was seen by the victim PW4. The nutshell of foregoing discussion is that I am of the considered opinion that in view of the testimony of PW4 prosecutrix, PW1 Virender, PW3 Manju, PW5 Ct. Naveen Kumar, PW6 SI Ram Pratap, PW7 W/SI Sunita, the prosecution has succeeded in proving the case beyond

reasonable doubt that accused Sitab Singh sexually harassed PW4 prosecutrix by exhibiting part of his body i.e. his private part and genital area with intention that it be seen by the child and as such, I hold guilty accused Sitab Singh for the offence u/s 11 (ii) of POCSO Act punishable u/s 12 of POCSO Act.”

27. Through the present appeal, the appellant *inter alia* has contended that there was a scuffle between the father of the prosecutrix and the accused, i.e., the appellant herein and that it was a case of enmity between the father of the prosecutrix and the accused, i.e., the appellant herein in view of the disputes between them over a few petty issues.

28. The appellant further contended that the statement of the prosecutrix, the minor child, had necessarily to be gauged with caution and the testimony of PW-4 was very clear to the effect that it was wholly tutored in as much as the terms that she used for the private part of the of appellant could not be believed to be known by a nine year old girl child which showed that she was wholly tutored. The appellant further submitted that the learned Trial Court had failed to appreciate that a normal person would never do such an act in public as alleged and that there was no eye witness produced by the prosecutrix which itself casts a doubt on the veracity of the prosecution version. The accused, i.e., the appellant herein further contended that it could not be appreciated that as to how anyone can leave a nine year old girl child at the house in the evening of the night hours of festival time which too raises a suspicion specially as she was studying for an exam for the next date. *Inter alia*, the witness stated that the learned Trial Court had failed to appreciate that the parents of the victim and the victim herself had not

produced any date-sheet of the exam to substantiate that she had an examination on the next date. The appellant further contended that the learned Trial Court had failed to appreciate that the prosecution had failed to prove the mobile number enumerated by the victim and her father in their testimonies.

29. It has further been submitted by the appellant that the PCR call relied upon by the prosecution does not mention the name of any person and only says that some boy had committed eve teasing with a lady and it could not be explained how a nine years old child could be said to be a lady, even if the story of the prosecution was deemed or considered to be a gospel truth.

30. It is further contended on behalf of the appellant that the ingredients of Section 12 of the POCSO Act, 2012 were not brought forth in as much as there was no 'sexual intent' that had been established against the appellant qua the commission of obscene acts. It has also been stated by the appellant that the provisions of Section 24 of the POCSO Act, 2012 have not been followed and the statement of the victim was recorded by a male police officer even though a woman Sub Inspector Sunita was present at the place of incident and the statement should have been taken by her which further casts a suspicion on the statement recorded by PW-6 to the effect that it was either made by the prosecutrix or the father or mother of the prosecutrix/victim.

31. The appellant further contends that Section 27 of the POCSO Act, 2012 was also not complied with in as much as the minor child was not at all medically examined to ascertain how terrified she was after the alleged incident.

32. On behalf of the State it was contended by the learned APP for the State that the contentions raised on behalf of the appellant were devoid of all merit and that through the testimonies of the prosecution witnesses, the prosecution version against the appellant stood established beyond a reasonable doubt.

33. On a consideration of the rival submissions and the Trial Court Record and the statements of the witnesses recorded, it is essential to observe that the accused, i.e., the appellant herein has vide his statement dated 28.10.2015 on having been duly advised by his counsel who was present in Court, has categorically stated that he did not dispute the proceedings under Section 164 of the Code of Criminal Procedure, 1973 which was EX.P-2. The statement of the prosecutrix which has been recorded vide proceedings EX.P-2 under Section 164 of the Code of Criminal Procedure, 1973 on 10.3.2015 brings forth clearly the statement of the minor child recorded in Hindi, which is translated into English and reads to the effect:

“ On the day of Holi night, Mummy Papa had gone out. My brother had also accompanied. I was playing in the gallery. Beneath our house one uncle resides- Sitab Singh. He called me. I saw him, he opened the zip of his pant and showed his Voh (penis), from where susu (urine) is passed. He said that don't tell to mummy and come down here quietly. I got frightened and immediately went inside and bolted from inside and then phoned to mummy papa. Then mummy papa made a report to the police.”,

which it is apparent that this statement of the child is in her own words and categorically supports the prosecution version in *toto*.

34. The testimony of the minor child recorded as PW-4 is also wholly consistent with the prosecution version.

35. The minor discrepancies in relation to the vehicle in which the police personnel came to the spot and the non-joinder of public persons into the proceedings does not in any manner retract from the veracity of the prosecution version. The testimonies of the prosecution witnesses i.e. W/Ct. Mukesh, SI Ram Pratap and Ct. Naveen make it apparent that it was SI Ram Pratap who had first reached the spot in view of his being on emergency duty and that in these circumstances he had first recorded the statement of the minor child. W/SI Sunita to whom the further investigation was subsequently assigned the investigation had reached the spot after the emergency officer had reached the spot.

36. Thus there is nothing to indicate any violation of any provision of Section 24 of the POCSO Act, 2012 which provides as follows:

“24. Recording of statement of a child.—

(1). The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

2. The police officer while recording the statement of the child shall not be in uniform.

3. The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

4. No child shall be detained in the police station in the night for any reason.

5. The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.”

37. As there was no contact between the accused, i.e., the appellant herein physically by any touch, the non-examination of the prosecutrix by any medical officer or doctor in terms of Section 27 of the POCSO Act, 2012 also thus in the circumstances does not detract from the prosecution version at all.

38. The contention raised on behalf of the appellant that it was not possible for the minor child to have been left alone by the parents on the day of festival, is also devoid of all merit in view of the factum that the minor child has stated categorically that there was an examination that she had to appear for the next day. The non-production of the date sheet in relation to the same is also not relevant in view of the factum that neither the testimonies of the parents of the prosecutrix nor of the Investigating Officer in any manner has been challenged on any such ground during their cross examination to counter that such date sheet had not been produced deliberately, or had not been seized deliberately and merely confronting a minor child with such a question does not aid the appellant in any manner.

39. The acts committed by the appellant thus of calling out to the child i.e., the prosecutrix PW-4 Ms. ‘X’ of aged nine years, and to the opening of the zip of his pant at the time of commission of the offence

and asking the minor child to come to his house and asking her not to tell to her mother, all thus clearly falls within the ambit of Section 11(i) of the POCSO Act, 2012 and this act is clearly an act done with '*sexual intent*' in the facts and circumstances of the instant case and thus though the learned Trial Court convicted the accused, i.e., the appellant herein under Section 11(ii) read with Section 12 of the POCSO Act, 2012, the act committed by the accused, i.e., the appellant herein clearly falls within the ambit of Section 11(i) read with Section 12 of the POCSO Act, 2012 by his having exhibited his penis in a manner so that it could be seen by the minor child/prosecutrix whose date of birth 10.9.2005 has been established on the record and is also not disputed by the accused, i.e., the appellant herein. The impugned judgment convicting the appellant though upheld qua his conviction under Section 11 of the POCSO Act, 2012 and punishment for the same under Section 12 of the POCSO Act, 2012 is however modified to the extent that the conviction is held to be one under Section 11(i) of the POCSO Act, 2012, read with Section 12 of the POCSO Act, 2012.

40. The nominal roll of the accused, i.e., the appellant herein was called from the Superintendent Tihar Jail and as received from the superintendent Central Jail No. 7, indicates that the appellant as on the date 17.4.2018 i.e., the date of the nominal roll has been incarcerated from 7.3.2015 and had till then undergone 10 months and 7 days of incarceration and that the fine imposed of Rs.3000/- had also not been paid, his jail conduct and association was however found to be satisfactory.

41. Vide the impugned order on sentence dated 10.7.2017 it was observed that though the provisions of Section 12 of the POCSO Act, 2012 stipulates a term of imprisonment of either description which may extend to a period of three years and to a fine, the learned Trial Court has sentenced the appellant to a period of two years rigorous imprisonment and to a fine of Rs.3000/- and in default of payment of the fine to further undergo simple imprisonment for one month with the benefit of Section 428 of the Code of Criminal Procedure, 1973.

42. In the circumstances of the case, the commission of the offence when the minor child was clearly alone at the time of the commission of the offence by the appellant, and in view of the '*sexual intent*' and the sexual overtones of the commission of the offence, there is no ground for any leniency and no ground for reduction of the sentence. The appeal and the accompanying applications are thus declined and the order on sentence is thus upheld.

ANU MALHOTRA, J.

FEBRUARY 20, 2019/SV