

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 19.10.2020

+ **CRL. A. 178/2017 & CRL.M.(BAIL) 7729/2020**

MANJEET PANDEY

.....Appellant

Versus

THE STATE (GOVT. OF NCT) OF DELHI Respondent

Advocates who appeared in this case:

For the Appellant : Ms Rakhi Dubey, Advocate (DHCLSC).

For the Respondent : Mr Amit Gupta, APP for State.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 08.10.2016 passed by the Ld. ASJ-01, North Rohini Courts, New Delhi, whereby he was convicted for committing an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act'), as well as under Section 363 of the Indian Penal Code, 1860 (hereinafter 'IPC'). The appellant also impugns an order dated 14.10.2016, whereby he was sentenced to rigorous imprisonment for a period of twenty years with a fine of ₹5,000/- and in default of payment of fine, to serve simple imprisonment for a further period of thirty days, for committing the offence punishable under Section 6 of the POCSO

Act. In addition, he was sentenced to rigorous imprisonment for a period of five years with a fine of ₹5,000/- and in default of payment of fine, to serve simple imprisonment for a further period of fifteen days for committing the offence punishable under Section 363 of the IPC. It was directed that both the sentences would run concurrently.

2. The appellant was prosecuted pursuant to registration of FIR bearing no. 178/2014, under Sections 363/376 of the IPC and Section 6 of the POCSO Act registered with PS Alipur. The said FIR was registered on a statement made by the victim's sister – a girl aged about thirteen years. She is hereafter referred to as 'the complainant'. She had stated that on the date of the incident (25.02.2014), she was present in her house along with her infant sister aged about two years. She is hereafter referred to as 'the child victim'. The complainant stated that at about 11:30 am, the appellant, who was a resident of the fourth floor of the same building where they resided, had attempted to take the child victim away with him on the pretext of buying her some articles. The complainant stated that she declined to permit the same. Nonetheless, he managed to allure the child victim and took her away stating that he would bring her back. She stated that since he did not bring her back for a considerable period of time, she started searching for her sister. While she was doing so, she met a woman – who she referred to as Sheela Aunty – and she told her that the appellant had committed a wrong act with the child victim and he had been handed over to the police. She also informed her that the child victim had been taken to the hospital. The complainant stated that she then went to

Harish Chandra Hospital and she found that the child victim was bleeding from her private parts. She further stated that she became aware that the appellant had also been apprehended by the police. She stated that she believes that the appellant had committed a wrong act with the child victim.

3. The appellant was apprehended by one Smt. Sheela (who testified as PW5) and other persons. She had stated that on 25.02.2014, at about 02:00 pm, she was returning back home from Harish Chandra Hospital. She saw that one boy, (whose name she came to know subsequently) Manjeet Pandey, had taken a small girl to a vacant land near the jungle. She stated that she came back to her house, which was a corner house. Subsequently, she came down and she found that the small girl was in the boy's lap and she was crying bitterly. She got suspicious and inquired as to why the girl was crying. At that time, she also saw that she was bleeding. She stated that she snatched the girl from him and saw that her private parts were injured and were bleeding and she called the police at 100.

4. The prosecution established that a PCR call had been received on 25.02.2014, at about 03:10 pm. Ct. Karambir Singh, who was examined as PW1, testified that on the date of incident, at about 03:10 pm, he had received information from the wireless operator that a two years old girl had been raped at Ganga Ram Colony, near Shani Mandir, Tikri Khurd, Narela, Delhi and the rapist had been apprehended. He stated that he entered the said information as DD

No. 50B (Ex.PW1/A). The inquiry relating to the same was handed over to WSI Sonia.

5. WSI Sonia was examined as PW11. She testified that on 25.02.2014, she was posted as SI at PS Alipur and at about 03:00 pm, DD No. 50B was assigned to her. She along with Ct. Tirender reached Shani Mandir, Alipur and met the Beat Constable Ajay Kumar. She stated that several public persons had gathered at the spot. They found that the accused had been beaten up by public. She stated that they became aware that a CATS Ambulance had taken the child victim to SRHC Hospital. She stated that she left Ct. Ajay with the accused and proceeded to SRHC Hospital from where she collected the MLC of the child victim, whose identity at the material time was not known. The child victim had been referred to LNJP Hospital for further treatment. She stated that she also met the sister of the child victim (the complainant), who disclosed that one lady Sheela had informed her that the child victim had been sexually assaulted by the accused. She recorded the statement of the complainant (Ex.PW2/A). She prepared a *rukka* (Ex PW11/A) and sent Ct. Tirender for registration of the FIR. She also identified her signatures on the *rukka*. WSI Sonia further testified that she arrested the accused and also identified her signatures on the arrest memo (Ex.PW8/A). She stated that the accused pointed out the place of occurrence and pursuant to the same, she prepared a memo (Ex.PW8/C) and a site plan (Ex.PW11/B).

6. The accused was also taken to SRHC Hospital and was medically examined. She collected *pullandas*, which were sealed with

the seal of SRHC Hospital, Narela and contained the samples of the accused. She identified her signatures on the seizure memo (Ex.PW8/D). She also collected the exhibits of the child victim and prepared a seizure memo (Ex.PW4/A). She further testified that she deposited all exhibits with the *malkhana* and also lodged the accused in the lock-up.

7. Thereafter, on 26.02.2014, the complainant (the sister of the child victim) and Ms. Sheela (PW5) were produced before the learned MM and their respective statements (Ex.PW10/A and Ex.PW5/A) under Section 164 of the Code of Criminal Procedure, 1973 (hereafter “Cr.PC”) were recorded.

8. The statement of the complainant recorded under Section 164 of the Cr.PC (Ex.PW10/A) is consistent with her statement recorded under Section 161 of the Cr.PC, on the basis of which the said FIR was filed. She reiterated that at about 11:30 am, the appellant who resided on the fourth floor of the house had come out and wanted to take away her sister (the child victim) on the pretext of buying her some articles. She stated that she refused but he took away the child victim. She stated that he did not return for a considerable period of time and therefore, she started searching for the child victim. She stated that at that time, she met Sheela Aunty (who was subsequently examined as PW5) and she told her that the appellant had done a wrong act with the child victim and had physically exploited her. He had thereafter been caught by the police and her sister (the child victim) was taken to the hospital.

9. The complainant was examined as PW2. She stated that she resided at the given address along with her parents and three younger sisters. She stated that she does not go to school but looks after the household as well as her younger sisters. She stated that her parents were working in different factories near the area. She stated that she was admitted to a school but she could not continue her studies after the birth of her younger sister (the child victim). During her examination-in-chief, she broke down and alleged that the accused had committed a wrong act with her sister, who was too young. She stated that on 25.02.2015, she was present at her home along with the child victim as her parents had left for their work. Her other two younger sisters were at her maternal grandfather's house. She stated that on that date, at about 11:30 am, the accused, whom she identified in court, had come towards her house and asked that the child victim go along with him and he would get her something to eat. She stated that they resided on the ground floor of the said building and the appellant was residing on the fourth floor of the said building. She stated that she did not know the appellant and had never talked to him. She also added that her sister (the child victim) may have gone upstairs on earlier occasions while playing and she may be familiar with the accused. She stated that she refused to hand over her sister to the accused (appellant) and went inside her room with her sister. She stated that she went to the bathroom and was not aware that the accused was still standing outside the room. She stated that he had called the child victim and had taken her with him. She stated that one

‘Aunty’ was watching TV in her room and she had told her that the appellant had taken away her sister.

10. She stated that she immediately went to the *gali* (lane) but no one was present there. She made inquiries with the next door neighbour of the accused and also found that the room of the accused was locked. She stated that while she was searching for her sister, one aunty whose name was Sheela met her and she told her that the child victim had been sexually assaulted by the appellant and she was admitted to the hospital. The complainant said that on hearing this, she along with some ladies of the neighborhood went to SRHC Hospital and found that there was blood on the private parts of her sister. She testified that subsequently, her parents had also reached there and the child victim was referred to a hospital in New Delhi. She confirmed that the police had met her and recorded her statement.

11. The mother of the child victim was examined as PW3. She stated that the family consists of herself, her husband and five daughters. Three of her daughters were residing at their native village along with her mother. However, her eldest daughter (the complainant) and the youngest daughter (the child victim), who is aged about 2 years, were residing in Delhi with them. She stated that she and her husband worked in the different factories near the area and her elder daughter (the complainant) looks after the household and also takes care of the child victim in their absence. She stated that on 25.02.2014, when she came back from her duty, she came to know that her daughters (the complainant and the child victim) were at

SRHC Hospital. She also reached there. She stated that the child victim was referred to LNJP Hospital and remained in the hospital for three days. She also identified the appellant as the person, who was residing on the upper floor of the same building, where they were residing on the ground floor.

12. Smt. Sheela was examined as PW5. She testified that on the date of the incident, when she was returning home from the hospital, at about 02.00 pm, she saw a boy near her house coming from the opposite side. He was holding a small girl in his lap and she saw him enter into the bushes on a vacant land near her house. She stated that she proceeded to the house but became suspicious. She stated that she sent another boy towards where that boy (the appellant) had gone but he returned back by stating that no one was present in the bushes or at the vacant land. She stated that thereafter, she went to the terrace of her house and remained there for 10 minutes, as she felt that something was amiss (she expresses this by stating that she was astonished). She stated that at that time, there were some women who had gathered below her house and she came down to stand with them. She saw the same boy coming from the opposite direction and noticed that he had a child in his lap, who was weeping. She affirmed that the boy came to a shop near her house and purchased some articles to pacify the child (the child victim). She stated that he had also purchased a liquor bottle from a nearby liquor shop and while he was giving money to the shopkeeper, he put down the girl from his lap on the road. At that time, she noticed that she was smeared with blood on

the lower part of her body and was hardly able to stand. She stated that she inquired from him as to what had happened to the child victim and he responded by saying that the child had fallen on the road and as a result, blood was oozing from her body. She stated that one of the women who were standing there challenged the said plea. PW5 stated that she took the child victim in her lap and noticed that her private parts were bleeding. She testified that she apprehended that boy and made a call on 100. The police came to the spot and that person (the accused) was handed over to the police and the child victim was taken to the hospital.

13. The testimony of the complainant (PW2), her mother (PW3) and Smt. Sheela (PW5) are consistent with the case of the prosecution and establish that the appellant had taken the child victim from her house. The testimony of PW5 also establishes that the appellant had been apprehended at the spot.

14. Ct. Ajay was examined as PW9. He stated that on 25.02.2014, he was posted at PS Alipur and on that day, he received a message through a wireless set and he reached Ganga Ram Colony, near Shani Mandir, where the public who had apprehend the accused, had handed him over. A CATS Ambulance had taken the victim to SRHC Hospital. He also testified that in the meantime, IO (WSI Sonia) and Ct. Tirender also arrived at the spot. He stated that the IO (WSI Sonia) left for SRHC Hospital along with Ct. Tirender. Ct. Tirender returned after some time and interrogated the accused. The accused was arrested and thereafter, his personal search was conducted.

15. Ct. Tirender was examined as PW8. His testimony is also consistent with the testimony of Ct. Ajay (PW9) and WSI Sonia (PW11). He stated that on 25.02.2014, he was posted at PS Alipur and had joined the investigation along with SI Sonia after she had received DD No. 50B. He stated that they reached Ganga Ram Colony, near Shani Mandir, Village Tikri Khurd, Delhi. On reaching the spot, they found that a CATS Ambulance had already taken the victim to the hospital. They proceeded to SRHC Hospital and collected the MLC. The child victim had been referred for further examination to LNJP Hospital. The sister of the child victim had also reached the hospital and identified the child victim. SI Sonia recorded the statement of the child victim's sister (the complainant). Thereafter, she had prepared the *tehrir* and had sent him to the PS for registration of the FIR. She stated that he went to the spot again with a copy of the FIR and original *tehrir* and the accused was arrested. He also identified his signatures on the arrest memo (Ex PW8/A).

16. The testimony of Ct. Tirender (PW8), WSI Sonia (PW11), Ct. Ajay (PW9) and Smt. Sheela (PW5) clearly established that the appellant had been apprehended at the spot of the said incident. He had been restrained by PW5 along with persons from the public, who had handed him over to Ct. Ajay.

17. The MLC of the child victim (Ex.PW7/A) indicates that she had been brought to SRHC hospital by a CATS Ambulance at 03:36 pm. The age of the child victim could not be ascertained. The history of the case could not be noted down as she was not accompanied by any

relative. The said report indicates that “*midline 2°-3° perennial tear present slight bleeding*”. It also notes that further examination could not be performed as the baby (the child victim) was uncomfortable and crying. The child victim was referred to BSA/LNJP Hospital for further examination, sample collection, repairs and anesthesia at the earliest. The child victim was taken to Lok Nayak Hospital on the very same day. The MLC made at the said hospital (Ex.PW13/A) indicates that she was brought to LNJP Hospital, at about 07:50 pm, on 25.02.2014. It records that “*one and a half year old female child brought to Gynae Casualty for examination*”. She had reported a history of bleeding from her vagina and her clothes have not been changed till the time of the examination. The child victim was examined and MLC notes that there was an abrasion of 2 x 3 cm present on B/C neck. There were recent nail marks present on the nose and the cheek. The MLC records that there was a posterior fourchette tear and fresh bleeding was seen. The child victim was brought to the Gynecological Ward from the Pediatric Department of Lok Nayak Hospital, at 12:20 am, on 26.02.2014 but the family of the child victim refused to admit her against medical advice.

18. It is apparent from the MLCs (Ex.PW7/A and Ex.PW13/A) that the child victim had suffered injuries. The posterior wall of her fourchette had been torn and bleeding from her vagina was seen at 03:36 pm, on 25.02.2014, when she was brought to SRHC Hospital (Satyawadi Raja Harishchandra Hospital). Fresh bleeding was also

seen when she was examined at 07:50 pm, on the same date at Lok Nayak Hospital.

19. It is also apparent from the report that the child victim was required to be admitted to the Gynecological Department for 'repairs'. However, her family members had not acceded to her being admitted to LNJP Hospital. It does appear that the remaining medical treatment would have been provided to the child victim at another hospital. However, there is no evidence to the aforesaid effect. But it is relevant to note that the mother of the child victim (PW3) had specifically stated that the child had remained in the hospital for three days. This testimony remained unchallenged. Thus, it does appear that the victim would have been taken to another hospital.

20. Dr. Nalini Bala Pandey, MO, Department of Obs and Gynae, LNJP Hospital was examined as PW13. She testified that "*As per MLC, the victim had a tear in the junction of labia posterior (fresh bleeding was present). Swelling was present at Labia Majora. The victim also had other injury marks and it was observed that the child was sexually abused.*" The said testimony remained unchallenged and PW13 was not cross-examined despite an opportunity to do so.

21. In view of the above evidence, there is no doubt that the prosecution has successfully established that the child victim had been sexually abused and was subjected to an aggravated penetrative sexual assault – an offence punishable under Section 6 of the POCSO Act.

22. There is ample evidence on record, which clearly establishes that the appellant was guilty of committing the aforesaid offence. As noticed above, the testimony of PW2 had clearly established that the appellant had taken away the child victim. The testimony of PW5 also established that the petitioner was seen with the child and was also apprehended, while the child was in his custody. The aforesaid evidence coupled with the injuries suffered by the child is sufficient to establish that the appellant is guilty of the offence, for which he was charged. However, any doubt that could possibly remain stood addressed by the forensic evidence.

23. WCt. Neelam was examined as PW4 and she had stated that on 25.02.2014, she was posted at PS Alipur and was on duty at Help Desk, from 02:00 pm to 08:00 pm, on that date. She stated that she had taken the child victim to LNJP Hospital and had got her medically examined. The MLC (Ex.PW13/A) also indicates that Ct. Neelam had accompanied the child victim. She had stated that after the child victim's medical examination, the concerned doctor had given her a sealed envelope, sexual evidence kit and a sample seal, sealed with the seal of LNH New Delhi. She had handed over the same to the IO (WSI Sonia) and who had seized them and prepared a seizure memo (Ex.PW4/A). WCt. Neelam identified her signatures on the said memo. She also testified that the IO (SI Sonia) had deposited the same with MHC(M). The seizure memo also indicates a Sexual Assault Evidence Collection Kit as well as a white coloured envelope

containing the clothes of the child victim, were kept in *pullandas* and sealed with the seal of LNH New Delhi.

24. Ct. Tirender (PW8) testified that the accused was taken for his medical examination to SRHC Hospital. The concerned doctor had handed over a sample seal as well as the *pullanda* containing the samples of the accused. The same were handed over to the IO (SI Sonia) who had seized the same and prepared a seizure memo (Ex.PW8/D). The MLC of the accused (Ex.PW11/C) indicates that samples collected from him were sealed in sealed *pullandas* and were handed over to the IO. The said samples included (i) undergarment worn by the accused; (ii) prepuce swab; (iii) nail scrapping; (iv) pubic hair; (v) blood sample; and (vi) blood sample for alcohol. The sealed *pullandas* containing the said samples were handed over to the IO. WSI Sonia had also testified that she had collected the *pullandas* containing the samples of the accused as well as of the victim and had deposited the same with the *malkhana*.

25. HC Ajay Kumar was examined as PW15. He testified that on 25.02.2014, he was posted as MHC(M) at PS Alipur and on that date, WSI Sonia had deposited one sealed sexual assault kit, one sealed white coloured envelope containing the clothes of the victim and a sample seal with the *malkhana*. The entry regarding the same was made in register no. 19 at serial no. 138/14 (Ex.PW15/A). He further testified that on the same day, WSI Sonia had also deposited six sealed *pullandas*, containing the samples of the accused along with the sample seal and the same was entered in register no. 19 at serial no.

142/14 (Ex.PW15/B). He deposed that on 05.03.2014, seven sealed *pullandas* and two sample seals were sent to FSL, Rohini through Ct. Tirender vide RC No. 21/21/14 (Ex.PW15/C). Ct. Tirender had after depositing the property with the FSL had handed over the acknowledgement slip (Ex.PW15/D) to him. He stated that another sealed *pullanda* was also sent to FSL vide RC No. 22/21/14 (Ex.PW15/E). The said *pullanda* was deposited with FSL and acknowledgement receipt (Ex.PW15/F) had been deposited with the *malkhana*.

26. In view of the above, the chain of custody of the samples of the accused as well as the victim has been established and there is no reason to entertain any doubt that the same were tampered with in any manner.

27. The FSL Report (Ex.F-1) indicates that semen was detected on exhibits: '1j₁' (one cotton wool swab on stick marked as Step 9, 'Vaginal Secretion'), '1j₂' (two microslides marked as Step 9, 'Vaginal Secretion') and '2c' (one dirty baby T-shirt). The DNA profile was generated from the samples. The results of the forensic analysis as disclosed in the FSL Report, is set out below: -

“RESULTS

Mixed DNA profile is obtained from source of exhibits '1j₁' (cotton wool swab-vaginal secretion), '1j₂' (microslides– vaginal secretion), '2c' (baby T-shirt) and '8' (nails).

Female profile is obtained from source of exhibits 'lp' (blood sample of victim), 'ln₁' (cotton wool swab-rectal examination), 'ln₂' (microslides-rectal examination), '2a' (cloth piece) & '2d' (baby T-shirt). The alleles from source of exhibit 'lp' (blood sample of victim) are **accounted** in alleles from source of exhibits 'lj₁' (cotton wool swab-vaginal secretion), 'lj₂' (microslides- vaginal secretion), 'ln₁' (cotton wool swab-rectal examination), 'ln₂' (microslides – rectal examination), '2a' (cloth piece), '2c' (baby T-shirt), '2d' (baby T-shirt) & '8' (nails)

Male profile is obtained from source of exhibits '4' (blood sample of accused), '6b' (underwear of accused), '7' (prepuce swab). The alleles from source of exhibit '4' (blood sample of accused) are **accounted** in alleles from source of exhibits 'lj₁' (cotton wool swab-vaginal secretion), 'lj₂' (microslides- vaginal secretion), '2c' (baby T-shirt) '6b' (underwear of accused), '7' (prepuce swab) '8' (nails)."

28. It is clear from the above that traces of semen found on the vaginal swab of the child victim, vaginal secretion of the child victim as well as the T-shirt worn by the child victim, was that of the appellant.

29. In view of the above, there can be no doubt that the appellant is guilty for the offence for which he was charged.

30. Ms. Dubey, learned counsel appearing for the appellant had contended that there were several inconsistencies and improvements in the testimony of PW2 as well as PW5 and therefore, their testimony could not be relied upon. She pointed out that PW2 had testified that after she refused to let her sister go with the appellant, she had gone

inside her room along with her sister (the child victim). She had, thereafter, gone to the bathroom and was not aware that the appellant was standing outside her room. He had called her sister (the child victim) and had taken her away. She stated that in the room, one Aunty was watching TV and she had told her that the appellant had taken away her sister. She stated that she immediately went to the *gali*, but there was no one there. In her initial statement recorded by the IO, on the basis of which the said FIR was filed, there was no mention of PW2 going to the bathroom or presence of any person in the room. Similarly, in her statement recorded under Section 164 of the Cr.PC, she had not mentioned that she had gone to the bathroom and the appellant had taken away the child victim, in her absence. She had also not mentioned anything about any Aunty watching TV in her room.

31. Next, she submitted that the testimony of PW5 is also not entirely consistent with her statement recorded under Section 164 of the Cr.PC. She pointed out that PW5 had testified that she had seen the appellant go to a shop near her house and purchase some article to pacify the child victim. She had also seen him purchase a liquor bottle from a nearby liquor shop. Ms. Dubey pointed out that no such fact was disclosed by PW5, in her statement recorded under Section 164 of the Cr.PC. She also referred to the cross-examination of the IO (WSI Sonia), who had testified that there was no shop in the vicinity of the area from where the appellant was apprehended. She also drew the attention of this Court to the site plan (Ex.PW11/B), which also did

not indicate any shop in the area. The said site plan indicates that there were residential colonies on two sides of the vacant area, where the offence is alleged to have been committed.

32. Undeniably, there are certain inconsistencies between the statements of PW2 in her testimony. However, it is necessary to bear in mind that PW2 was merely thirteen years old at the time of the incident and minor inconsistencies in the statements are expected. Such inconsistencies do not in any manner raise any doubt as to the truthfulness of the said statements or renders her testimony wholly unreliable. It is material to note that there is no inconsistency in PW2's statement that the appellant had asked for the girl child in order to buy her some articles and had taken her away. She is also consistent in her statements that she had refused to allow the same. The question whether he had taken the girl child by assuring to bring her back shortly or that he had done so while PW2 had gone to the bathroom, would not in any manner raise any doubts as to the fact that the appellant had taken the girl child with him. The presence of another person in the room who had seen the appellant take away the girl child is relevant. Undeniably, proper investigation in this regard ought to have been undertaken but this too is not sufficient to raise any doubt that the appellant had in fact taken the child victim with him and had committed the offence on 25.02.2014.

33. It is also apparent that PW5 has made considerable improvements in her testimony, when compared with her statement recorded under Section 164 of the Cr.PC. In her statement, there was

no mention of the appellant purchasing any articles from a nearby shop or purchasing liquor for his consumption. However, the said improvements do not raise any doubt as to whether she had seen the appellant with the child and had snatched the child from his custody. She had claimed that she had apprehended the appellant and he had been restrained by her and other persons from the public. The evidence on record clearly indicates that persons from the public had restrained the appellant and had handed him over to Ct. Ajay. There is, thus, no doubt that the appellant had been apprehended at the spot, immediately, after the child victim had been taken from his custody. Insofar as the shops in the vicinity of the area are concerned, PW5 was not cross examined in this regard and thus, there is no clarity as to where the shops were located.

34. As stated above, any inconsistency in the testimonies of the witnesses do not render the same wholly unreliable. Further, such inconsistencies/improvements pale into insignificance considering that there is no doubt as to the medical examination of the child victim; medical examination of the accused; collection of their samples; and the forensic test results establishing that the appellant had committed the offence punishable under Section 6 of the POCSO Act, for which he was charged.

35. In view of the above, the impugned judgment convicting the appellant for committing the offence punishable under Section 6 of the POCSO Act and Section 363 of the IPC does not require any

interference. This Court concurs with the decision of the Trial Court convicting the appellant for committing the said offences.

36. The next aspect to be examined is regarding the appellant's challenge to the sentence awarded to him for committing the offence punishable under Section 6 of the POCSO Act. Ms. Rakhi Dubey had focussed much of her arguments to assail the sentence awarded to the appellant. She contended that the sentence of twenty years of rigorous imprisonment for committing the offence punishable under Section 6 of the POCSO Act was highly disproportionate and harsh. She submitted that the minimum sentence of ten years of rigorous imprisonment is by itself a very severe sentence and therefore, a sentence of twenty years of rigorous imprisonment ought to be reduced to the minimum sentence, as is provided under Section 6 of the POCSO Act in force at the material time. She referred to the decision of the Allahabad High Court in ***Chhotak Banvasi v. State of U.P.: Jail Appeal No.1326/2016, decided on 28.10.2017***; the decision of the Bombay High Court in ***Ahemad Pasha Shaikh v. The State of Maharashtra: Crl. A. No. 692/2018, decided on 21.06.2019***; and the decision of the Allahabad High Court in ***Chhatradhari v. State of U.P.: Jail Appeal No.1597/2017, decided on 15.12.2017***.

37. On the strength of the aforesaid decisions, Ms. Dubey submitted that the sentence awarded to the appellant ought to be reduced. She pointed out that in ***Chhotak Banvasi*** (*supra*), the Allahabad High Court had reduced the sentence from twelve years rigorous imprisonment to ten years. She stated that in that case, the victim was

five years old and she was the niece of the accused. She stated that in **Ahemad Pasha Shaikh** (*supra*), the victim was a boy aged five years and the appellant was found guilty of sodomising the child. In this case, the Bombay High Court upheld the sentence of ten years of rigorous imprisonment awarded to the appellant for committing an offence punishable under Section 6 of the POCSO Act. Similarly, in **Chhatradhari v. State of U.P.** (*supra*), the Allahabad High Court upheld the sentence of ten years of rigorous imprisonment, for an aggravated penetrative assault, punishable under Section 6 of the POCSO Act. Ms. Dubey stated that in this case also the victim was very young and was only seven years old.

38. Mr Amit Gupta, learned APP for State countered the aforesaid submissions. He stated that a sentence awarded, could be interfered with, only if the court had found that the same was manifestly erroneous. He submitted that in the present case, the decision of the Trial Court to sentence the appellant for rigorous imprisonment of twenty years, for an offence punishable under Section 6 of the POCSO Act, could not be faulted. He submitted that it was relevant to note that the victim was just a two-year-old helpless child and she had been brutally assaulted. He referred to the decision of the Supreme Court in **Ravi v. State of Maharashtra: (2019) 9 SCC 622**, the decisions of this Court in **Gopi Nisha Mallah v. State: 2018 SCC OnLine Del 11021**; and **Jabbar v. State: (2018) 251 DLT 71 (DB)**, in support of his contention that the sentence awarded to the appellant did not warrant any interference. He pointed out that in **Gopi Nisha Mallah** (*supra*), a

Division Bench of this court had upheld the sentence of life imprisonment in a case where an eight year old was subjected to a sexual attack, resulting in her suffering injury of a vaginal tear, which required her to undergo surgical procedure and be hospitalised for a period of nearly ten days. In **Jabbar v. State** (*supra*), a Division Bench of this court had reduced the sentence awarded to the accused for sodomizing a six-year-old boy, from life imprisonment to fifteen years of rigorous imprisonment.

39. Mr. Gupta also contended that Section 6 of the POCSO Act has been amended by virtue of Protection of Children from Sexual Offences (Amendment) Act, 2019 and the minimum punishment for an aggravated penetrative assault has been enhanced to twenty years. He submitted that although the said amendment is not applicable, the legislative intent is required to be kept in mind. Thus, the sentence awarded to the appellant could not be stated to be harsh or disproportionate to the offence for which he has been convicted.

40. Section 6 of the POCSO Act, as was in force at the relevant time, provided a range of punishments that could be imposed for an aggravated penetrative sexual assault. The sentences that could be imposed ranged from rigorous imprisonment for a term of ten years to life imprisonment along with a fine. The discretion to award the appropriate sentence has to be exercised keeping in view the principle of proportionality. Merely because a minimum sentence is provided under the statute does not necessarily mean only that sentence is required to be imposed. It is necessary for a court to consider the

special aspects of the crime and ensure insofar as possible that the sentence awarded is in proportion to the crime. Thus, the special aspects as to the gravity of the crime committed would be of paramount importance. An aggravated penetrative assault may in certain cases not be as brutal as in others. The court would necessarily have to take into consideration the manner in which the offence has been committed, for the purposes of sentencing. Clearly, all offences punishable under Section 6 of the POCSO Act do not attract a uniform sentence. It is for this specific purpose that the legislature has left it to the discretion of the court to ensure that insofar as possible, the sentence is proportional to the offence, while also specifying the minimum and the maximum sentence that can be awarded.

41. In ***Union of India v. Kuldeep Singh: (2004) 2 SCC 519***, the Supreme Court had observed as under:

“10. Criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime...”

42. The court had further held that the “*proportion between the crime and the punishment is a goal respected in principle, and remains a strong influence in determination of the sentence*”.

43. The discretion available with the court to determine the sentence to be awarded must, therefore, necessarily be exercised bearing in mind the principle of proportionality. Thus, the court would award the minimum sentence, if it is satisfied on the scale of proportionality, the offence committed would fall in the lowest rung. In other words, all other crimes punishable under that section would warrant a higher degree of punishment. Similarly, the maximum punishment can be awarded only in cases where the aspects of a particular offence indicate that on the scale of proportionality, the crime stands on a highest rung in the scale of proportionality after considering the mitigating circumstances, if any.

44. Keeping the aforesaid in mind, it cannot be stated that this is a case which requires to be shown any leniency. It is clear that the offence committed in the present case, cannot be placed at the lowest rung on the ladder of proportionality. The child victim in this case was barely two years at the material time and completely helpless. The appellant had taken full advantage of the same and had brutalized her. The child victim had suffered injuries as reflected in the MLC. Although, there is some controversy whether she remained in the hospital for three days or not, there is no dispute that she was hospitalized for two days and the medical opinion was that she required to undergo procedures for repair. Her examination at SRHC Hospital could not be undertaken as the child victim was crying and was very uncomfortable and the concerned doctors had recommended anesthesia on urgent basis. The MLC prepared at LNJP Hospital

indicates that even after several hours of her being in the hospital, fresh bleeding was seen. In view of the above, the contention that the appellant must be awarded the minimum punishment is wholly unsustainable.

45. Ms. Dubey had referred to the decision of the Allahabad high Court in ***Chhotak Banvasi v. State of U.P.*** (*supra*). In that case the victim was five years old. The Court had accepted that the accused had committed an aggravated penetrative assault on the child. The Court had also accepted the evidence of the victim in regard to commission of the offence. She had pointed to her private parts and stated that the accused had done a dirty act with her and it was very painful. She had further pointed to her private parts and stated that she had bled from the same and she had remained in the hospital for three days. Despite accepting the said evidence, the Court had reduced the sentence awarded to the appellant from twelve years of rigorous imprisonment to the minimum sentence, that is, ten years of rigorous imprisonment along with fine. The sentence was reduced keeping in view the “*mental status, social and economic conditions, family background, age and other relevant position of the accused – appellant*”. This Court is respectfully unable to agree with the considerations that the court came to bear for reducing the sentence. This Court is of the view that on the scale of proportionality the sentence awarded to the accused in ***Chhotak Banvasi*** (*supra*) did not warrant any reduction.

46. The decision of the Bombay High Court in **Ahemad Pasha Shaikh v. The State of Maharashtra** (*supra*) is of little assistance to the appellant. In that case, a boy aged five years had been sodomized. The Bombay High Court had upheld the sentence of ten years awarded to the accused. The State had not appealed against the sentence awarded by the Trial Court and this was not a case where the Bombay Court could consider enhancing the same. In **Chhatradhari v. State of U.P.** (*supra*), the victim was aged about six years. It was found that the accused had entered the room where she was sleeping and had inserted his finger in her vagina. She had screamed. On hearing her scream, her elder sister had rushed to the spot and the accused had fled away. The victim was medically examined. There were no injury marks on her body. However, the external genitalia was swollen and abrasions were present. Redness was also found near the vulva. Her hymen was intact. Clearly, on the scale of proportionality, the offence committed by the appellant in this case would stand much higher on the scale. In this case, the child victim was barely two years and had suffered injuries on her private parts on account of the brutal penetrative sexual assault. The brutality of the offence committed in this case clearly warrants a punishment higher than the minimum sentence prescribed in the statute.

47. This Court is also guided by the decision of a Division Bench of this court in **Gopi Nisha Mallah v. The State: 2018 SCC OnLine Del 11021**, whereby the court had upheld the sentence of life imprisonment awarded to the appellant therein for committing an

offence punishable under Section 6 of the POCSO Act. In that case, the appellant was held guilty for abducting a girl aged eight years. He had inserted his finger in her anus and his penis into her vagina, resulting in the victim's suffering injuries. The medical report indicated that she had suffered a vaginal tear of about 3 cms. and was hospitalized for about ten days.

48. There is yet another aspect that dissuades this Court from accepting the contentions advanced by Ms. Dubey that the sentence ought to be reduced. The sentence awarded for any crime must reflect the conscience of the society. In ***Union of India v. Kuldeep Singh: (2004) 2 SCC 590***, the Supreme Court had observed as under: -

“13. The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.”

49. The Supreme Court had further referred to its earlier decision in the case of ***Dhananjoy Chatterjee v. State of West Bengal: (1994) 2 SCC 220*** and ***Ravji v. State of Rajasthan: (1996) 2 SCC 175*** and observed as under:

“Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of

the victim of the crime and the society at large while considering the imposition of appropriate punishment”.

50. In *Ravi v. State of Maharashtra: (2019) 9 SCC 622*, the Supreme Court had referred to the recent amendment in Section 6 of the POCSO Act and also observed that the court would also need to bear in mind the legislative policy even though it may not have any applicability to the offences committed prior thereto. The relevant paragraphs of the said decision are quoted below:

“59. The recent amendment in Section 6 of the 2012 Act has substituted the punishment as follows:

“Post the Amendment, Section 6 has been substituted as follows:

‘6. Punishment for aggravated penetrative sexual assault.—(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which *shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.*

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

(emphasis supplied)

60. The minimum sentence for an aggravated penetrative sexual assault has been thus increased from 10 years to 20 years and imprisonment for life has now been expressly stated to be imprisonment for natural

life of the person. Significantly, “death sentence” has also been introduced as a penalty for the offence of aggravated penetrative sexual assault on a child below 12 years.

61. The legislature has impliedly distanced itself from the propounders of “No-Death sentence” in “No Circumstances” theory and has restated the will of the people that in the cases of brutal rape of minor children below the age of 12 years without murder of the victim, “death penalty” can also be imposed. In the Statement of Objects and Reasons of the Amendment Act, Parliament has shown its concern of the fact that “in recent past incidents of child sexual abuse cases administering the inhuman mindset of the accused, who have been barbaric in their approach to young victim, is rising in the country”. If Parliament, armed with adequate facts and figures, has decided to introduce capital punishment for the offence of sexual abuse of a child, the court hitherto will bear in mind the latest Legislative Policy even though it has no applicability in a case where the offence was committed prior thereto. The judicial precedents rendered before the recent amendment came into force, therefore, ought to be viewed with a purposive approach so that the legislative and judicial approaches are well harmonised.”

51. As noticed above, it is well settled that the sentencing must necessarily reflect the conscience of the society. The legislative amendment to provide for a greater sentence, for an aggravated penetrative sexual assault on a child, reflects the conscience of the society and its higher degree of intolerance towards such offences. Thus, even though the minimum sentence of twenty years of rigorous imprisonment as prescribed was not applicable at the material time,

the sentence awarded to the appellant falls within the range of punishment that can be imposed for committing an aggravated penetrative sexual assault, which is punishable under Section 6 of the POCSO Act. Plainly, the said sentence cannot be stated to be disproportionate or manifestly erroneous.

52. In view of the above, the appeal is, accordingly, dismissed.

53. All the pending applications are also disposed of.

OCTOBER 19, 2020
RK

VIBHU BAKHRU, J



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