

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

+ **CRL.A. 6/2021**

Date of decision: 05th April, 2021

IN THE MATTER OF:

KRISHNA MURTI

..... Appellant

Through Mr. Maroof Ahmad and
Mr. M.K Khan, Advocates

versus

STATE OF NCT OF DELHI

..... Respondent

Through Ms. Kusum Dhalla, APP for the State
along with SI Jagdish PS Bindapur.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This appeal is directed against the judgment dated 21.10.2020, convicting the appellant herein for an offence under Section 363 IPC read with Section 8 of the Protection Of Children From Sexual Offences Act, 2012 (hereinafter referred as 'The POCSO Act'). By a separate order dated 20.11.2020, the appellant has been sentenced to undergo Simple Imprisonment for a period of three years and a fine of Rs.2,500/- for offence punishable under Section 363 IPC and in default further imprisonment for a period of three years. The appellant is also sentenced to undergo Simple Imprisonment for a period of three years with a fine of Rs. 2,500, for the offence punishable under Section 8 POCSO Act and in default of payment further imprisonment for a period of three months, both the sentences shall run concurrently.

2. FIR No.606/13, dated 01.12.2013 was registered at Police Station

Binda Pur for offences under Sections 354, 363 IPC read with Section 8 of the POCSO Act. On investigation charge-sheet under Sections 354, 366A, 506 IPC read with Section 8 of the POCSO Act has been filed on 25.01.2014.

3. The brief facts as narrated in the charge-sheet are:

a) On 01.12.2013 a PCR call was received at Police Station Binda Pur, Delhi regarding sexual offence on a minor, the complaint was registered vide DD No.14A.

b) On receiving the complaint, medical examination of the complainant was conducted at Deen Dayal Upadhyay Hospital vide MLC No. 26847. The statement of the victim/prosecutrix was recorded. In her statement, the prosecutrix stated that on 30.11.2013, she left her house at 7 PM to buy *momos* from Nawada. While coming back from Nawada, the prosecutrix met the accused/appellant herein, who is a neighbour of the child victim. The appellant enticed the prosecutrix to sit on his scooty and took her to one house in Matiala. While the accused/appellant was taking the prosecutrix on his scooty, the brother of the prosecutrix saw them. It is stated in the statement that the accused caught hold of the hand of the prosecutrix and forcefully took her inside the house. He asked her to do the wrong act with him, the prosecutrix got perturbed and ran away from the spot and came back to her house. The prosecutrix stated in her statement that she was very scared and hence she did not disclose anything to her mother. On the next day, the prosecutrix narrated the incident to her mother and her mother brought her to the police station. On her complaint, FIR No.606/13, dated 01.12.2013 was registered at Police

Station Binda Pur for offences under Sections 354, 363 IPC read with Section 8 of the POCSO Act.

c) The accused was arrested on 01.12.2013. Statement of the prosecutrix under Section 164 Cr.P.C. was recorded on 05.12.2013. In the statement under Section 164 Cr.P.C the prosecutrix stated that on 30.11.2013, at about 7:30 PM when the prosecutrix was returning back from Navada after purchasing Momos the appellant who is a neighbour stated that he would drop her back home in his scooty. It is stated that she refused to go with the appellant but the appellant insisted and the prosecutrix sat on the scooty of the appellant. The appellant took her to a house which he had taken on rent. He asked the prosecutrix to come inside the house and told her that he wanted to talk to her. It is stated that when the prosecutrix told him that she is like his daughter and that whatever he wanted to tell her he can tell her but she will not enter the house. It is stated that the appellant told her that he will not even spare his daughter let alone the prosecutrix. It is stated that when the appellant was trying to open the lock, she ran away. It is stated that the appellant ran after her and warned her not to reveal about this incident to any person.

d) The charge-sheet was filed against the accused. The appellant pleaded that he is not guilty and claimed trial.

e) To prove its case the prosecution examined 10 witnesses.

- i. PW-1 is the child victim.
- ii. PW-2, Head Constable Bharat Veer, was examined to prove the FIR.
- iii. PW-3 is the mother of child victim.

- iv. PW-4 is the brother of child victim.
 - v. PW-5 is Head Constable Santosh Kumar who proved the PCR call.
 - vi. PW-6 is Constable Kanwar Rakesh who along with SI Shakti Singh and the mother of the child victim reached at the house of accused and arrested him.
 - vii. PW-7 is the lady Constable Babita who took the victim to the hospital for her medical examination.
 - viii. PW-8 is Dr. Varshney who identified the handwriting of the attending doctor who had prepared the MLC.
 - ix. PW-9 is the school principal of child victim.
 - x. PW-10 SI Shakti Singh is the IO.
- f) The victim, who was examined as PW-1, deposed as under:

"On 30.11.2013 at about 7.00p.m, I was going to fetch MOMOs(Chinese food) from a shop Nawada on foot and while returning, I met the accused at Budh Bazar, situated at a distance of 10 minutes from my house and offered me a lift on his scooty. Initially I refused to go alongwith him 2-3 times but thereafter he persuaded me to come with him being his neighbour and since he was also going in the same direction. Thereafter he took me on his scooty at a rented room in a locality in Nawada. I inquired from the accused as to why he has brought me there and accused replied that tie needs to talk to me and thereafter he held my hand tightly and when the accused was tried to open the lock of the room, I managed to free my hand and came back to my house on foot. Thereafter I told the entire facts to my mother. Accused reached his house after sometime. My

mother made inquiries from the accused and thereafter called the police."

g) The accused examined himself as DW-1. He stated that the mother of the child victim used to quarrel with him on minor issues. On 30.11.2013, mother of child victim quarrelled with him on the issue of drying clothes in the common area. When the accused objected to the mother of the child victim, she threatened to implicate him in a false case. Consequently, the child victim was tutored by her mother to make false statements against the accused and the accused was falsely implicated in this case.

4. The trial Court after going through the material on record held that the victim was under 18 years of age and the victim was taken by the accused to a house which did not belong to the accused. The trial Court held that from the statement of victim made under Section 164 Cr.P.C. and in the deposition in Court, the statement of the brother of the victim (PW-4) who saw the victim accompanying the accused on his scooty, it is clear that the accused had enticed the child victim to sit on his scooty and allegedly took her to one house in Matiala without the consent of the parents of the victim and therefore the appellant is guilty of an offence under Section 363 IPC.

5. The trial Court observed that though there are discrepancies in the statement of the victim, but these discrepancies do not go to the root of the matter and shake the basic version of the case of the prosecution. The learned Trial Court held that the statements of the witness and victim conclusively establish that the accused took the victim to a house in Matiala. The Trial Court relied on the deposition of the mother of the victim (PW-3)

that the child victim returned home at 8 PM, and narrated the entire incident to her, which corroborates the statement of the accused. The Trial Court held that even in the absence of any other witness, the victim has stated in all her statements that the accused had taken the victim to a house in Matiala and held her wrist tightly. The Trial Court did not accept the defence of the accused that the family of the accused and the victim are neighbours and there were previous fights between them and the appellant had been implicated. The learned Trial Court convicted the appellant for an offence under Section 363 IPC read with Section 8 of the POCSO and sentenced the appellant to undergo Simple Imprisonment for a period of three years and a fine of Rs.2,500/- for offence punishable under Section 363 IPC and in default further imprisonment for a period of three years. The appellant is also sentenced to undergo Simple Imprisonment for a period of three years with a fine of Rs. 2,500, for the offence punishable under Section 8 POCSO Act and in default of payment further imprisonment for a period of three months.

6. Heard Mr. Maroof Ahmad, learned counsel appearing for the appellant, Ms. Kusum Dhalla, learned APP appearing for the State and perused the material on record.

7. Mr. Maroof Ahmad, learned counsel for the appellant contends that the doctor who conducted the MLC of the child victim on 01.12.2013 stated that no physical or sexual assault can be determined from the MLC. He also stated that the child victim and her mother refused physical examination, including gynae examination as mentioned in MLC dated 01.12.2013. The counsel for the appellant states that the appellant has been falsely implicated in the instant FIR by the concerned Police at the instance of the mother of

the child victim who wanted to implicate the appellant because a quarrel had taken place between the appellant and family of the victim in the morning of 30.11.2013. He further states that the child victim has been tutored to make false statements because of the quarrel. Learned counsel for the appellant states that no public witness was examined by the prosecution despite the fact that the road, from where child victim was allegedly taken by the appellant, is a busy road. It is also contended that there are a lot of contradictions, inconsistencies and discrepancies in the statements/depositions of the child victim (PW-1), mother of the child victim (PW-3), brother of child victim (PW-4). He further states that whereas the mother of the child victim (PW-3) stated that the child victim reached back to the house after incident at around 8 PM, the brother of the child victim (PW-4) stated that the child victim had returned to the house at around 9:30 PM. PW-4, the brother of the child victim, also stated that he and his family members had gone in search of the child victim when she had not returned home but no such fact has been stated by the mother of the child victim. Learned counsel for the appellant contends that the child victim had stated that her mother called the police on the same day and the police reached the house in the morning, PW-3, the mother of the child victim stated that she called the police at number 100 on the next day. However, as per the DD No. 14 A, the first information was registered in the police station at 1:44 PM on 01.12.2013. He states that the learned Trial Court wrongly recorded time as 1:44 AM in the impugned Judgement while in the DD No. 14A it has been mentioned time as 1.44 in the day on 01.12.2013. Learned counsel for the appellant states that none of the witnesses corroborate each other about the exact time when the police was informed.

He states that there are contradictions in the statement of the child victim under Section 164 and in the deposition made before the court. In her statement under Section 164 Cr.P.C the prosecutrix has not stated that the accused held her hand but in Court there is an improvement and the prosecutrix stated that the appellant caught her hands. It is contended that there is an improvement in the foundational fact by the prosecutrix in the Court. It is contended by the learned counsel for the appellant that if the statement of the prosecutrix made under Section 164 Cr.P.C is correct then the offence under the POCSO Act will not be made out. It is urged by the learned counsel for the appellant that there are major contradictions in the statement/deposition of PW3 and PW4. It is contended that PW4/brother in his statement stated that he apprised his PW3/mother of the facts as soon as he reached home, whereas, PW3/mother in her cross examination stated that she came to know about the incident allegedly from the child victim around 8 PM. The learned counsel for the appellant would draw the attention of this Court to para 14 of the impugned judgment dated 21.10.2020 where it is held that, *"It is not convincing that why despite the fact that he saw the accused taking his sister on his scooty, he did not inform the police immediately rather he apprised this fact to the mother of the child victim. The statement of PW4 is not corroborated by the mother of the child victim, who has nowhere stated that his son had seen the accused taking her daughter on his scooty and her son had gone to look out for child victim."* The learned counsel for the appellant would state that despite the same, the Trial Court has passed the impugned Judgement and impugned Order on Sentence against the Appellant. The learned counsel for the appellant took this Court through para 15 of the impugned judgment dated 21.10.2020

where it is stated, “Hence, it is visible that there are several contradictions between the statements of witnesses.” It is argued by the counsel for the appellant that the site plan was made at the instance of PW3/mother, who is not the eye witness to the incident.

8. *Per contra*, Ms. Kusum Dhalla, learned APP for the State supports the impugned judgment and states that the testimony of the child victim and her mother are consistent and reliable. She further states that no one would tutor a child to file a false case as revenge for a simple quarrel over drying of clothes. It was also submitted that appellant was already known to the child victim being her neighbour.

9. The appellant has been convicted for offence under Section 363 IPC and Section 8 POCSO Act. Section 361 IPC is punishable under Section 363 IPC.

10. Section 361 IPC defines Kidnapping from lawful guardianship. Section 361 IPC reads as under:

“ 361. Kidnapping from lawful guardianship.-Whoever takes or entices any minor under 1[sixteen] years of age if a male, or under 2[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Explanation.—The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

(Exception) —This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes

himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.”

11. The punishment for kidnapping is given in Section 363 IPC which reads 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.”

12. The FIR, the Statement of the prosecutrix under Section 164 Cr.P.C. and the deposition of the victim, would show that the accused has taken the victim to a house in Matiala. PW-4, the brother of the victim has deposed that he saw the appellant take the victim on his scooty. This fact is further corroborated by the mother of the victim, PW-3. The family of the victim and the accused admittedly are neighbours. If the accused only wanted to give lift to the victim he should have taken the victim to the house of the victim, there is no reason as to why he took the victim to Matiala. The justification of the learned Trial Court is correct in holding that ingredients of Section 361 IPC are made out against the accused and therefore the appellant herein be convicted for an offence under Section 363 IPC.

13. Coming to the next question as to whether the appellant is liable to be convicted under Section 7 of the POCSO Act or not.

14. Section 7 of the POCSO Act defines sexual assault and Section 8 of the POCSO Act deals with the punishment for sexual assault. Section 7 and 8 of the POCSO Act reads as under:

"7. Sexual assault

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

8. Punishment for sexual assault

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."

15. Section 29 of the Protection of Children from Sexual Offences Act, 2012 reads as under:

" 29. Presumption as to certain offences

Where a person is prosecuted for committing or abetting or attenuating to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved"

16. It is for the accused to come with the statement as to why he took the victim to the house in Matiala when he knew where the victim resides.

17. The prosecutrix in her deposition in the Court has said that the accused held her hand. This fact was also stated by the prosecutrix in her complaint made to the Police. The fact that in her statement under Section 164 Cr.P.C the prosecutrix has not stated that the appellant held her hand is immaterial and on that basis alone the appellant cannot be acquitted of the offence under the POCSO Act because in the FIR which was made after the

incident and in the Court the prosecutrix had stated the appellant held her hand which has been reiterated in the deposition in the Court. It cannot be said that there is a material improvement in the statement of the prosecutrix. In view of the above the foundation fact for an offence under Section 7 of the POCSO Act punishable under Section 8 of the POCSO Act stands established. Section 29 of the POCSO Act raises a presumption against an accused for committing or abetting or attempting to commit an offence under Section 7 of the Act. As stated earlier, it was for the appellant to rebut the presumption as to why he took the victim to another house. His defence of false implication and his denial that the incident never occurred has been disbelieved.

18. The Calcutta High Court in Sahid Hossain Biswas v. State of West Bengal, 2017 SCC OnLine Cal 5023, observed as under:

"23. A conjoint reading of the statutory provision in the light of the definitions, as aforesaid, would show that in a prosecution under the POCSO Act an accused is to prove 'the contrary', that is, he has to prove that he has not committed the offence and he is innocent. It is trite law that negative cannot be proved [see Sait Tarajee Khimchand v. Yelamarti Satyam, (1972) 4 SCC 562, Para-15]. In order to prove a contrary fact, the fact whose opposite is sought to be established must be proposed first. It is, therefore, an essential prerequisite that the foundational facts of the prosecution case must be established by leading evidence before the aforesaid statutory presumption is triggered in to shift the onus on the accused to prove the contrary.

24. Once the foundation of the prosecution case is laid by leading legally admissible evidence, it becomes incumbent on the accused to establish from the

evidence on record that he has not committed the offence or to show from the circumstances of a particular case that a man of ordinary prudence would most probably draw an inference of innocence in his favour. The accused may achieve such an end by leading defence evidence or by discrediting prosecution witnesses through effective cross-examination or by exposing the patent absurdities or inherent infirmities in their version by an analysis of the special features of the case. However, the aforesaid statutory presumption cannot be read to mean that the prosecution version is to be treated as gospel truth in every case. The presumption does not take away the essential duty of the Court to analyse the evidence on record in the light of the special features of a particular case, eg. patent absurdities or inherent infirmities in the prosecution version or existence of entrenched enmity between the accused and the victim giving rise to an irresistible inference of falsehood in the prosecution case while determining whether the accused has discharged his onus and established his innocence in the given facts of a case. To hold otherwise, would compel the Court to mechanically accept the mere ipse dixit of the prosecution and give a stamp of judicial approval to every prosecution, howsoever, patently absurd or inherently improbable it may be." (emphasis supplied)

19. The victim is the most important witness in this case she has consistently deposed that she went to Nawada to buy *Momos* and on her way back the accused, who is her neighbour, made her to sit on his scooty and took her to a house in Matiala. In the FIR and in Court the victim has stated that the accused told her that he wanted to speak to her and he held her hand tightly and while trying to open the lock the victim fled. In view of the established fact that the accused had taken the victim to another place and he

held her hand is sufficient to invoke Section 8 of the POCSO Act unless the appellant is able to rebut the presumption as to why he took the prosecutrix to a different place. Sexual intent can be inferred by the appellant holding the wrist of the prosecutrix while opening the lock. The fact that the appellant took the prosecutrix to another house is sufficient for this Court to hold that offence under Section 7 of the POCSO Act has been committed by the appellant. The appellant has not stated any reason as to why he took the prosecutrix to another house. The appellant has not been able to rebut the presumption under Section 29 of the POCSO Act. This Court is also not inclined to accept the story of the appellant that he has been implicated because of enmity. In view of the above this Court found that the prosecution has brought home the case without any reasonable doubt.

20. The Judgment of the Trial Court convicting the appellant under Section 363 IPC and Section 8 of the POCSO Act is upheld. The minimum sentence that can be imposed on a person convicted for an offence under Section 8 of the POCSO Act is three years which has been awarded by the Trial Court. The appeal is dismissed.

SUBRAMONIUM PRASAD, J.

APRIL 05, 2021

Rahul