

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-D-895-DB-2016

Date of Decision:17.08. 2022

Satpal

..... Appellant

Vs.

State of Haryana

..... Respondent

**CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH
HON'BLE MR. JUSTICE LALIT BATRA**

Present: Mr. K.P.S. Virk, Advocate, for
Mr. K.S. Dhaliwal, Advocate,
for the appellant.

Mr. Deepak Bhardwaj, D.A.G., Haryana.

AMOL RATTAN SINGH, J.

This appeal has been filed by the accused who has been convicted by the trial court (learned Additional Sessions Judge, Kaithal) for the commission of offences punishable under the provisions of Sections 342, 376-D and 506 of the IPC and Section 5 (m) of the Protection of Children from Sexual Offences, Act, 2012 (hereinafter referred to as the POCSO Act), he having been thereafter sentenced to imprisonment for life for the commission of the offence punishable under Section 376-D of the IPC and having also been imposed a fine of Rs. 2,00,000/- for the commission of the said offence.

He has also been sentenced to one years' rigorous imprisonment and imposed a fine of Rs. 1,000/- for the commission of the offence punishable under the provisions of Section 342 of the IPC; and further, for a period of 3 years rigorous imprisonment for the commission of the offence punishable under Section 506 of the IPC, with a fine of Rs. 10,000/- having been also

imposed for the commission of that offence.

The substantive sentences have all been ordered to run concurrently.

As regards the offence punishable under the provisions of Section 5 (m) of the POCSO Act, it has been held by the learned trial court that in view of Section 42 of that Act, no separate sentence need be passed for the commission of that offence, in view of the sentence already imposed, of life imprisonment (“under” Section 376-D IPC).

2. The matter originates from FIR No. 117, registered at Police Station Dhand, District Kaithal, on 19.08.2015, registered at the instance of the mother of the child-victim and with the statement in the FIR being that the victim, a student of Class V in the Government School of the village, left for school everyday at 07:00 A.M.

On 18.08.2015, the complainant found that her children were quarreling with each other at about 08:00 P.M. and upon being asked the reason thereof, then the complainants' son, Vinod, told her that the appellant Satpal (hereinafter referred to as the accused), had done an objectionable act with the child victim, who had told him so.

As per the FIR, the complainant is stated to have then taken her daughter aside to ask her about the same with the victim having wept and told her that Satpal, son of Chaula Ram, who was working as a sweeper in her school had committed an objectionable act with her 2-3 days ago and that “today” (i.e. on 18.08.2015), when she had gone into the class along with other students, he had come into the class and had sent all the children out but had stopped her by holding her hand. He had then bolted the door and the window

of the class room and took off his clothes as well as hers and thereafter committed an objectionable act with her due to which she suffered pain.

As per the FIR, the child also stated that he had committed objectionable acts many times prior thereto also with her; and had threatened to kill her if she disclosed it to anybody.

3. The complainant having told these facts to her husband, Jai Singh, he gathered people and narrated the matter, saying that Satpal should be punished; but with the appellant and his family members putting pressure upon the victims' family for effecting a compromise, which they did not do. The complainant then informed the police that her daughter had been raped by the appellant.

The complaint closes with the plea of the complainant that justice be done with her family and her daughter and strict punishment be awarded to the accused.

4. Thus, with an application to that effect (Ex. PA) having been submitted by the complainant, the FIR came to be registered on 19.08.2015 after which the police is stated to have reached the place of occurrence, i.e. the school, with a rough site plan having been prepared (Ex.PC) and with the child victim having been thereafter produced before the learned Duty Magistrate, Kaithal, who recorded her statement under the provisions of Section 164 of the Cr.P.C. on 19.08.2015 itself at 07:00 P.M.; to the effect that she was a student of Class V in the Government School at Pobala, with Satpal (accused) doing the sweeping work there and that on the previous day at 07:30 A.M. all the children were sitting in the class room when the accused came there and told them to leave as he had to clean it but with him having restrained her from

leaving by holding her hand and pressing her mouth.

She stated that the other children all went out, after which the accused shut the class room door and committed a wrong act with her, also threatening her that if she told anybody at home then he would kill her.

The statement under the provisions of Section 164 of the Cr.P.C. further reads to say that at night she (victim) told her mother of the entire occurrence after which her mother told her father of it.

The child further told the Magistrate that before that also the accused had committed a wrong with her 6-7 times when she was in a lower class.

She next stated that her father informed the police; and that she (victim) had nothing further to say other than what she had already stated (as above) of her own will without any pressure from any person.

5. Ex. PE is the counseling report submitted by the legal counsel of the District Court at Kaithal, shown to be attested by ASI Rekha Rani on the same date, i.e. 19.08.2015.

The statement made by the child to the counsel is essentially to the same effect as per her statement under the provisions of Section 164 of the Cr.P.C. but with one difference seen therein, that before the counsel she stated that upon all the other children having gone out, the accused caught her arm and placed his hand on her mouth and shut the class room door.

She next stated before the counsel that he then took off her pants (*Salwar* in Hindi) as also his own pant (*Pajama* in Hindi) and committed a wrong act with her, which was not the first time that he had done it, as he had also done it many times when she was in Class IV.

She next stated to the counsel that when she told him that she would tell her parents, he had threatened to kill her.

Last in that statement (to the counsel) she stated that she wished to take legal action against the accused and that she was not under any pressure to make her statement.

The said statement is seen to be thumb marked by the child's mother and signed by the child in Hindi.

6. By way of evidence gathered, the investigating officer got conducted the medical examination of the child, so conducted by Dr. Monika Goel (PW-12), as also the medical examination of the accused, by Dr. Harkirat Singh (PW-11).

In the presence of the doctor and lady Head Constable Babli, as also the complainant, the Investigating Officer gathered the clothes of the child as also a vaginal swab and a cervical swab taken by the doctor, all of which were separately sealed and put in a parcel which again was sealed; and with all the aforesaid items, by way of evidence, along with a sample seal, presented to the Forensic Science Laboratory, Madhuban.

The accused was also arrested vide an arrest memo dated 19.08.2015 (Ex. PH) and with the confessional statement of the accused also having been recorded (as per the investigating agency), which is Ex. PJ. The underwear of the accused was also taken into custody and sent to the Forensic Science Laboratory.

7. A copy of the admission register of the Government Primary School, Pobala, was also obtained by the investigating officer, showing that the child was a student of the 5th Class with her date of birth being 01.01.2005, she

having been first admitted to school on 26.04.2010.

The statement of the learned JMIC, Kaithal (Duty Magistrate) dated 19.08.2015, is seen as Ex. PN/1, stating to the effect that a statement of the child under the provisions of Section 164 of the Cr.P.C. was recorded at 06:40 P.M. at the residence of the Duty Magistrate, with all other persons who had come with the child not being present at that time; and with the learned Magistrate further stating that he had satisfied himself that the prosecutrix was not under anyones' pressure and was in a fit state to get her statement recorded.

8. The FSL report, Ex. PR, is seen to be dated 15.12.2015, before which the report under the provisions of Section 173 of the Cr.P.C. had been already submitted to the competent court, alleging therein the commission of offences as first mentioned in this judgment.

Consequently, the case being triable by a Court of Sessions, it was committed to that court by the learned JMIC, Kaithal, on 22.09.2015.

9. With the FSL report having been received, the accused was charged with the offences for which he was eventually convicted but with him at that stage (06.01.2016) having pleaded 'not guilty' and claiming trial, it was accordingly proceeded with by the trial court.

10. PW-1 before the trial court was lady ASI Rekha Rani of the Women Police Station, Kaithal, who deposed that on 19.08.2015, she was posted at Police Station City, Kaithal, as an investigating officer; and on that day, on the call of the SHO Police Station Dhand, she reached that police station where the complainant (Kamlesh), her husband Jai Singh and their daughter (child victim) were found present, with the application/complaint Ex. PA having been presented to this witness (though addressed to the SHO Police

Station Dhand), after which the FIR was got recorded by PW-1, who also identified her signature beneath Ex. PB-1 and PA.

She along with the child, her parents and police officials then reached Village Pobala, Tehsil Dhand and recorded the statement of the father of the victim, i.e. Jai Singh and verified the facts from the victim, after which the spot was inspected in the Government Primary School, Pobala, with a site plan having been prepared on the demarcation of the child and with the SHO, Ajit Rai, also having reached the spot.

PW-1 further testified that she had visited the house of the accused but he was not found there.

She further testified that when the child was asked she also disclosed that her friend, another minor girl, was a witness to the occurrence.

Upon reaching Village Pobala again, the matter was inquired from the minor girl (name not given in the testimony), who as per PW-1, narrated all the facts but with her parents having refused to let her be cited as a witness.

The investigating officer next stated that she had thereafter reached the residence of the learned Duty Magistrate, Kaithal, and produced the child victim for recording her statement under the provisions of Section 164 of the Cr.P.C., which was thereafter collected by this witness and the child was also counseled by Ms. Sanjam Dhanda, Advocate, with her counseling report having been also collected and attested by PW-1.

The said witness next testified that she had got the child examined from the General Hospital, Kaithal, with lady Dr. Monika Goel having thereafter handed over a sealed parcel to her (Ex. PF) in the presence of the complainant and Head Constable Babli.

The witness next testified that upon having returned to the village, the child was handed over to her parents in the presence of Head Constable Babli, with the statements of the said Head Constable, as also of the parents, recorded under the provisions of Section 161 of the Cr.P.C.

As per the testimony of PW-1 when she was thereafter again going to the house of accused Satpal, one Karma, son of Jeeta (uncle of the accused) produced the accused before her who was then interrogated and arrested vide the arrest memo Ex. PH and who also suffered a disclosure statement Ex. PJ, admitting to the crime and the manner of its commission.

The place of occurrence was then got demarcated again, this time from the accused, with the demarcation report Ex. PK prepared and the statements of Constable Pala Ram and Narinder, Head Teacher of the school, recorded under the provisions of Section 161 of the Cr.P.C. and with the case property having been deposited with the '*Moharrir*' Head Constable in the police lock up.

11. Further as per PW-1, on 20.08.2015 the accused was got medically examined at General Hospital, Kaithal, with the doctor having handed over a sealed parcel of the underwear of the accused along with a sample seal, which were taken into possession vide the recovery memo Ex. PM, in the presence of Constable Pala Ram, with the accused also having appended his signature thereto and with him thereafter having been produced before the learned Area Magistrate who sent him to judicial custody.

On 22.08.2015, the investigation file is stated to have been handed over by PW-1 (ASI Rekha Rani) to the SHO Police Station Dhand.

In the cross-examination of this witness, nothing significant is

seen except that she admitted that no respectable person of the locality was joined by her in the investigation but with her having denied that the statements recorded by the learned Duty Magistrate and the lady Advocate were “tutored”.

12. PW-2 is the child victim herself who testified that she had two brothers and one sister and was a student of Class V studying at the Government Primary School, Pobala, and with her also having identified the accused in court, stating that he was employed as a sweeper in the school.

Thereafter, her testimony is virtually the same as the complaint as regards the occurrence.

She next testified that when she was in Class IV the accused had committed the same act with her twice or thrice. Thereafter, other than stating that she had quarreled with her brother who stated that he would disclose the facts to her parents, she also stated that her classmate had seen the above act committed by the accused.

The remaining part of the testimony is with regard to her having accompanied the police and got the demarcation report made, and with her also having admitted to the statement under the provisions of Section 164 of the Cr.P.C. (Ex. PN), with her also admitting to her signatures on the said statement.

Last, she stated in her examination-in-chief that she was medico-legally examined at the General Hospital, Kaithal, by a lady doctor, after which her clothes were taken into possession by the doctor.

13. In her cross-examination by the defence counsel before the trial court, she stated that she could not tell the exact date and month of the previous occasions when the accused had violated her person but that she was a student

of Class-IV at that time; further stating that she did not disclose the matter to anyone else earlier because the accused had threatened to kill her, with those earlier acts also having taken place in the school.

Thereafter, there is nothing significant in her cross-examination except to state that there were two teachers in her school, namely Narinder and Satish but she did not know whether there was any watchman employed in the school, with the school timings being from 07:30 A.M. to 02:30 P.M.

However, what is of significance is that she stated that on 18.08.2015 (i.e. the date of occurrence), the said teachers were not present in school, with there being 09 students in her class and with the students of Class IV and V sitting together in one room, as there were only two rooms in the school.

14. PW-3 is the father of the child, i.e. Jai Singh, who effectively stated in terms of what is stated in the complaint, including the fact that the accused had tried to pressurize him and his family to compromise the matter but that they had refused and that thereafter an application was given to the SHO and the statement of the child had been recorded before the learned Magistrate, and that the child was also counseled by the lady advocate.

In his cross-examination PW-3 admitted that the contents of the application/complaint Ex. PA were not read over to him but he also stated that his thumb impressions were not taken on any other paper by the IO except on the said Ex. PA. He further stated that from Police Station Dhand, they had gone to the Government Primary School, Pobala.

15. PW-4 is the complainant and mother of the child, i.e. Kamlesh, shown to be aged about 35 years and a Labourer by vocation.

Her testimony is also seen to be in terms of the complaint as recorded in the FIR, with her further testifying that on the date that the FIR was recorded, the place of occurrence in the school was inspected by the investigating officer in her presence, and with the statement of her daughter also having been recorded by the learned Duty Magistrate, Kaithal and with her daughter having been counseled by a lady advocate after which she was also medico-legally examined at the General Hospital.

In her cross-examination, she stated that she admitted that she was illiterate and that the application, Ex. PA, had been written by her brother-in-law, Raj Kumar and her thumb impression obtained by the police on the same, with she and her husband and the child having gone to the police station to report the matter.

She could not tell as to on how many pages she affixed her thumb impression, though she did state that the investigating officer did not read the contents of those papers to her, and with the police having remained in the school up-to 05:30 P.M. after which they returned to Police Station Dhand and then to Kaithal.

16. PW-5 is seen to be Narender Singh, Head Teacher, Government Primary School, Pobala, who stated that the accused had been brought to the school in police custody with the key of the school having been handed over to the police who got conducted the demarcation from the accused as per the report Ex. PK and with him having handed over the child's certificate of date of birth, Ex. PO, with the said date being 01.01.2005 and with the original record having been brought by him to court.

There is nothing significant to be discerned from the cross-

examination of PW-5 except that he had admitted that there were two teachers posted in the school and that the school timing was from 08:00 A.M. to 02:30 P.M. on 18.08.2015, with there being one watchman in the school but with the key of the school being with the accused, Satpal, and with him (PW-5) having reached the school on that date at 07:45 A.M. and with the police having called him to the police station on 19.08.2015, on which date the statement of the child had been recorded and with no other proceedings conducted; though he thereafter stated that demarcation was also done by the police in his presence and with the date of birth record of the child having been collected by the police actually on 07.09.2015.

17. PWs 6, 7 and 8 are police officials who testified with regard to the registration of the FIR, examination of the child under Section 164 of the Cr.P.C., her medical examination, arrest of the accused and his medical examination and with nothing of significance discerned from their cross-examination.

18. PW-9 was ASI Harpal, who stated that on 25.08.2015 he was posted as an investigating officer at Police Station Dhand, on which date the investigation file was handed over to him for further investigation and with him having recorded statements of two police officials, and with the draftsman, Ram Niwas, having been called on 07.09.2015 to prepare the scaled site plan of the place of occurrence (Ex. PQ), which was so done on the child victim pointing out the spot at the school and with the record of the date of birth of the child having been collected from the Headmaster of the school.

In his cross-examination, he stated that he had done no other investigation with the investigation earlier having been already conducted by

ASI Rekha Rani.

19. PW-10 was the criminal '*Alhmad*' attached to the court of the learned JMIC Kaithal who had recorded the statement under the provisions of Section 164 of the Cr.P.C. of the child and with the said witness having identified the handwriting and signatures of the Magistrate, (i.e. the statement as recorded under the provisions of Section 164 of the Cr.P.C.), stating that he was acquainted with the signatures of the learned Magistrate.

In his cross-examination PW-10 admitted that the documents were not prepared or signed by the JMIC in his presence.

20. PW-13 is again a formal witness, i.e. Constable Tarsem Kumar, who testified with regard to three envelopes having been handed over to him by ASI Rekha Rani on 19.08.2015, for delivery to the higher authorities, which he so delivered without any delay, with none having tampered with the envelopes as long as they remained in his custody.

21. PW-11 was Dr. Harkirat Singh who medically examined the accused and who tendered by way of evidence his sworn affidavit, Ex. PS, stating to the effect that the accused was examined at the General Hospital, Kaithal, on 20.08.2015 "due to a history of sexual intercourse", upon an application having been filed by the police and that the patient was found to be conscious, oriented and fully cooperative, with his vital parameters being normal as was his behaviour.

The affidavit further states that there was no tear seen in the clothes as the accused was wearing, with no stains of any kind of blood also present, and with there being no injuries on his person.

His secondary sexual characters were well developed including

his genital organs, with there being no blood stains on either his penis, scrotum or any other surrounding part thereto.

By way of his opinion, PW-11 stated that there was nothing to suggest that the accused was incapable of performing sexual intercourse.

In his cross-examination PW-11 admitted that no scientific test was carried out by him at the time of examining the accused and that his opinion was based on his general examination, with him denying that he had opined as per the wishes of the IO.

22. PW-12 was the doctor who medically examined the child victim, i.e. Dr. Monika Goel, who had also submitted her sworn affidavit, Ex. PU and who identified her signature on the medico-legal report, Ex. PV, with the original record also having been brought by her to court.

She also identified the *Salvar* of the child victim as was taken out from a sealed parcel sent by the Forensic Science Laboratory. She stated that it had been handed over by her to the investigating officer.

As per the sworn affidavit of PW-12, she conducted the medico-legal examination of the child on 19.08.2015, with the allegation at that stage being a history of multiple sexual assaults over a period of 1 year, with such assaults having taken place about 4 or 5 times and the latest one stated to have been on 18.08.2015 at about 07:00 to 07:30 A.M. at the Government Primary School, Pobra, by the accused.

The affidavit further goes on to say that the child was well oriented to time place and person, with her general condition being fair, vital and stable but with there being redness in both the eyes.

The girl was stated to be of a weak built with her breasts not

developed and with neither auxiliary nor pubic hair present but with her gait and behaviour being normal.

She was stated to have changed her clothes which were however handed over to the police after putting them into a sealed parcel.

The child was also stated to have eaten food and ingested liquid after intercourse, with her also having gargled, washed, urinated and passed stools.

Her menstrual cycle had still not started and with her urine having tested negative as regards pregnancy.

There was also not seen to be any external mark of injury on any part of her body and with her '*Labia Majora*' and '*Minora*' not having developed, with no tear also seen to be present and with there also not being any laceration.

Her hymen was found to be absent. A vaginal swab was taken on a slide by the witness, as was a cervical swab of the child.

The vagina was stated to admit a tip of the finger only.

Eventually, PW-12 opined that the possibility of sexual intercourse could not be ruled out.

23. In her cross-examination, the doctor stated that a hymen can be absent also due to “reasons like cycling, any injury, sports, by birth etc.” She further stated that the absence of the hymen was not fresh but she could not say as to for how long the hymen was absent.

PW-12 next stated in her cross-examination that the period of sexual intercourse after examination cannot be ascertained and that it was correct that at the time of the examination of the victim there was no

abnormality in her private parts except the absence of a hymen.

She also stated that there was no injury, either healed or having any old scar mark etc.

Next, she stated that if a young man of 25-26 years violates the person of an 11 year old girl, there is a possibility of injuries on her private parts.

Next she stated that she had conducted 'PV examination' with the tip of her finger, further stating that normally semen can be present on a victims' parts for 48 to 72 hours.

Last in her cross-examination, PW-12 stated that she gave her opinion as regards the possibility of sexual intercourse not being ruled out, on the basis of the history of the victim told by her parents and the absence of a hymen.

24. Thereafter, the statement of the accused under Section 313 of the Cr.P.C. was recorded, with him having denied every question put to him other than the one with regard to whether he wished to lead any evidence in his defence or not, to which he replied in the affirmative.

However, as per the record of evidence before this court, he actually did not lead any such defence evidence and in fact with his counsel having closed evidence without leading any on 20.07.2016, i.e. 08 days after the statement under the provisions of Section 313 of the Cr.P.C was recorded.

25. The learned trial court, after recording the facts of the case and referring to the testimonies of the prosecution witnesses and other evidence led by the prosecution, eventually held him guilty of the offences that he was charged with and sentenced him as already discussed in the opening part of this

judgment.

26. To do so, that court essentially relied upon the testimony of the child victim after having ascertained her ability to depose before the court and by having put general questions to her in that regard.

The said testimony was found to be essentially in consonance with the complaint initially made by the child's mother and also in terms of the statement that she made under Section 164 of the Cr.P.C. before the learned Duty Magistrate one day after the alleged occurrence. It was noticed by that court that she had been consistent in stating that she was "raped/sexually assaulted on 18.08.2015 and even prior to this ghastly incident, accused had committed such like shameful acts twice or thrice."

27. It was also specifically noticed by that court that no circumstances had been highlighted by the accused to doubt the testimony of the child, either due to any prior enmity or other reason; and consequently, a girl of 11 years age and her parents would not depose falsely against the accused.

28. As regards there being no injury marks observed on the person of the child as per the medical report and the testimony of the doctor who had examined her, the argument by the defence counsel before the trial court in that regard was negated by the court, again in view of the consistent stand taken by the victim herself right since the initial stage till the time that she testified before the trial court.

In that context, it was also held by the trial court that the incident that occurred on 18.08.2015 was not a solitary one because had that been so she would have offered some resistance and in that process would have suffered injury marks on her person, but since she had also revealed that she

had been violated on 3 or 4 occasions earlier, that would explain the absence of injury marks on her person as regards the occurrence on 18.08.2015; and consequently, with her hymen also being absent/torn, it was held that there would be no reason to doubt her testimony as also that of her parents.

29. As regards the arguments of the learned defence counsel before that court, that neither the brother of the child nor her friend/classmate who had witnessed the occurrence were examined as witnesses by the prosecution, that argument also was found to be of not much significance in view of the testimony of the child herself; and as regards there being no testimony of her friend/classmate who had allegedly witnessed the occurrence, it was also observed that the parents of that girl had in any case refused at the initial stage itself before the police, to get her statement recorded.

30. Before this court, Mr. K.P.S. Virk, and Mr. K.S. Dhaliwal, Advocates appearing for the appellant, first submitted that with the alleged occurrence having taken place at 07:30 A.M. on 18.08.2015, and with it allegedly having brought to the notice of the mother of the prosecutrix at about 08:00 P.M. on that date, the parents of the prosecutrix did not go to the police immediately, on the pretext that they had gathered people from the village and were being pressurized by the family of the appellant-accused to compromise the matter, and that therefore they reported the incidence to the police at 04:20 P.M. on the next day after a delay of more than 20 hours.

As per learned counsel the delay is fatal to the case and that it was a concocted allegation made against the appellant.

31. Learned counsel for the appellant next submitted that the circumstances of the case are highly suspicious and do not inspire confidence

as regards the occurrence, inasmuch that it would be highly doubtful that in the presence of 9 students of Class V and other students of Class IV, all in the same room, the appellant would have dared to stop the prosecutrix from leaving the class room.

Secondly, in that regard, he submitted that with the incident stated to have taken place at 07:30 A.M. but with the teacher (PW-5) having come to the school at 07:45 A.M., it would have been impossible to commit the act with a child within that period.

32. Mr. Virk next argued that even as per the version of the prosecutrix herself, she had first narrated the incident to her brother, after which, due to the quarrel between them, it came to the knowledge of the mother and therefore, the evidence of PWs 3 and 4, i.e. the father and the mother of the prosecutrix respectively, is nothing more than hearsay as they were admittedly not present at the spot in any case.

He reiterated that as neither the brother of the prosecutrix, nor the friend/classmate who allegedly had witnessed the occurrence, were examined, consequently, other than the statement of the prosecutrix herself, there is no evidence whatsoever to support the allegation against the appellant.

33. Learned counsel next submitted that even medical/scientific evidence is actually completely absent from the case because even PW-12, Dr. Monika Goel, who had medico-legally examined the prosecutrix/victim, stated that there was no external injury on any part of her body, with not even a laceration or tear seen on her private parts, which would also be borne out by the medico-legal report Ex. PV.

Mr. Virk next submitted that further, as per the testimony of the

said witness, the vagina of the prosecutrix admitted one finger tip only, with the vaginal and cervical swabs sent to the FSL also not having been detected with any semen contained in them.

He next submitted that the doctor having admitted that a hymen can be absent for any reason due to injury, cycling and by birth etc., and with the said absence not found to be fresh and there being no abnormality in the private parts of the victim other than the absence of a hymen, and with no injury at all in such a young girl, there is actually no medical evidence whatsoever to support the allegations.

In that context, learned counsel next submitted that normally semen would be present for between 48 to 72 hours after intercourse but with none detected.

Further referring to the medical evidence, Mr. Virk submitted that there were also no injuries marks found on the person of the appellant even on his genital organs, which would be highly unlikely in the case of forcible intercourse with a child aged about 10-11 years.

In that context, he cited a judgment of the Supreme Court in **Rahim Beg** vs. **The State of U.P.** (1972) 3 SCC 759.

Last in the context of medical evidence, Mr. Virk submitted that just because there was a semen stain present on the undergarment of the appellant, that would not establish his guilt of having committed any sexual act with the prosecutrix, as such a semen stain could be present for any reason, in support of which he also referred to the same judgment.

34. Learned counsel for the appellant next submitted that there were improvements in the statements of the prosecutrix, starting from the statement

made under the provisions of Section 164 of the Cr.P.C. right till the time of her deposition before the trial court, inasmuch as, in her statement under Section 164 of the Cr.P.C., she only stated that after all the children went out of the room the accused committed a wrong act with her after bolting the door and that he had committed such act previously also, 6-7 times. However, in her statement before the counselor (legal counsel), she gave a more elaborated version (as per learned counsel for the appellant) and spoke about her clothes also having been removed by the accused and that the act was committed many times with her.

He submitted that thereafter in her testimony as PW-2, she also further elaborated that she had felt a pain in her private parts and that the accused had committed the act twice or thrice earlier.

35. He next submitted that the father of the prosecutrix, i.e. PW-3 Jai Singh, admitted that his statement Ex. PA was written by the police officials at the police station and the contents thereof were not read over to him whereas the mother of the prosecutrix as PW-4 stated that the statement was written by her brother-in-law, Raj Kumar, as had been produced before the police.

He submitted that therefore there was obviously due consultation and deliberation over a period of more than 20 hour before a written complaint was even filed, which leaves enough room for a false accusation, with the prosecutrix also possibly having been tutored to depose in a particular manner.

36. Mr. Virk next submitted that there was an absence of a fair trial, inasmuch as the proceedings before the trial court would show that actually the court would have been prejudiced against the appellant because the allegation was of a sexual offence against a minor child.

He contended that whereas a layman may consider such accusations to be the truth, however the court would be required to look at the evidence very carefully before coming to a conclusion that a person is guilty of having committed any offence.

Learned counsel submitted that the prejudice against the appellant was evident from the fact that, firstly, even in the report submitted by the police under the provisions of Section 173 of the Cr.P.C., there was alleged to have been commission of an offence punishable under Section 376-D of the IPC, with a charge also having been framed under the said section, whereas there is not even a whisper of a gang rape in the case and with even the trial court and the public prosecutor (as also the counsel for the appellant before the trial court), also not having pointed to that glaring defect.

However, learned counsel very fairly admitted that though the same may be brushed aside as only a “technical defect”, yet, it actually depicts the casual manner in which the entire trial was conducted, with even the appellants' own counsel not having defended him properly and with no defence evidence also having been led.

Further in that context, learned counsel for the appellant submitted that a perusal of the statement under the provisions of Section 313 of the Cr.P.C. would also show that the trial was conducted in a casual manner and with the appellant in any case having denied the allegations against him.

37. Last, Mr. Virk submitted that in fact no offence under the provisions of Section 376 in any case is made out even if the entire story of the prosecution were to be accepted at face value; because actually no offence of rape has ever been proved to have been committed and further, no offence even

punishable under the provisions of Section 5 of the POCSO Act would be made out against him.

He submitted that the term “Penetrative Sexual Assault” as defined in Section 3 of that Act, exactly corresponds to the definition of rape under the provisions of Section 375 of the IPC and therefore, for an offence either under Section 5 of the POCSO Act or Section 376 of the IPC to have been committed, it necessarily requires penetration as a *sine qua non*.

Thus, Mr. Virk reiterated that with medical evidence not proving any penetration, therefore simply because the hymen was absent, that cannot be made a basis to reach a conclusion that there was penetration, especially when the doctor in her testimony stated that even the absence of the hymen was not fresh, and can be for any reason whatsoever, again seen with the fact that there was absolutely no injury whatsoever on the genitals of the appellant.

38. Learned counsel further submitted in that regard that the statements of the victim were made in Hindi, with no suggestion of any kind of penetration at all and with her only having said that the appellant had committed a bad act (*'Ghalat Kaam'*) or that he had done a *'Luchi Baat'* with her; and consequently, that has been wholly wrongly interpreted to be actual penetrative rape in terms of the definitions given in Section 375 of the IPC and Sections 3 and 5 of the POCSO Act.

He submitted that the other phrase used by her was that her honour had been violated (*'Izzat Loot Li'*) and therefore her subsequent statement that she had started having a pain in her private part would seem to be a tutored one, especially as even in her testimony in Hindi she used the phrase “private part” which a 10-11 year old girl from a village would not know.

Learned counsel submitted that therefore with a child of such tender age not able to tell whether there was penetration or not, it was the duty of the court to look for such indications, with evidence therefore becoming all the more evident, for which the only help that could have been taken, was by way of medical/scientific evidence to that effect, but with no such evidence having been led to prove any penetration whatsoever.

39. He hence submitted that at worst, even if the prosecution story is to be accepted to any extent, only an offence punishable under the provisions of Section 7 of the POCSO Act would be made out in view of the age of the victim, i.e. of sexual assault, which has been defined to be touching the vagina, penis, anus or breast of a child, or making a child touch such parts of the accused or any other person, or with any other act having been committed with sexual intent, which involves physical contact without penetration.

Thus, with the prosecutrix being below 12 years of age, an offence punishable under the provisions of Section 9 (m) of the POCSO Act could also be said to have been committed (punishable under Section 10 thereof), if at all the prosecution story is to be accepted even at face value.

40. Before concluding his arguments, learned counsel for the appellant also submitted that the appellant even at the time of the alleged assault, being a married man having two small children aged 4 years and 6 years, would be unlikely to commit such an offence and that further, he being the sole earning member of his family, his incarceration would obviously have an adverse effect on his children and his family.

41. To conclude his case, learned counsel for the appellant submitted that he has been behind bars for 7 years with his conduct having remained very

good during the entire period and consequently, he may be given a chance to reform himself if at all he is found guilty of having committed any kind of offence, though the contention is that no such offence at all has been committed and therefore he deserves to be acquitted of the charges framed against him; and the judgment of the trial court therefore reversed.

42. *Per contra*, Mr. Deepak Bhardwaj, learned D.A.G., Haryana, first submitted that there would be no reason whatsoever for either the child or her parents to falsely accuse the appellant; and further, as regards the only 'eye witness' examined being the child victim herself, it is well settled law that in fact that is the most important piece of evidence, as such kinds of crimes are mostly committed behind four walls, where it is not possible to find any eye witness and with the violators often being persons in authority or close relatives.

In that context Mr. Bhardwaj cited a judgment of a coordinate Bench of this court in Sanjay vs. State of Haryana (CRA-D-DB-2014), decided on 04.02.2022.

He next cited the another judgment of a Division Bench of the Delhi High Court in State vs. Sanjay Kumar Valmiki (2014) SCC Online Del 794.

He also cited the judgment in Satish Kumar vs. State of Haryana 2019 Latest Caselaw 925 SC.

43. Learned State counsel submitted that with the trial court judge as also the learned Duty Magistrate who recorded the statement of the child under the provisions of Section 164 of the Cr.P.C., having both satisfied themselves of her capacity to answer questions in court intelligently, there would be no

reason to discard her testimony; and with that consequently to be accepted as the correct narration of events.

Mr. Bhardwaj next submitted that with the evidence on record having proved that the appellant was working as a sweeper in the school and also had the keys to it, he was obviously a person in authority and therefore in the light of the testimony of the child, read with the testimony of PW-12 Dr. Monika Goel, who stated that the possibility of sexual intercourse could not be ruled out, with the hymen also found absent, there would be no reason to reverse the judgment of the trial court in any manner.

In the context of the hymen being missing, learned counsel submitted that nothing having come on record that the child was into some kind of sports and in fact she being of a weak built as deposed by the doctor, the absence of the hymen can only be attributed to penetrative sexual assault by the appellant.

He next submitted that the absence of semen on the vaginal and cervical swabs or the person of the victim does not mean that an offence punishable under Section 5 (m) of the POCSO Act was not committed.

44. Mr. Bhardwaj further vehemently argued that Section 29 of the POCSO Act provides that where a person is prosecuted for violating any of the provisions under Sections 3, 5, 7 and 9 of the Act, where the victim is a child, the court shall presume that the accused has committed the offence, with Section 30 further providing for a presumption that in any prosecution regarding an offence punishable under the said Act, the culpable mental state of the accused includes intention, motive, knowledge of a fact and the belief in or reason to believe; and in fact the onus is on the accused to prove that he had

no such mental state in respect of the act that he has been charged with.

He submitted that thus, with the appellant having failed to rebut that presumption by leading any kind of evidence in his defence, the appeal deserves to be dismissed.

45. Next learned State counsel submitted that as regards conviction of the accused under Section 376-D of the IPC, that alone would not be a ground to acquit him in view of Sections 464 and 465 of the Cr.P.C. which stipulate that until and unless a prejudice has been caused to the accused, no sentence or order passed by a court of competent jurisdiction shall be deemed to be invalid merely on the ground of an irregularity in framing of a charge.

46. He concluded by submitting that with the case of the prosecution having been duly proved before the trial court and it being a case of a child rape, it is a crime against humanity, with the petitioner therefore not deserving any leniency by this court.

47. Having heard the arguments of learned counsel on both sides and having gone through the evidence led before the trial court, before considering the matter in detail, the statutory provisions as would be necessary to be looked at, from the Indian Penal Code (as existent on 18.08.2015), the Protection of Children From Sexual Offences Act, 2012, as also the Code of the Criminal Procedure, 1973, need to be reproduced here.

Indian Penal Code, 1860

“342. Punishment for wrongful confinement.—Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or

with both.”

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“[375. Rape.—A man is said to commit “rape” if he— (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives

consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

“376. Punishment for rape.—(1) Whoever, except in the cases provided for by sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in his custody or in the custody of a

police officer subordinate to him; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for

life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.- For the purposes of this sub-section,-

(a) “armed forces” means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b) “hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) “police officer” shall have the same meaning as assigned to the expression “police” under the Police Act, 1861 (5 of 1861);

(d) “Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows’ home or an institution called by any other name, which is established and maintained for the reception and care of woman or children.

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376-C. Sexual intercourse by a person in authority.-Whoever, being—

- (a) in a position of authority or in a fiduciary relationship; or
- (b) a public servant; or
- (c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women’s or children’s institution; or
- (d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in

his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 5 years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1.- In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section [375](#).
Explanation 2.- For the purposes of this section, Explanation 1 to section [375](#) shall also be applicable.

Explanation 3.-“Superintendent”, in relation to a jail, remand home or other place of custody or a women’s or children’s institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4.- The expressions “hospital” and “women’s or children’s institution” shall respectively have the same meaning as in Explanation to sub-section (2) of section [376](#).”

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“376D. Gang rape.—Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and

rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.”

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“506. *Punishment for criminal intimidation.—Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;*

If threat be to cause death or grievous hurt, etc.—*and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or 8 [imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.”*

Protection of Children From Sexual Offences Act, 2012

“2. Definitions.—*(1) In this Act, unless the context otherwise requires, —*

(a) "aggravated penetrative sexual assault" has the same meaning as assigned to it in section 5;

(b) "aggravated sexual assault" has the same meaning as assigned to it in section 9;”

XXXX XXXX XXXX XXXX

“(d) "child" means any person below the age of eighteen years;”

XXXX XXXX XXXX XXX

“(f) "penetrative sexual assault" has the same meaning as assigned to it in section 3;”

XXXX XXXX XXXX XXX

“(i) "sexual assault" has the same meaning as assigned to it in section 7;

(j) "sexual harassment" has the same meaning as assigned to it in section 11;”

“3. **Penetrative sexual assault.**—A person is said to commit "penetrative sexual assault" if—

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

“4. **Punishment for penetrative sexual assault.**—Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

5. **Aggravated penetrative sexual assault.**

XXXX XXXX XXXX XXXX

(c) whoever being a public servant commits penetrative sexual assault on a child; or

xxxx xxxx xxxx xxxx

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

xxxx xxxx xxxx xxxx

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

xxxx xxxx xxxx xxxx

p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

xxxx xxxx xxxx xxxx

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

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.

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.

9. Aggravated sexual assault.—(a)

Whoever, being a police officer, commits sexual assault on a child—

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(c) whoever being a public servant commits sexual assault on a child; or

xxxx xxxx xxxx xxxx

(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

xxxx xxxx xxxx xxxx

(f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or

xxxx xxxx xxxx xxxx

(m) whoever commits sexual assault on a child below twelve years; or

xxxx xxxx xxxx xxxx

(u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.

10. Punishment for aggravated sexual assault.—*Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five*

years but which may extend to seven years, and shall also be liable to fine.

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 of 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.*

Explanation.—Any question which involves “sexual intent” shall be a question of fact.

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 liable to fine.”

The Code of Criminal Procedure, 1973

“464. Effect of omission to frame, or

absence of, or error in, charge.—(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision, is of opinion that a failure of justice has in fact been occasioned, it may,—

(a) in the case of an omission to frame a charge, order that a charge be framed, and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

465. Finding or sentence when reversible by reason of error, omission or irregularity.—

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the

prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

1. In determining whether any error, omission or irregularity in any proceeding under this Code, or any error or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.”

48. Before considering the case of the appellant on merits, the first aspect that this court is to deal with is the issue of the appellant having been charged with and convicted for the commission of an offence punishable under Section 376-D of the IPC.

As already seen from the reproduction of the said provision hereinabove, the essential ingredient for convicting a person for the commission of an offence punishable under the said provision, is that it should be proved that a woman was raped by one or more persons constituting a group or acting in furtherance of a common intention.

In the present case, very obviously, there is not even a whisper at any stage of any person other than the appellant himself, having in any manner sexually harassed the child; and consequently, he should not have been even charged with the said offence by the trial court as it has unfortunately done (and then gone on to convict him under the same provision).

That is however not to say that if the appellant is found guilty even by this court of having committed any other sexual offence against a 10-11 year old child, that is less reprehensible in any manner; but the only reason that

we have used the word “unfortunately” in the paragraph immediately preceding hereinabove, is not in the context of the appellant but in the context of the trial court not having applied its mind properly to that aspect of the case.

49. The question therefore is that what would be the effect of such charge and conviction by that court, upon the appellant.

In our opinion, the learned State counsel is absolutely correct in pointing to the provisions of Sections 464 and 465 of the Cr.P.C. (also reproduced hereinabove), and therefore even in terms of Section 464 thereof, we would not find the sentence of the trial court to be invalid merely on the ground that a proper charge was not framed against the appellant; because in effect no failure of justice has resulted in the eventual conviction of the appellant by the trial court, as regards the evidence led before that court in a regular trial, where he was given due opportunity to defend himself. Of course we would presently see as to whether such evidence would be sufficient to sustain the conviction under any other offence, either falling under the provisions of the IPC or the POCSO Act.

In other words, whether or not this court finds the appellant, on merits, guilty of having committed any offence under the IPC or the POCSO Act, would be presently seen on the basis of the evidence led by the prosecution; but what is to be observed here is that only because the trial court charged him with an offence punishable under the provisions of Section 376-D, whereas actually in our opinion it should have been instead Section 376 (2) (f), (i), (k) and (n) of the IPC, that error of charge and conviction cannot result in acquittal on that basis alone, the 'base' allegation being of the rape of a minor.

In that context, we have to say that we appreciate also the stand of

the learned counsel for the appellant, to the extent that he did very fairly state that in view of the aforesaid provisions, i.e. Sections 464 and 465 of the Cr.P.C., the conviction would not be unsustainable, provided of course this court finds that he has been correctly found guilty of having committed any offence at all under the IPC or the aforesaid Act of 2012.

Of course, to repeat, his contention was that the appellant deserves to be acquitted as he committed no such offence, which we will be required to see hereinafter on the merits thereof.

50. Hence, to conclude on that aspect, we hold that instead of Section 376-D, the appellant should have been actually charged by the trial court with the commission an offence punishable under the provisions of Section 376 (2)(f), (i), (k) and (n), and we proceed to examine the matter in that context, as to whether the evidence led before the trial court would be sufficient to sustain his conviction for the commission of such an offence, or for any other offence under the provisions of the aforesaid Code or the Act of 2012.

[It is to be observed here that though Section 376AB is a provision by which punishment for rape on a woman under 12 years of age is provided, (which is rigorous imprisonment for a term not less than 20 years but which may also extend to imprisonment for life which would mean imprisonment for the remainder of that persons' natural life, with even the death penalty provided (obviously where the court finds it wholly just to so impose that punishment), however that was a provision inserted vide an amendment made by Act no.22 of 2018, whereas the 'present' occurrence is of 18.08.2015.]

51. Coming then to the merits of the matter as regards whether any such offences have been committed by the appellant or not.

As seen from the reproduction of the provisions of Section 375 (as amended vide Act No. 13 of 2013), a man is stated to commit rape if he either penetrates his penis to any extent into the vagina, mouth, urethra or anus of a woman; or makes her to do so with him or any other person; or if he inserts, to any extent, any object or a part of the body (not being the penis) into the aforesaid parts of a woman's body or makes her to do so with him or with any other person; or further, he manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any other part of her body or makes her to do so with him or any other person, or even if he applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person against her will, without her consent, or even with her consent if such consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt, and also even with her consent (as per the allegations in the present context), if she is under 18 years of age.

Thus, with the age of the child in question having been proved before the trial court to be 10 years 07 months and 18 days old, as on the date of the occurrence that is alleged to have taken place on 18.08.2015, very obviously if the charge is actually found to be proved against the appellant, such act of his would come within the definition of rape, if we find the act committed (as per the allegations) falling within the parameters of Section 375 of the IPC.

52. Other than the aforesaid offence punishable under the provisions of the IPC, the appellant was also charged with the commission of an offence

punishable under the provisions of Section 5 (m) of the POCSO Act, which is an offence of aggravated penetrative sexual assault on a child below twelve years of age.

It is to be observed here that Section 5 (f) stipulates that whoever being on the management or staff of an educational institution commits penetrative assault on a child in that institution, would also have so committed aggravated penetrative sexual assault, with clause (l) thereof pertaining to repeated penetrative sexual assaults.

The punishment for such aggravated penetrative sexual assault, as per Section 6 of the POCSO Act, is imprisonment for a term which shall not be less than 10 years but which may also extend to rigorous imprisonment for life along with a fine to be imposed.

53. The question therefore is that in terms of the evidence led before the trial court, would the appellant be guilty of having committed either penetrative sexual assault as defined in Section 3 of the POCSO Act or aggravated penetrative sexual assault as defined in Section 5 thereof, or would he be guilty of having committed any offence of sexual assault as defined in Section 7 thereof or aggravated sexual assault (non-penetrative) as defined in Section 9 thereof, or/and the offence of rape as defined in Section 375 of the IPC.

54. As seen, learned counsel for the appellant has vehemently stressed on the following points before this court :-

(i) That despite the tender age of the child and the fully matured age of the appellant (27 years as shown above his statement recorded under the provisions of Section 313 of the Cr.P.C.), it is not possible that there would be absolutely no injury at all on any part of the body of the child, including on or around her

private parts, if there were penetrative sexual assaults;

That even as per the testimony of PW-12, Dr. Monika Goel, who medically examined the child, there was also no abnormality in the private parts of the victim except the absence of her hymen and in fact there was no external or internal injury on her private parts at the time of the examination which took place on the very next day after the alleged occurrence, with there also being no healed injury or scar marks also seen on any part of the body;

That the doctor also admitted that if a young man of 25-26 years violates the person of an 11 year old girl, there would be a possibility of injuries on her private parts;

That even the physical examination of the vagina of the child showed that only the tip of the finger could be admitted in the vagina, which could not be the case after penetrative sexual assaults, especially if such penetrative assaults had taken place 2 to 5 times over the past 1 year or so, as per the allegation of the child against the appellant;

That though semen can be present on the victims' private parts for 48-72 hours after any such sexual assaults, none was found either on her clothes or even in the cervical and vaginal swabs sent for examination to the Forensic Science Laboratory;

That the absence of a hymen could also be due to reasons like cycling, injury, sports, from the time of birth etc. and further the absence of the hymen was not shown to be fresh even as per the

testimony of the doctor.

(ii) The delay in lodging the FIR is fatal to the case of the prosecution.

(iii) The circumstances of the case being highly suspicious do not inspire confidence as it would be highly unlikely that the appellant would have dared to hold the hand of the prosecutrix and keep her in the class room in the presence of other students of Class IV and V; and further, the act could not have been committed in the short period between 07:30 a.m. and 07:45 a.m. as alleged, because as per the testimony of the Head Teacher (PW-5) he reached the school at 07:45 a.m. on that date.

(iv) That eventually, other than the testimony of the child, the whole case is based on hearsay evidence of her father and mother with not even her brother, to whom she is initially stated to have told of the occurrence on the evening thereof, having been examined.

(v) That the improvements in the statement of the prosecutrix would be seen from the fact that what she is alleged to have told her mother (PW-4) at the first instance is not the same as what she stated under the provisions of Section 164 of the Cr.P.C., and thereafter she improved her statement in her testimony by stating that she had suffered a pain in her private parts.

(vi) That the contradiction between the testimony of her father, PW-3 and her mother (PW-4) is apparent, inasmuch as the

father stated that the complaint Ex. PA was written by police officials whereas her mother stated that it was written by her brother-in-law, Raj Kumar, who again was never examined.

(vii) That with no evidence of penetration by any medical evidence or even the specific question put to the child in that context, simply the absence of the hymen would not mean that the appellant is guilty of any such assault and consequently, if at all therefore this court comes to the conclusion that there was any assault, it would at worst be a non-penetrative assault, for which the punishment is much lesser than what has been imposed by the trial court.

54-A. The argument raised by learned counsel for the appellant, first as regards the absence of semen either in the private parts of the child or on her clothes or even from the cervical or vaginal swabs sent for examination; that could not by itself disprove any penetrative sexual assault with a penis, because even as per the doctors' testimony, the child had urinated and washed up etc. in the meanwhile, i.e. after the alleged occurrence till the time of her medical examination on the next day.

Hence, at least that contention of learned counsel for the appellant is rejected by this court.

55. Coming then to the absence of any kind of injury on any part of the body of the child especially her private parts or around them, though that by itself may not be enough to hold that a penetrative sexual assault did not take place, however, the absence of any injury internally or externally in or around private parts, seen with the fact that the vagina admitted only one finger

tip, did initially cast a doubt in the mind of this court as to whether any penile insertion actually took place or not; because unfortunately even the cross-examination of the child does not reveal any question put to her with regard to exactly in what manner the appellant assaulted her sexually other than taking off her clothes (as she very clearly testified to before the trial court and which is also stated in the initial complaint filed by her mother which was converted into an FIR, though she did not say so specifically before the learned Magistrate who recorded her statement under the provisions of Section 164 of the Cr.P.C.)

However, she did state before the learned legal counsel in the District Court at Kaithal on the same date as her statement was recorded under the provisions of Section 164 (on 19.08.2015), that the appellant took off her pant (*Salvar* in Hindi) with one hand and he also removed his own pant (*Pajama* in Hindi) and thereafter committed an objectionable act (*Luchi Baat*) with her, which was not the first time, as he had done so many times earlier also when she was in Standard IV.

56. In that context, it is to be repeated that in her statement before the learned Magistrate under the provisions of Section 164 of the Cr.P.C. (Exs. PD and PN), she stated that after asking all children to leave the class room but by restraining her from so leaving by catching hold of her hand and pressing her mouth, he committed a 'wrong act' with her in the class room after bolting the door and having threatened to kill her, after which she narrated the matter to her mother who then told her father, with her further stating that he had done that wrong act 6-7 times with her earlier also in a lower class.

57. The details of her statement before the legal counsel on the same date (as already noticed) (Ex. PE) is to the effect that the appellant (Satpal) works as a sweeper in her school and asked when she had gone to school at 07:30 A.M. on 18.08.2015, he came and asked all the children to leave the school as he had to clean the room and when all the children went out, he caught hold of her arm after bolting the door of the class and he “closed her mouth”, took off her pant (*Salvar*) and removed his own pant after which he did an objectionable act with her which was also done many times earlier when she was studying in Standard IV, with him having also having threatened to kill her if she disclosed that fact to any of her family members, with the child further stating that she wanted to initiate legal action against the appellant and that she was with her making her statement without any pressure or any kind.

Again to repeat, as regards her testimony before the learned trial court, it is essentially to the same effect except that she added that after he removed her trouser and violated her person, she felt a pain in her 'private part', and though she did not say so under Section 164 of the Cr.P.C. also, however, in the initial complaint itself lodged by her mother, it is stated she felt a pain when he was doing a bad act with her (without using the words “private part”).

58. Hence, in our opinion, though the contention of learned counsel for the appellant that the said phrase has been added later only on tutoring of the child, as she normally would not know those words in any case, she being a girl from a completely rural background (which would suggest the lack of knowledge of English to that extent), may be correct to that extent as regards the usage of the phrase in “private part”, however, that does not mean that the reference to the pain she had was a later addition in her testimony, because as

regards having experienced pain itself, even her mothers' version as per the child's own statement to her, was to that effect right from the beginning.

59. Therefore, in the immediate aftermath of the trauma that the child went through, she may have forgotten to state so before the learned Duty Magistrate in her statement under the provisions of Section 164 Cr.P.C. and before the legal counsel, (that she had a pain), which she would have again remembered at the time of her testimony, after she had initially told her mother at the first instance.

60. However, that alone is obviously not what is to be considered by this court but has to be seen also with the fact that the medical evidence in the form of the medico-legal report, Ex. PV, as also the testimony of PW-12 Dr. Monika Goel, state that the vagina admitted the tip of “a finger only.”

Though we may have had a doubt in our mind as to whether any penetrative sexual assault with a penis took place or not in view of that fact, (looking at the age of the child as also the completely matured age of the appellant), however, a penetrative assault amounting to rape is also committed if any other body part is inserted into the vagina, mouth, anus or urethra, or if such body parts of a woman are manipulated for such insertion.

Hence, insertion of a finger, tongue or mouth etc. also amounts to rape, in terms of Section 375 IPC and amounts to penetrative sexual assault as per Section 3 of the POCSO Act.

We also cannot rule out that due to the size of the penis etc. there may not have been any loosening of the vaginal muscles even though the appellant is alleged to have sexually violated the child for anything between 2 to 7 times over a period of one year (as stated by her).

Therefore, after considering the consistent version of the child, as also what her mother stated in the initial complaint and her testimony, further seen with the absence of the hymen, with there being no motive for false implication even vaguely suggested before either the trial court or this court, we do not find any ground to acquit the appellant.

61. As regards the contention of learned counsel for the appellant that there was a delay lodging the FIR; in fact we find there to be no delay as the child was only about 10 years old at that time when the assault took place in the morning, which occurrence her brother was quarreling about with her on that very evening at home; and which therefore came to the knowledge of her parents on that evening at about 08:00 p.m. (on 18.08.2015).

Naturally, in the aftermath of such a serious trauma of knowing that their child had been subjected to sexual assault, it was natural for the parents to gather the village people; and with it also stated in the complaint itself by the mother, that pressure was put by the appellants' family upon the victims' family to not pursue the matter further, but with them having decided to do so, and with the FIR lodged on the next day itself, i.e. 19.08.2015.

Consequently, we find no real delay in the complaint being lodged and the FIR being registered.

62. As regards the contention of learned counsel for the appellant that it would be highly unlikely that the appellant would have dared to hold the hand of the prosecutrix in front of other students and to detain her in the class room, what again must obviously be kept foremost in mind is that, firstly, all of them were children of about 09 to 11 years of age with the appellant being not just the '*Safai Karamchari*' in the school but also a person to whom the keys of

the premises were entrusted (as per the testimony of the Head Teacher himself). Thus, he being about 25-30 years of age at that stage, he was obviously a person in authority over the children and consequently, his having restrained and confined her in the class room is not an unbelievable act in our opinion.

Secondly, as already stated earlier, there is not even a whisper by him for any motive at all of false acquisition either by the child or by her parents, at any stage.

As regards the contention that the act could not have been committed between 07:30 a.m. to 07:45 a.m., firstly in that regard, it could have been so committed as 15 minutes for a sexual act is not an impossibility; and second, whether or not the testimony of the head teacher to the effect that he actually came to the school at 07:45 a.m. on that date, is believable or not, is a wholly moot question in the face of the testimony of the child herself, to the effect that at the time in question there were no teachers present in the school.

63. As regards the contention of Mr. Virk, that other than the testimony of the child there is no other testimony of any eye witness, that contention is rejected by us in view of the fact that in any such occurrence the likelihood of an eye witness would be extremely remote, and therefore it is the testimony of the victim herself even when she is a child, that is to be given paramount importance, seen with the chain of narration of the occurrence to other persons; and again, the lack of motive for false implication.

64. Next, as regards the contradiction between the testimony of the child's father to the effect that the complaint was written by police officials with her mother however stating that it was written by her brother-in-law, we would not attach much importance to that contradiction in view of the fact that

the complaint itself did get recorded in the police station on 19.08.2015 in the circumstances already referred to hereinabove.

65. Consequently, it is held by this court in the light of the testimony of the child herself, as also of her mother to whom she narrated the occurrence on that very evening, the appellant is guilty of having inserted some body part into her vagina, which could not be described by the child in detail, as firstly, no specific question was put to her in that regard (possibly looking at her tender age itself), and also because, being a child she may not have been able to describe that act properly, other than saying at different points of time that a bad act had been committed with her (*Gandi Baat/Luchi Baat/Izzat Loot Li*). Thus rape, as defined in Section 375 IPC, was committed upon her by the appellant; and having accepted the child's testimony we would also therefore not disbelieve her testimony that the appellant had assaulted her earlier also when she was in Class IV.

He is therefore guilty of having committed an offence punishable under Section 376 (2) IPC and specifically clauses (f), (i), (k) and (n) thereof, he being a person in a position of trust or authority in respect of the child victim, who committed rape [reference clause (f)], the victim being below 16 years of age [reference clause (i)], and he being in a position of control and dominance over her [reference clause (k)]; and having committed such act repeatedly, as per her testimony, accepted by this court [reference clause (n)].

The appellant, in our opinion, is also guilty of having committed aggravated penetrative sexual assault in terms of Section 5(f) of the POCSO

Act, he being on the staff of an educational institution where she studied; and further, even in terms of Section 5(m) of the Act of 2012, the child being below 12 years of age. Further, he would also be guilty in terms of Section 5(l) of that Act for committing the offence repeatedly.

66. As regards the charge against the appellant of the commission of an offence punishable under the provisions of Section 342 of the IPC, we find no error in the judgment of the trial court for having convicted him for that offence committed, in terms of the testimony of the child as regards her being wrongfully confined by the appellant in a classroom of the school when she had gone for studies; and hence the conviction for the commission of such an offence and the sentence of rigorous imprisonment for 1 year and payment of a fine of Rs. 1,000/- as imposed by that court, are upheld.

Similarly, in view of the child's consistent statement and testimony, as regards the appellant having threatened her with her life, we also uphold the judgment of the trial court to that extent, he having been correctly in our opinion, convicted for the commission of an offence punishable under Section 506 of the IPC and sentenced to imprisonment for a period of 3 years and with a fine of Rs. 10,000/- also imposed upon him (of course all sentences having been ordered to run concurrently by that court).

67. Coming then to the sentence to be imposed upon the appellant for the commission of the offences punishable under Sections 376 (2) (f), (i), (k) and (n) as also Section 6 of the POCSO Act (as regards the commission of offences described in Section 5(f), (l) and (m) of that Act).

The minimum punishment provided for an offence punishable under Section 376 (2) [prior to its amendment vide Act no.22 of 2018] is 10 years rigorous imprisonment, which also may extend to imprisonment for life, with it specifically stipulated that it would mean for the remainder of his natural life, with a fine to be also imposed.

The punishment provided for the commission of an offence described in Section 5 (f), (l) and (m) of the POCSO Act, 2012, i.e. for aggravated penetrative sexual assault, punishable under Section 6 of the said Act, is also a minimum of 10 years rigorous imprisonment, extendable to imprisonment for life and with a liability to pay a fine also.

68. The trial court, though in respect of an offence punishable under the provisions of Section 376-D which we have found to be actually not a sustainable charge at all, [with instead the appellant being guilty (as regards the provisions of the IPC), of the commission of offences punishable under the provisions of Sections 376 (2) as described hereinabove], has imposed a sentence of life imprisonment upon the appellant; and otherwise we would not interfere with that punishment at all looking at the fact that he committed the offence on a young innocent child about 10 years of age. Yet, we are inclined to agree with learned counsel appearing for him that he being about 27 years of age at that time and with two small children himself and it being his first offence (*albeit* an extremely heinous one to say the least), we consider it appropriate to impose instead of a punishment of life imprisonment, a sentence of 25 years rigorous imprisonment upon him (instead of for the “rest of his

natural life” in terms of life imprisonment as described in Section 376 of the IPC), with a fine of Rs. 2,00,000/- (Two Lakhs) also imposed, though not for an offence punishable under the provisions of Section 376-D of the IPC (as imposed by the trial court), but under Section 376 (2) (f), (i), (k) and (n) thereof; with the sentences and the fines imposed for the commission of the other offences (under Sections 342 and 506 of the IPC) also upheld, as already stated earlier. All sentences would run concurrently.

All fines would be paid to the victim by way of a fixed deposit to be made in her name in a nationalized bank.

Also, as has been correctly held by the learned trial court, since Section 42 of the POCSO Act, 2012, provides that where an offender has been found guilty of the commission of an offence punishable under Section 376 IPC, he would be liable to be punished under either the IPC or the Act of 2012, whichever provides for punishment which is greater in degree, therefore, as Section 376(2) of the IPC (prior to the amendment of 2018, with the occurrence being of the year 2015), provides for the same punishment as is provided under Section 6 of the POCSO Act, 2012, naturally no separate punishment need be imposed by this court under the Act of 2012.

69. The appeal is thus, subject to modification of the sentence, dismissed, in the manner that for the most serious offence punishable under Section 376(2), the sentence is reduced from life imprisonment to 25 years rigorous imprisonment, alongwith a fine of Rs. 2,00,000/- imposed; and with the other sentences imposed by the trial court qua the offences punishable under Sections 342 and 506 of the IPC upheld, alongwith all fines imposed;

with all sentences to run concurrently as already said.

Default of payment of fines shall result in six months further imprisonment, for each default (in respect of each fine imposed).

(AMOL RATTAN SINGH)
JUDGE

(LALIT BATRA)
JUDGE

August 17, 2022
nitin/dharamvir

Whether speaking/reasoned	Yes
Whether Reportable	Yes