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

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR KAURAV

CRL. A. No.747 of 2017, CRL. M. (BAIL) 89/2021 &
CRL.M.A. 20474/2022

Between:-

RAM GURU S/O SHRI BANKELAL
(PRESENTLY CONFINED IN CENTRAL
JAIL NO.4, TIHAR, NEW DELHI)

.....APPELLANT

[Through: Ms. Anu Narula, Advocate (DHCLSC)]

AND

STATE (NCT OF DELHI) RESPONDENT

(Through: Shri.Utkarsh, Additional Public Prosecutor for the
State with Sub-Inspector Ashish, Police Station:
Dabri)

% Pronounced on : 14.11.2022

J U D G M E N T

1. This appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') is against the judgment dated 28.04.2017 and order on sentence dated 12.07.2017 passed by the learned ASJ-01, Dwarka Courts, New Delhi, in SC No. 440911/2016, whereby, the appellant/accused has been convicted under Section 6 read with Section 5(n) of Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO'), and sentenced to undergo

rigorous imprisonment for 12 years with a fine of Rs. 10,000/- and in default of payment further simple imprisonment for 02 months.

2. Learned counsel for the appellant submits that the judgment of conviction and sentence passed by the learned trial court is bad in law and deserves to be set aside. She submits that the learned trial court did not appreciate the evidence in proper perspective, and there are material contradictions and omissions in the evidence of the prosecution witnesses. There is no direct evidence against the present appellant, and the benefit of doubt ought to have been given to the appellant.

3. She further submits that the testimony of the child victim (PW1), mother of the child victim/Munni (PW2) and sister of the child victim (PW4) differ from each other. According to her, throughout the testimony of the child victim, her sister and her mother is that they are in total five siblings i.e., four sisters including the child victim and a brother, whereas, during cross-examination in court, the mother of the child victim deposed that she has six children i.e., two daughters and four sons. There are discrepancies with regard to who was sleeping in the room when the alleged incident took place. There are contradictory versions regarding the arrest of the appellant. The mother of the victim/PW2 and Head Constable Ishwar Lal (PW3) have given different account of the arrest of the appellant, and the version of PW3 is not corroborated by any other witness. The child victim/PW1, in her testimony, has stated that her mother has told her that they must teach the appellant a lesson as he was a drunkard and used to beat his wife and children. The sister of the child victim, PW2, has deposed that on the day of the incident, the appellant and the mother of the child victim fought and that she has been tutored by

her mother. The medical reasons for the presence of worms around the anal area of a child can happen due to various reasons such as constipation, passing hard stool etc., and therefore, even the medical examination of the child doesn't completely establish the commission of unnatural offence on the child.

4. She further argues that the FSL report submitted on 05.04.2017 by PW16/IO has not been put to the accused under Section 313 of the Cr.P.C and non-putting to the accused a vital piece of evidence is fatal to the case of the prosecution. She relies on the judgement of the Hon'ble Supreme Court in the case of *Rahul v. State of Delhi* CRL.A. No. 611/2022 and the decisions of the High Court in the cases *Vishambahar Isiah v. State of Punjab* CRL.REV.P 277/2020 vide order dated 24.08.2021, *Bal Kishan v. State of NCT*¹ and *Laxman @ Lucky v. State*².

5. On the other hand, learned APP on behalf of the respondent-State vehemently opposes the submissions, and submits that the offences committed by the appellant/accused are heinous in nature and, therefore, the trial court has rightly convicted him. He submits that the learned Additional Sessions Judge has considered all the arguments made by the appellant, and there is sufficient evidence to prove his guilt beyond a reasonable doubt. He submits that the statement of Dr. Khushboo Gupta (PW10) establishes the commission of the offence. The FSL report also indicates the presence of semen in the articles seized from the prosecutrix as well as appellant-accused. The prosecutrix has herself given her statement against the appellant/accused. He further submits that no prejudice has been

¹2022 SCC OnLine Del 2820

²2022 SCC OnLine Del 663

shown to have been caused to the accused as he was given the right to cross-examine IO W-SI Chandra Kanta (PW16) on 05.04.2017, and the ground of defect under Section 313 of the Cr.P.C was not raised at the time of arguments in the trial court. Therefore, the judgment passed by the trial court is sound and does not warrant any interference.

6. I have heard learned counsel for the parties and perused the record.

7. The case of the prosecution is that *vide* D.D. No. 59-A dated 24.04.2014 at about 7:39 pm, the police were informed by a caller that the husband of the caller had committed rape on her daughter, aged about seven years. The above-said information was assigned to Women Sub-Inspector Chandra Kanta for reconnoitering. Women Sub-Inspector Chandra Kanta, along with Constable Prahlad, reached the spot and found the mother of the child victim, who in her statement, stated that she has been residing at B-30, Sita Puri, Gali No. 4, near Nehru Academy School, along with her family. She hails originally from Post Sarmera, District Patna, Bihar, and her husband hails from Samastipur. She stated that she works as a housemaid; and her husband mostly remains at home and is a habitual drinker. On 24.04.2014, at about 4:30 pm, she left her home for work and when she had returned at about 7:00 pm, her daughter, aged about seven years, had told her that when she had gone to work in the evening, and the child victim had gone to take water, her father had closed the window and door of the room and opened the chain of his pant and put his private part to her mouth and, thereafter, he had forcibly inserted his private part into her vagina. Police endorsed her statement and, thereafter, registered the case under Sections 376/377 IPC and under Section 6 of the POCSO Act. During the course of the

investigation, police collected the evidence, both oral and documentary, and arrested the accused. After completion of the investigation, police filed the chargesheet in the court; and offences under Section 6 read with 5 (n) POCSO Act 2012 were framed against the accused, to which he pleaded not guilty and claimed trial.

8. Before the trial court, the prosecution examined 18 witnesses in support of the charges, namely- the mother of the child victim/Munni (PW2), child victim (PW1), sister of the child victim (PW4), Principal Amar Singh (PW6), Dr. Khushboo Gupta (PW10), Dr. Manjeet Kumar (PW5), Dr. Bobo Singh (PW7), MM Ms. Mann Goel Kharb (PW8), HC Ishwari Lal (PW3), Head constable Raj Singh (PW9), Constable Ajeet Singh (PW11), Constable Satish (PW14), Women Constable Manju (PW12), Constable Prahlad (PW13), Constable Ravinder (PW15), ASI Khazan Singh (PW18), Constable Anil (PW17) and Women Sub-Inspector Chandra Kanta (PW16) and, thereafter, the appellant made his statement under Section 313 of Cr.P.C, wherein, he claimed innocence and stated that the child victim had deposed before the court at the instance of her mother who did not want to live with him.

9. After evaluating all the evidence adduced by the parties, the trial court found the appellant/accused guilty of the offences under Section 6 read with Section 5(n) of the POCSO Act and accordingly, the appellant has been convicted and sentenced as mentioned above.

10. On perusal of the impugned judgment, it appears that the trial court considered the case under the anvil of the following facts:-

- a. Firstly, whether in the present case the victim was below the age of majority. The prosecution proved the same through the school admission record, according to which the date of birth of

the child victim was 10.02.2008 and the date of the incident was 24.04.2014.

- b. Secondly, whether the child victim was subjected to penetrative sexual assault. The prosecution examined Dr. Manjeet Singh (PW5), Dr. Naorem Bobo Singh (PW7) and Dr. Khushboo Gupta (PW10). The testimonies of all these witnesses remained unchallenged, unrebutted and uncontroverted. Dr. Khushboo Gupta (PW10) deposed that one girl aged about 7 years, was referred to the Department of OBS and Gynae by CMO. She examined the child victim and found the vaginal introitus healthy. She also found a small superficial cut around 05 cm at the lower margin of the anal orifice, and there was a cut around 2 mm at the right lateral margin of the anus. There were two-three small worms (trichuris) around the anus. The examination was painful. Samples were taken. As the gynaecologist found an injury on the anus region of the child victim and the examination was painful, the prosecution proved the fact that the child victim was subjected to sexual assault.
- c. Thirdly, whether the penetrative sexual assault was by the child victim's father, for which the trial court relied on the testimony of the child victim, the sister of the child victim, the mother of the child victim and the FSL report. The Forensic Science Laboratory/Ex. PX examined the exhibits collected by the doctor from the child victim and the accused on 24.04.2014 and 25.04.2014. The Ex. PX is reproduced as under-

"The exhibits were subjected to DNA examination. Blood was found on exhibits '2', '3', '4', '5', '8', '12' and '13', i.e., microslide as anal smear of the child victim, cotton wool swab on a wooden stick described as a perineal swab, one underwear having the brown

stain of the child victim, cotton wool swab on a wooden stick, anal swab of the child victim, brown gauze cloth piece of accused, gauze cloth piece of the victim and dark brown foul-smelling liquid as blood sample EDTA vial from the victim. Human semen was found on the exhibit '2', '3', '4' and '5'. Sh. Indresh Kumar Mishra, Assistant Director (Biology), Forensic Science Laboratory, Rohini, concluded that alleles from the source of exhibit '8' (blood in gauze from accused) and '13' (blood sample EDTA vial from the victim) were accounted in the mix alleles from the source of exhibit '2' (anal smear from, prosecutrix), '3' (i.e., a perineal swab from prosecutrix), '4' (underwear from prosecutrix) & '5' (i.e., an anal swab from prosecutrix)."

11. The age of the prosecutrix has not been questioned by either of the parties, so point 'a' is unchallenged. The challenge herein is with regard to points 'b' and 'c'. To substantiate the same, the appellant alleges that there are certain contradictions and inconsistencies in the testimonies of the witnesses which discredit them, and the FSL cannot be taken as cogent evidence due to not putting the same to the appellant-accused under Section 313 of the Cr.P.C.

12. With respect to the argument of the learned counsel for the appellant under Section 313 of the Cr.P.C, it can be seen that on 7.10.2016, evidence of PW16, namely IO Women Sub Inspector Chandra Kanta, was completed, and she was discharged. On 07.01.2017, the statement of the accused under Section 313 of the Cr.P.C was recorded. On 08.03.2017, the trial court directed the production of the FSL report and a notice to the director (FSL) was issued. On 05.04.2017, the results of the FSL were produced by PW16. The copy thereof was supplied to counsel for the accused, and on the same date, the statement of PW16 was recorded. The counsel for the accused was given the opportunity to cross-examine, which

was not availed, and the FSL report was exhibited as Ex.PX. The order dated 08.03.2017 is reproduced under:-

***“State v. Ram Guru
FIR No. 294/14
P.S. Dabri***

08-03-2017

***Present: Sh. Pramod Kumar, Ld. (Substitute) Addl. P.P. for
state***

Accused produced from J.C.

Report has not been filed from the FSL

Director FSL is directed to file the report.

***Issue notice to the Director (FSL) in this regard for the next date
of hearing.***

Put up on 05.04.2017

***sd/-
(Atul Kumar Garg)
Ld. ASJ-01, South-West District
Dwarka Courts, New Delhi
08.03.2017”***

Statement of PW16/IO W-SI Chandra Kanta dated 05.04.2017 is reproduced as under:-

***“State v. Ram Guru
FIR No. 294/14
P.S. Dabri***

***Statement of the IO W-SI Chandra Kanta No. 4768-D, SW, P.S.
Dabri
ON S.A.***

***I have completed the FSL result in the present case. I
hereby tender FSL result.***

***At this stage, one sealed envelope duly sealed with the
seal of FSL, Delhi is opened and same is found contained FSL
result dt. 15.03.2017. The FSL result is now Ex. PX.***

XXXXX by Sh. L.S. Gautam, Ld. Counsel for the accused

Nil. Opportunity given.

RO&AC

***sd/-
(ATUL KUMAR GARG)
SPECIAL JUDGE (POCSO),
SOUTH-WEST DISTRICT
DWARKA COURTS, NEW DELHI
05.04.2017”***

On 15.04.2017 and on 25.04.2017, arguments were heard and on 28.04.2017, the judgement of conviction was passed.

13. Section 313 of the Cr.P.C confers valuable rights upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, as has been held in the decision of ***Reena Hazarika v. State of Assam***³. This Section empowers the court to examine the accused after the evidence for the prosecution has been taken. The object of empowering the court to examine the accused is to give him an opportunity of explaining any circumstances which may tend to incriminate him and thus to enable the court, in a case where the accused is undefended, to examine the witnesses in his interest. The examination of the accused under Section 313 of Cr.P.C is not a mere formality. The accused must be given the opportunity to explain each and every circumstance appearing in the evidence against him. Section 313 of the Cr.P.C. prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him. The accused are to be specifically questioned about as to what their defense is against the incriminating material brought before him or her.

14. In the decision of ***Shivaji Sahabrao Bobade v. State of Maharashtra***⁴, with the same being reiterated in ***State (Delhi Administration) v. Dharampal***⁵, The Hon'ble Supreme Court has stated that where an omission, to bring the attention of the accused to an inculpatory material, has occurred that does not *ipso facto* vitiate

³ (2019) 13 SCC 289

⁴ (1973) 2 SCC 793

⁵ (2001) 10 SCC 372

the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of inculpatory material not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has with regard to the circumstances established against him but not put to him.

15. The Hon'ble Supreme Court, in its decision in **Nar Singh v. State of Haryana**⁶, has considered the recourse with the appellate court regarding the scope of Section 313 of the Cr.P.C under the facts where the appellant/accused had raised a plea that material evidence in the form of Ex. P-12, i.e., the information of the ballistic expert, was not put to him while recording his statement under Section 313 of the Cr.P.C. The court has held that-

“30. Whenever a plea of omission to put a question to the accused on a vital piece of evidence is raised in the appellate court, courses available to the appellate court can be briefly summarised as under:-

(i) Whenever a plea of non-compliance of Section 313 Cr.P.C. is raised, it is within the powers of the appellate court to examine and further examine the convict or the counsel appearing for the accused, and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate court any reasonable explanation of such circumstance, the court may assume that the accused has no acceptable explanation to offer;

(ii) In the facts and circumstances of the case, if the appellate court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate court will hear and decide the matter upon merits.

(iii) If the appellate court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C. has occasioned or is likely to have occasioned prejudice to the accused, the appellate court may direct retrial from the stage

⁶ (2015) 1 SCC 496

of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;

(iv) The appellate court may decline to remit the matter to the trial court for retrial on account of the long-time already spent in the trial of the case and the period of sentence already undergone by the convict, and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused..”

16. In the case at hand, admittedly, the statement under Section 313 of the Cr.P.C was recorded much before the production of the FSL report, and therefore the incriminating evidence was not put before the accused. In view of the aforesaid, the substantial right of the appellant stands violated while not putting entire incriminating material before him; therefore, instead of taking any of the recourse suggested in the case of *Nar Singh (supra)*, this court finds it appropriate to ignore FSL report Ex.PX to be read in evidence against the appellant and proceeds to decide the matter on merits.

17. While perusing the records, PW1/ the child witness, after she was found competent to depose, testified that on the day of the incident, the mother of the child victim had gone to work, her younger brother and sister were present in the house and the appellant/father of the victim who was sleeping inside the house, called the victim on the bed. Thereafter, the appellant put his penis into the mouth of the victim and inserted his penis into her anus. She felt severe pain at that time, and when she went to attend the call of nature, she noticed blood. She apprised her mother of the same, who then called the police. On cross-examination, she further stated that she had not narrated the alleged incident at the instance of her mother, and it is wrong to suggest that no such incident took place with her.

18. PW4/the sister of the child witness, after she was found competent to depose, testified that on the day of the incident, when her mother left the house for work, she went to fetch water from the mosque. When she returned, her younger sister, the child victim, told her that the appellant had inserted his penis into her anus, and the child victim started bleeding and crying. Once her mother returned, she apprised the entire incident to her, who in turn then called the police. On cross-examination, she stated that she had been tutored by her mother to depose against the accused and that a fight took place between the accused/appellant and her mother, but it was wrong to suggest that the appellant did not commit any wrong act with her sister. So far as the testimony of this witness is concerned, she did support the allegation of sexual assault.

19. PW2/mother of the child victim, Munni, testified that when she returned from work, she found 10-12 persons gathered in front of the house, as PW4 had already told some persons about the incident. PW4 told her that the appellant had committed a wrong act with the child victim. She inquired from the child victim, who told her that the appellant had put his penis into her mouth and inserted his penis into her anus. She called the police thereafter. The appellant was not at the house and he called to ask for money; and on the pretext of giving him the money, he was apprehended by the police officials. She, on cross-examination, testified that it was wrong to suggest that she did not want to stay with the accused due to frequent fights and that she had falsely implicated him pursuant to a conspiracy with the child victim.

20. The Hon'ble Supreme Court, in the matter of *State of Punjab v. Gurmit Singh & Ors.*⁷, illustrating the reliability of the statement of the prosecutrix, stated that minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and does not require corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience.

21. The same has been reiterated in multiple judgments of the Hon'ble Supreme Court in the cases of *Sham Singh v. State of Haryana*⁸, *Vijay @ Chinee v. State of Madhya Pradesh*⁹, *Mukesh & Anr. v. State (NCT of Delhi) & Ors.*¹⁰, *State represented by Inspector of Police v. Saravanan & Anr.*¹¹, *State of Himachal Pradesh v. Manga Singh*¹² and in the recent judgment of *Pappu v. State of Uttar Pradesh*¹³.

22. The Hon'ble Supreme Court, in its decision in *Phool Singh v. State of Madhya Pradesh*¹⁴, wherein the appellant was convicted, and the ground for defence raised was that the medical evidence did not support the prosecution and the entire case of the prosecution rests on the sole deposition of the prosecutrix, while relying on multiple judgements, observed that as a general rule, if credible, conviction of the accused can be based on sole testimony, without corroboration and that the sole testimony of prosecutrix should not be doubted by court

⁷ (1996) 2 SCC 384

⁸ (2018) 18 SCC 34

⁹ (2010) 8 SCC 191

¹⁰ (2017) 6 SCC 1

¹¹ (2008) 17 SCC 587

¹² (2019) 16 SCC 759

¹³ 2022 SCC OnLine SC 176

¹⁴ (2022) 2 SCC 74

merely based on assumptions and surmises. Further, this court, in **Vijay v. State**¹⁵, also dismissed the appeal against conviction on the ground that the child victim's testimony had been consistent and no contradictions were found in the victim's testimony.

23. A similar stance was taken by the High Court of Calcutta in **Prabir Bhuian v. State of West Bengal**¹⁶, wherein the appeal of the accused, who was the stepfather of the victim, against conviction under Section 8 of POCSO was being heard, it was observed that minor contradictions in the testimony of the witness are no ground to reject the whole of the testimony of the witness:-

“Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution’s case doubtful. The normal course of human conduct would be that while narrating the particular incident, there may occur minor discrepancies, such discrepancies may render credential to the depositions. Parrot like statements are disfavoured by the Courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and the environment in which such witness was making the statement.”

24. In the present matter, the testimonies of the child victim (PW1), mother of the child victim (PW2) and sister of the child victim (PW4), so far as the incident in question is concerned, are consistent and do not suffer from any apparent material inconsistencies.

25. Under such circumstances, the conviction cannot be interfered with on the ground of inconsistencies in the evidence of the prosecutrix. Therefore, this argument of the learned counsel for the appellant is hereby rejected.

¹⁵ 2019 SCC OnLine Del 10485

¹⁶ 2021 SCC OnLine Cal 3063

26. So far as the argument that the victim was tutored by the mother of the victim/wife of the appellant as she did not wish to reside with the accused anymore is concerned, non-cordial relations between the mother of the victim and the accused cannot lead to a presumption of tutoring when the account of the victim in regard to the offence does not suffer from any inconsistencies. In *Subash Chandra Rai v. The state of Sikkim*¹⁷, the same was cemented with-

“Merely because P.W. 4 was presumably not in a cordial relationship with her husband did not mean that she would have made the victim a bait to bail out of the marriage by accusing him of depraved and degenerate acts. Such accusations could not have assured her of an escape from her marriage without recourse to legal procedure.”

27. On the basis of the aforesaid, there are no major inconsistencies between the witness testimonies of the prosecution being the mother of the victim, the sister of the victim and the victim herself, and therefore, this court does not find any justification to take a contrary view.

28. Accordingly, the conviction and sentence is upheld. The appeal is hereby dismissed and pending application(s), if any, are accordingly disposed of.

29. This court appreciates the assistance provided by the learned counsel for the parties.

**(PURUSHAINDRA KUMAR KAURAV)
JUDGE**

NOVEMBER 14, 2022/PG