

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

Criminal Appeal No.D-452 of 2021 (O&M)
Date of Decision: 24.5.2023

Harpreet Singh @ Honey ... Appellant
Versus
State of Punjab ... Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA

Argued by: Mr. G.K. Dhir, Advocate,
for the appellant.

Mr. Alankar Narula, AAG, Punjab.

MANISHA BATRA, J.

1. The instant appeal has been preferred against the judgment of conviction and order on quantum of sentence both dated 27.07.2021 passed in Sessions case bearing No.51 of 06.02.2020 titled as *State v. Harpreet Singh @ Honey* registered in connection with FIR No.124 dated 30.10.2018 at Police Station Mahilpur, District Hoshiarpur under Sections 363, 366 and 376 AB of Indian Penal Code (IPC) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”) whereby the appellant-accused had been held guilty and sentenced as hereunder:-

Under Section	Sentence
376-AB IPC, 1860	Rigorous imprisonment for a period of 20 years and to pay a fine of Rs.50,000/- and in default of payment of fine to further undergo R.I. for a period of 6 months.
363 IPC, 1860	Rigorous imprisonment for a period of 7 years and to pay a fine of Rs.25,000/- and in default of payment of fine to further undergo R.I. for a period of 3 months.
366 IPC, 1860	Rigorous imprisonment for a period of 10 years and to pay a fine of Rs.40,000/- and in default of payment of fine to further undergo R.I. for a period of 4 months.

2. Brief facts relevant for the purpose of disposal of this appeal are that on 30.10.2018, the complainant “A” (name withheld) recorded her statement before SI Neelam Kumari alleging therein that her daughter “P” (name withheld) i.e. the prosecutrix was born out of loins of her first husband Jasvir Singh on 04.11.2013. She had re-married and was residing at Village Datta. On 25.10.2018, her daughter “P” told her that she was feeling pain while passing urine. On asking, she further disclosed to the complainant that on the previous day i.e. on 24.10.2018 during noon time, the accused Harpreet Singh alias Honey who was residing in their neighbourhood and who had been addressed as ‘Honey mama’ by the prosecutrix, had done wrong acts with her after taking her to his house. She disclosed that he had moved his hands on her private parts. The complainant further disclosed that she narrated all these facts to her husband on 26.10.2018 as he was away to Amritsar on 25.10.2018. The matter had also been taken up in Panchayat but to no avail. She prayed for taking action against the culprit. On the basis of this statement, initially a case under Section 354 of IPC and Section 10 of POCSO Act was registered. Investigation proceedings were initiated. The prosecutrix was medico legally examined. Her statements under Section 164 Cr.P.C. as well as under Section 161 of Cr.P.C. were also recorded. The accused was arrested on 04.12.2019. He was also medico legally examined. During investigation, offences under Sections 376-AB, 363, 366 of IPC and Section 6 of POCSO Act were added. After completion of necessary investigation and usual formalities, challan under Section 173 Cr.P.C. was presented in the Court for trial of the accused.

3. Copies of challan were supplied to the accused free of cost. The

case had been committed to the Court of Sessions. On finding a prima facie case for commission of offences punishable under Section 363, 366, 376-AB of IPC and Section 6 of POCSO Act, the accused had been charge-sheeted accordingly. He pleaded not guilty to the charges and claimed trial.

4. To substantiate its case, the prosecution examined 10 witnesses. **PW-1** mother of the prosecutrix besides deposing in support of the prosecution version proved her statement Ex.PW-1/A, Ex.PW-1/B birth certificate of her daughter and PW-1/C memo qua taking the above said certificate in possession. The prosecutrix appeared as **PW-2** and deposed about the occurrence and proved her statement Ex.PW-2/A. **PW-3** Manni Parmar, Clerk, Office of Registrar, Birth and Death proved Ex.PW-1/B birth certificate issued by the Registrar and its verification report Ex.PW-6/A. **PW-4** Ms. Damandeep Kamal Heera, Judicial Magistrate deposed about recording statement of victim under Section 164 of Cr.P.C. and proved application Ex.PW4/A as moved by the Investigating Officer, statement Ex.PW2/A of the victim and Ex.PW4/B certificate given by her. **PW-5** Dr. Dimple, tendered affidavit Ex.PW-5/A and deposed about conducting medico legal examination of the victim on 31.10.2018. She also proved Ex.PW-5/B/PW-5/D medico legal report of the victim and pictorial diagram Ex.PW5/C. **PW-6** Simarjit Kaur, Assistant Deputy Superintendent deposed about conducting inquiry on the complaint of the complainant and proved inquiry report Ex.PW-6/A. **PW-7** SI Neelam Kumari deposed about conducting investigation and about various steps taken by her during the course of investigation leading to collection of entire incriminating evidence and justifying the prosecution of the accused for committing rape upon the

victim. Apart from the documents already proved in evidence, she proved Ex.PW7/A endorsement made on the statement of the complainant, Ex.PW7/B FIR, Ex.PW7/C endorsement made on the FIR, Ex.PW7/D rough site plan of the place of occurrence, Ex.PW7/E statement of prosecutrix under Section 164 Cr.P.C., Ex.PW7/F memo of arrest of accused, Ex.PW7/G personal search memo of accused and Ex.PW7/H DDR No.32. **PW-8** SI Vijayant Kumar deposed about joining investigation on 30.10.2018. **PW-9** Arjun Khanna, Draftsman proved scaled site plan Ex.PW9/A and **PW-10** ASI Narinder Singh deposed about adding offences under Sections 376 IPC and Section 6 of POCSO Act, 2012 vide DDR Ex.PW-10/A.

5. Statement of accused under Section 313 of Cr.P.C. was recorded wherein he abjured his guilt and claimed himself to be innocent. He stated that an inquiry was conducted in the matter by DSP Sukhwinder Singh. In defence evidence, he produced copy of inquiry report Ex.DB whereby cancellation of FIR had been recommended. He stated that he had been implicated in this case due to party fraction.

6. On appraising the evidence produced on record and hearing arguments advanced by both the sides, the learned trial Court vide judgment and order dated 27.07.2021 held the appellant-accused guilty and sentenced him in the manner as indicated above.

7. Feeling aggrieved, the present appeal has been filed by the appellant-accused seeking relief of setting aside the judgment of conviction and order on quantum of sentence as passed by learned trial Court.

8. Learned counsel for the appellant argued that the findings as given by learned trial Court were not sustainable in the eyes of law as they

were suffering from several material infirmities. The learned trial Court did not apply its judicious mind and did not appreciate the evidence produced on record in a proper manner. It ignored the fact that the statements of the prosecutrix and her mother i.e. the complainant were suffering from material improvements, exaggerations and inconsistencies. These inconsistencies were not minor and could not be ignored. The version as set up in the complaint was highly improbable and unnatural. There was delay of six days in reporting the matter to the police which had not been satisfactorily explained. The medical evidence did not suggest the commission of offence of rape upon the victim. The prosecutrix who was a child witness was proved to have recorded different statements at different points of time during investigation and trial. Her statement did not inspire any confidence to prove that it was a case of aggravated penetrative sexual assault/rape.

9. Continuing his attack on the credibility of witnesses, he further argued that, the statement of the mother of the victim was highly untrustworthy. The ingredients for commission of offences punishable under Sections 363 and 366 IPC had not been established at all. The learned trial Court had presumed the statement of the prosecutrix as gospel truth without considering the fact that the same was suffering from material inconsistencies of such nature which went to the root of the matter and she was also proved to be a tutored witness. With these broad arguments, it was submitted that the impugned judgment and order of sentence were liable to be set aside, the appeal deserved to be accepted and further that the appellant-accused deserved to be acquitted of the charges for which he had been held guilty and convicted. To fortify his argument, learned counsel for

the appellant placed reliance upon authorities cited as **Mr. Hrishikesh**

Sahoo v. State of Karnataka and others, 2022 (2) KCCR 145; **Rakesh v. State of Haryana**, 2023 (1) RCR (Criminal) 700; **Bhagwan Singh and others v. State of M.P.**, AIR 2003 Supreme Court 1088; **State (Nct of Delhi) v. Raman Kumar**, 2017 (4) AD (Delhi) 1; **Altaf Ahmed @ Rahul v. State (GNCTD of Delhi)**, 2021 (1) R.C.R. (Criminal) 296; **The State, Govt. of Nct of Delhi v. Tufail**, 2019 (3) JCC 3049; **Jasbir Singh v. State**, 2022 (2) JCC 1410; **Ramdas and others v. State of Maharashtra**, (2007) 2 Supreme Court Cases 170; **Narender Kumar v. State (NCT of Delhi)**, 2012 (3) R.C.R. (Criminal) 66; **Pratap Misra and others v. State of Orissa**, AIR 1977 Supreme Court 1307 and **State of Madhya Pradesh v. Ramesh and another**, (2011) 4 Supreme Court Cases 786.

10. Per contra, it was argued by learned Assistant Advocate General, Punjab for the respondent-State that the findings as given by learned trial Court were well reasoned. The prosecutrix was a child witness of tender age. Her statement inspired full confidence to prove the allegations as levelled in the FIR and the same could not be ignored only because of the minor inconsistencies that were bound to occur even in statements of truthful witnesses. The testimony of her mother i.e. the complainant was relevant under the principle of res gestae and the same also proved the fact that the prosecutrix had been subjected to act of aggravated penetrative sexual assault by the appellant. The presumption under Section 29 of POCSO Act was absolute and the Court had to presume that it was the accused who had committed the offences for which he had been charge-sheeted unless the contrary was proved. The appellant had failed to discharge that burden and, therefore, it was urged that the appeal being devoid of any merit was liable

to be dismissed.

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11. Having heard learned counsel for the appellant and learned Assistant Advocate General, Punjab for the respondent-State at considerable length and on minute scrutiny of the evidence placed on record, we are of the opinion that the following points are required to be considered in this case:-

- (i) Whether the prosecutrix who was admittedly a child was proved to have been kidnapped/abducted by the appellant?
- (ii) Whether the prosecutrix was proved to have been subjected to act of aggravated penetrative sexual assault by the appellant?

12. Since the appellant had been held guilty and convicted for commission of offence punishable under Section 6 of the POCSO Act, therefore, we are of the opinion that in the light of the contentions raised by learned State counsel, it is firstly necessary to examine the effect of presumption under Section 29 of the POCSO Act and the manner in which the accused can rebut such presumption. As per this section, when a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of the POCSO Act, then the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, unless the contrary is proved. In our opinion, the submission that statutory presumption under Sections 3, 5, 7 & 9 of the POCSO Act is absolute, cannot be accepted as the well settled proposition of law is that the statutory presumption would stand activated only if the prosecution proves the foundational facts and even when the statutory presumption is activated, the burden on the accused is not to rebut the presumption beyond a reasonable doubt. If the accused is in position to

create a serious doubt about the veracity of the prosecution case, or the accused brings on record material to render the prosecution version highly improbable, the same is sufficient. Reference in this regard can be made to **Subrata Biswas v. State**, 2019 SCC OnLine Cal 1815, wherein it was held by Apex Court that the statutory presumption under Section 29 applies when a person is prosecuted for committing offences under Sections 5 and 9 of the POCSO Act and reverse burden is imposed upon the accused to prove the contrary. The word “is prosecuted” in the aforesaid provision does not mean that the prosecution has no role to play in establishing and/or probablising primary facts constituting the offence. If that were so, then the prosecution would be absolved of the responsibility of leading any evidence whatsoever and the Court would be required to call upon the accused to disprove a case without prosecution laying the firm contours thereof by leading reliable and admissible evidence. It was held that such an interpretation not only led to absurdity but rendered the aforesaid provision constitutionally suspect. It was further observed that a proper interpretation of Section 29 was that when a person is prosecuted under Sections 5 & 9 of the POCSO Act, the prosecution is absolved of the responsibility of proving its case beyond reasonable doubt. On the contrary, it is only required to lead evidence to establish the ingredients of the offence on preponderance of probabilities. Upon laying the foundation of its case by leading cogent and reliable evidence, the onus shifts upon the accused to prove the contrary.

13. Similar proposition of law was laid down in **Sachin son of Baliram Kakde v. The State of Maharashtra**, 2016 ALL MR (Criminal) 4049 wherein Bombay High Court held that the presumption under Section

29 of the POCSO Act could not be said to be irrebuttable. Infact no presumption was irrebuttable in law, as it could not be equated with conclusive proof. The provision of Section 29 mandated the Court to draw the presumption unless contrary was proved. One had to keep in mind, as expressed by an eminent jurist that presumptions are bats in law, they fly in a twilight but vanish in the light of facts. Reliance can also be placed upon judgment dated 23.04.2018 (Nagpur Bench) passed in **Amol s/o Dudhram Barsagade v. State of Maharashtra**, CrI. Appeal No.600 of 2017, and upon **Rakesh v. State of Haryana's case** (Supra) which is a decision of this Court, wherein similar observations were made.

14. In view of the proposition of law as discussed above to the effect that the presumption under Section 29 of the POCSO Act cannot be stated to be irrebuttable, let us proceed further to examine the evidence produced on record to come to the conclusion that the foundational facts of the prosecution case have been established or not? However, before delving on that point, we consider it important to discuss the position of law with regard to the credibility of testimony of a child witness since the prosecutrix being eight year old girl and falling within the definition as given in Section 2 (d) of the POCSO Act, was a child witness. Reference in this context can be made to **Mangoo and another v. State of Madhya Pradesh**, AIR 1995 Supreme Court 959, wherein the Apex Court while dealing with evidence of a child witness, had observed that there was always scope to tutor the child and the Court must determine as to whether the child has been tutored or not. This fact can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring. Reference can

further be made to **Panchhi and others v. State of U.P.**, AIR 1998 Supreme Court 2726, wherein the Apex Court observed that testimony of a child witness must find adequate corroboration before it is relied upon. It must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child evidence is an easy prey to tutoring. The Apex Court in **Nivrutti Pandurang Kokate and others v. State of Maharashtra**, AIR 2008 Supreme Court 1460 while dealing with a child witness had observed that precaution is necessary while assessing the testimony of a child witness because such witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses and they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence, the Court finds an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration but in case his/her deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon the evidence of such witness. Reliance can further be placed upon **Ramesh and another's** case (Supra), (2011) 4 SCC 786 wherein the Apex Court had observed that evidence of a child witness must be evaluated more carefully with greater circumspection because if he/she is more susceptible to tutoring.

15. Keeping in view the above discussed position of law into mind and to appreciate the contentions as raised by learned counsel for the

appellant as to creditworthiness of the child prosecutrix and her mother, we now deem it relevant to refer to the statements recorded by the prosecutrix during the course of investigation and at the time of her examination in the Court. She had recorded her statement Ex.PA under Section 161 of Cr.P.C. before the Investigating Officer on 20.11.2018 and on the same day had got recorded her statement under Section 164 Cr.P.C. Ex.PW2/A before the Illaqa Magistrate. In her statements recorded under Sections 161 and 164 of Cr.P.C., the prosecutrix had stated that she was watching TV in her house on one Friday, when the appellant-accused Harpreet Singh @ Honey belonging to her village had inserted his fingers in her vagina and had sucked it with his tongue. She stated that she had shown her tongue to the accused and was to tell about this fact to her teacher as well as her mother and then had told about the incident to her mother. She stated that her mother was at home when the appellant had come. However, when her testimony was recorded before the trial Court on 09.02.2021, she is shown to have given a different version by saying that on the day of occurrence, the appellant had taken her to his house to show cartoons on TV where he had started moving his hands on her private parts. She further stated that she had screamed and came out of his house. The appellant had tried to stop her but she had managed to escape. In her previous statement, she had stated that her mother was at home when the accused had come but by changing her version in her sworn deposition, she stated that the mother of the accused was present in his house when she had gone there. She identified the accused who was shown to her through Video Conferencing facility in the Court. During cross-examination, she was duly confronted with the contents of statements Ex.PA and

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Ex.PW2/A. She admitted the contents of these statements to be correct. Not even this, she admitted that she had been tutored by her mother as to what was to be deposed by her in the Court and even admitted that her mother and police had advised her about the statement which was to be made by her before the Magistrate and the Police. On analyzing the testimony of the prosecutrix, it is crystal clear that she has improved her version and had been speaking half truths. Then the admission made by the prosecutrix that whatever she deposed was as told to her by her mother and police, undoubtedly proves that she was a tutored witness thereby shaking credibility of her evidence as it cannot be stated to be safe to rely upon her testimony. In this regard, we stand fortified by the observations made by High Court of Delhi in **Raman Kumar's** case (Supra) wherein the prosecutrix who was a child had admitted during cross-examination that whatever deposed was as told to her by police uncle and her testimony was not considered to be creditworthy and **Altaf Ahmed @ Rahul's** case (Supra) wherein the child victim deposed that she was told by her mother about what to say in the Court and her statement was considered as testimony of a tutored witness.

16. Let us now assess the evidence led by the mother of the prosecutrix i.e. PW-1. In her statement Ex.PW1/A as recorded before the police as well as her sworn deposition, she deposed that on 25.10.2018, the prosecutrix had apprised her about the acts done by the appellant with her on the noon of 24.10.2018 and also deposed that she did not tell about this fact to anybody on 25.10.2018 since her husband Baljinder Singh had gone to Amritsar. She further stated that she had told about the incident to her

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husband on 26.10.2018 and then matter had been taken up in the Panchayat. In her statement Ex.PW1/A she had stated that she did not agree with the Panchayat. In her sworn deposition, she improved her statement by saying that on 27.10.2018, the members of the Panchayat had come to her house and she was pressurized to enter into a compromise which was in writing but she did not sign the same. She further improved her version by saying that she had gone to report the matter to the police on 27.10.2018 and kept on going there till 30.10.2018 when her statement was recorded as the police officials did not take any action earlier but in her statement Ex.PW1/A, nothing of that sort had been mentioned. Her statement is inconsistent with the statement of the prosecutrix as contrary to the testimony of the prosecutrix who had firstly stated that the appellant had come to her house and had ravished her and then had stated that the appellant had taken her to his house, this witness stated that she did not know as to when the appellant had taken her daughter to his house. She gave a different version by saying that her daughter was playing outside on 24.10.2018. She stated that her house was on the first floor whereas the family of her brother-in-law was residing on the ground floor. It is quite unnatural that the appellant came to the house of the prosecutrix which was existing on the first floor without the knowledge of the appellant or the family of her brother-in-law. She did not disclose the name of any member of the Panchayat who had exerted pressure upon her to enter into a compromise. She made self contradictory statement by firstly saying that she had gone to the Panchayat for compromise but then stating that it was her husband who had gone to the Panchayat. Her husband Baljinder Singh was not examined as a witness. Though she stated that she

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had obtained divorce from him in the year 2020 but it was not her version that at the time of occurrence, she was having so strained relations with him that he did not come forward to testify a witness in her favour. All this creates a doubt over the truthfulness of the version of this witness.

17. The evidence led by the mother of the prosecutrix i.e. PW-1 cannot be considered to be reliable and trustworthy due to one more reason which is delay of six days on her part in reporting the matter to the police. Obviously, the prosecutrix herself being a child of tender age of eight years was not in a position to report the matter to the police and it could not be expected from her to do so. Therefore, it was her mother who was to take a call for this purpose. There is no denying the fact that in cases of sexual assault, delay in reporting the matter to the police cannot always be considered to be fatal as delay in such cases may occur due to apprehension on the part of the parents of a child victim that in case, the matter is referred to the police, the reputation of the family will be tarnished and the victim will be exposed to the glare of the society. However, it is also equally well settled that some reasonable explanation must come on record justifying the delay and the Court must take notice of the fact that the delayed lodging of report is relevant. This is so because the delay in lodging the FIR more often than not, results in embellishment and exaggeration, which is a creature of an afterthought. In the absence of plausible explanation, a danger creeps in of introduction of a coloured version, an exaggerated account of the incident or a concocted story as a result of deliberation and consultations. The explanation as given by the mother of the prosecutrix is that she kept on going to the police from 27.10.2018 to 30.10.2018 for lodging of FIR but the

police did not take any action. Her statement to this effect appears to be an improved version because nothing could be brought on record by her to prove that she had gone to the police prior to 30.10.2018. She had stated that brother and sister-in-law had accompanied her. None of them had been cited as a witness. As such, it emerges that the delay in reporting the matter to the police has not been satisfactorily explained and this vital aspect had made the prosecution version quite improbable and has rendered the statements of the prosecutrix as well as her mother unworthy of credit. The unexplained and unsatisfactory delay in reporting the matter to the police coupled with the fact that the testimony of the prosecutrix which is established to be made on the basis of tutoring and has not been corroborated by some independent disinterested evidence cannot be stated to be worthy of acceptance to prove the allegations as levelled against the appellant.

18. It is also noteworthy that PW-1 was even otherwise not an eye-witness to the occurrence and her statement was hearsay in nature, therefore, the same could not be relied upon. The position of law is that hearsay evidence is not admissible in evidence. However, Section 6 of the Indian Evidence Act is an exception to the general rule under which the hearsay evidence becomes admissible. For bringing such evidence to be admissible, what is required to be established is that, it must be contemporaneous with the acts and there should not be an interval which would allow fabrication. The statement sought to be admitted, therefore, as forming part of *res gestae* must have been made contemporaneous with the acts i.e. in the course of the transaction or immediately thereafter. Reliance in this context can be made to **Bhaskaran v. State of Kerala**, 1985 Criminal Law Journal 1711 wherein

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it was observed by Apex Court that statement is relevant only if it is of a person who has seen the actual occurrence and who uttered it simultaneously with the incident or so soon thereafter, as to make it reasonably certain that the speaker is still under the strain of excitement caused by it having seen the incident. The application of res gestae depends upon the proximity of time of conveyance of the information. It must be so proximate that the information conveyed, infact, forms part of the same transaction. The real test is proximity of time and the principle behind res gestae evidence is that the information is conveyed before there is any lapse of time so as to develop or to cook up a story. In the instant case, it is, however, apparent from the record that there was no spontaneity and immediate proximity as also continuity between the occurrence and the statement allegedly made by the victim to her mother and the statement made by her mother to the police. As such, the same cannot be stated to be admissible as res gestae and, therefore, also the statement of PW-1 could not be acted and relied upon to hold that the prosecutrix had been subjected to sexual abuse by the appellant and the same cannot be held admissible in evidence under Section 6 of the Indian Evidence Act.

19. The appellant had been charge-sheeted for commission of offences punishable under Sections 363 and 366 of IPC. The essential ingredients of offence punishable under Section 363 of IPC are taking away or enticing away of a minor girl below 18 years of age from her lawful guardianship without consent of her guardian whereas the ingredients to establish a charge under Section 366 of IPC are kidnapping/abducting or inducing of a female for the purpose of forcing or seducing her to illicit

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intercourse. As, the evidence of the prosecutrix is proved to be testimony of a tutored witness who has also given inconsistent and improved statement and as discussed above, since the same cannot be relied upon beyond doubt, therefore, on the basis of her statement it cannot be stated that the appellant had either taken/enticed away the prosecutrix or had induced her to go from any place for the purpose of subjecting her to illicit intercourse. Therefore, the ingredients for commission of offences punishable under Sections 363 and 366 of IPC has also not been proved beyond doubt.

20. So far as the offence punishable under Section 376-AB is concerned, the same provides punishment for committing rape of a woman under 12 years of age. The offence of rape is defined under Section 375 of IPC and offence of aggravated penetrative sexual assault is defined under Section 6 of POCSO Act. As per both these sections, a man/person is said to commit rape/aggravated penetrative sexual assault, if he inserts, to any extent, any object or part of the body not being the penis, into the vagina, the urethra or anus of a woman/child or makes her/child to do so. Learned counsel for the appellant while finding further fault with the judgment of the learned trial Court vehemently argued that there was no medical evidence to show that prosecutrix had been subjected to aggravated penetrative sexual assault/rape as no injury was found on the private parts or any part of body of the prosecutrix and the statement of her mother that there was redness and nail marks in her private part was also falsified from the medical evidence produced on record. A perusal of the medico legal report Ex.PW5/B and the testimony of PW-5 Dr. Dimple proves that she had ruled out the possibility of rape upon the prosecutrix and had found that the hymen of the prosecutrix

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was intact. There was no redness on vulva. There was no evidence of any injury on any part of the body of the prosecutrix. The question which arises for consideration is whether the proved facts established that the prosecutrix was subjected to act of aggravated penetrative sexual assault at all. Undoubtedly, to constitute the offence of rape/aggravated penetrative sexual assault, it is not at all necessary that there should be complete penetration of penis with emission of semen and ruptured hymen. Even partial penetration of the penis with the labia majora or the vulva with or without emission of semen or even an attempt at penetration is sufficient for the purpose of law. However, in the peculiar circumstances of the present case when the testimony of the prosecutrix and her mother are at variance with regard to her even being taken away by the appellant at all, these variations have become all the more important in the absence of any medical evidence showing that the appellant had moved his hands around the private parts of the body of the prosecutrix and had subjected her to sexual assault by doing so. The learned trial Court did not take all these points into consideration and, therefore, in our opinion, the findings given by learned trial Court as to guilt of the appellant for commission of offence punishable under Section 6 of the POCSO Act/376-AB of the IPC have become liable to be reversed.

21. In view of the discussion as made above and judging the case of the prosecution on the touchstone of totality of facts and circumstances of the case and on having regard to the evidence as a whole, it is not possible for us to hold that the charges as framed against the appellant have been proved beyond doubt. On the contrary, the findings given by learned trial Court are shown to have been made in favour of the prosecution by

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overlooking many irreconcilable inconsistencies and omissions rendering the prosecution case unworthy of credit. We are, therefore, of the opinion that the prosecution has failed to prove the charges against the appellant to the hilt as obligated in law and, therefore, he is entitled to be extended benefit of doubt. Accordingly, the appeal succeeds and is allowed and the impugned judgment and order on quantum of sentence dated 27.07.2021 passed by learned Additional Sessions Judge, Hoshiarpur is set aside. The appellant is acquitted of the offences punishable under Sections 363, 366 and 376 AB of IPC and Section 6 of POCSO Act. The points of consideration are accordingly answered against the prosecution and in favour of the appellant. He be released forthwith from custody if not wanted in any other case, upon execution of bonds to the satisfaction of the trial Court which shall remain in force for a period of six months in terms of Section 437-A of Code of Criminal Procedure. Let a copy of this judgment along with the trial Court record be sent forthwith to the trial Court. A copy of judgment, if applied for, be also made available to the appellant.

22. All the pending criminal miscellaneous application(s), if any, automatically stand disposed of.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

24.5.2023
manju

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No