

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

119

CRR-1869-2023

Date of decision: 21.08.2023

Rakesh

..... Petitioner

Versus

State of Haryana and another

..... Respondents

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

PRESENT: Mr. Abhimanyu, Advocate for the petitioner.

NIDHI GUPTA, J.

1. Challenge in the present revision petition is to the order dated 02.06.2023, rendered by the learned Additional Sessions Judge, Special Court, Faridabad, whereby the application filed by the revisionist-petitioner/accused under Section 216 Cr.P.C. for alteration of charges in a case arising out of FIR No. 609 dated 08.10.2021 registered under Section 506 IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act'), was dismissed.

2. Briefly, the aforesaid FIR was registered at the behest of complainant/mother of the 6-year-old victim on the allegations that on 22.09.2021, when she took her minor son for vaccination, she left her daughter/victim at the house of her close friend, namely, Dolly. On 27.09.2021, when the complainant went to her mother's house at Karol Bagh, Delhi, her daughter/victim told her that she was sexually assaulted

by the petitioner on 22.09.2021. She further told her that the petitioner also threatened her with dire consequences that he will kill the victim's parents and brother, if, she narrated about the incident to anyone.

3. Learned counsel for the petitioner, *inter alia*, submits that there is no allegation qua aggravated penetrative sexual assault against the petitioner in the statements of the victim dated 11.10.2021 before the Child Welfare Committee (CWC), and dated 09.10.2021 (Annexure P-2, Colly.) before the Illaqa Magistrate recorded under Section 164 Cr.P.C. The only allegation against the petitioner is that he tried to commit oral sex with the minor/victim which falls under the category of aggravated sexual assault under Section 10 of the POCSO Act instead of Section 6 of the POCSO Act. The victim has appeared in the witness-box as PW-1 before the trial Court and in her entire statement dated 08.02.2022 (Annexure P-3) i.e. in examination-in-chief and cross-examination she had nowhere stated that aggravated penetrative sexual assault had occurred and reiterated the same facts as mentioned in her testimony before the CWC and Illaqa Magistrate, that no penetration had happened and the petitioner has only tried to do oral sex with her. It is further stated that even in the MLR of the victim dated 08.10.2021 (Annexure P-7) it has been clearly mentioned by the doctor that no penetrative sexual assault had happened. It is submitted that accordingly, the learned trial Court by ignoring all the material available on record has wrongly charged-sheeted the petitioner under Section 506 IPC and Section 6 of the POCSO Act, vide order dated 06.1.2022 (Annexure P-8). Feeling

aggrieved, the petitioner had filed an application Annexure P-5 under Section 216 Cr.P.C. for alteration of charge, which was dismissed by the trial Court vide order impugned herein only on the ground that there is no change in the statements of the minor victim. Thus, it is prayed that the impugned order dated 02.06.2023, may kindly be set aside.

4. No other argument is raised on behalf of the petitioner.
5. I have heard learned counsel for the petitioner.
6. 'Penetrative sexual assault' is defined in Section 3 of the POCSO Act, and reads as under:-

“Section 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;*
- (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 the 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.”*

7. From the bare perusal of the provisions of Section 3 and in particular, clause (a) and clause (d) of the POCSO Act, it transpires that a person is said to have committed penetrative sexual assault if, *“he applies his mouth to the penis, vagina..... or makes the child to do so.....”*. In the present case, the victim in her statements before the CWC; before the

Area Magistrate under Section 164 Cr.P.C. (Annexure P-2 colly); and also while appearing as PW-1 before the trial Court (Annexure P-3), has categorically reiterated the same stand that the petitioner had tried to do oral sex with her and tried to put his private part into her mouth. It has been consistently and repeatedly stated by the prosecutrix that the petitioner “*removed his pant and gave his penis in my hands and tried to insert it in my mouth.*” Thus, it is proved on record that he tried to do oral sex with the victim and the same is covered under Section 3(d) of the POCSO Act.

8. It has also come on record that the petitioner was charge-sheeted vide detailed order 06.01.2022 (Annexure P-8) by the learned trial Court, after hearing learned counsel for the petitioner at length, but he has not challenged the said order till date. Thus, the learned trial Court after considering all the facts and circumstances has rightly observed that no new ground is made out to alter the charges under Section 216 Cr.P.C. as the victim in her testimony as PW-1 has only *prima facie* stated what was already stated by her in her earlier statements before the CWC and learned Area Magistrate.

9. Learned counsel for the petitioner is unable to dispute or controvert the abovesaid concurrent findings as returned by the learned trial Court.

10. More so, Section 216 Cr.P.C. entitles/enables the Court to amend or alter charge at any stage before the pronouncement of the judgment. The power under Section 216 Cr.P.C. cannot be interpreted in a

manner, restricted to be exercised by the Court *suo moto* only. It can be exercised on the application of the public prosecutor or the victim only.

11. In view of the above, no ground is made out to disturb the findings returned by the trial Court. Accordingly, the instant revision petition stands **dismissed**.

12. However, nothing stated above shall be taken as an expression of opinion on the merits of the case.

21.08.2023
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(NIDHI GUPTA)
JUDGE

Whether speaking/reasoned Yes/No

Whether Reportable Yes/No