



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

% ***Judgment reserved on : 17th August, 2023***
Judgment delivered on: 22nd September, 2023

+ CRL.A. 73/2022, CRL.M.(BAIL) 229/2022(suspension of sentence)

KALU @ NIYAZ Appellant

Through: Ms.Sunita Arora, Advocate.
(DHCLSC)

versus

THE STATE GNCT OF DELHI Respondent

Through: Ms. Shubhi Gupta, APP for the State.
SI Anurag Sharma, PS Amar Colony.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

CRL.A. 73/2022

1. The present appeal has been filed seeking setting aside the judgement dated 30th June, 2021 and the order of sentence dated 26th October, 2021 passed by the learned Additional Sessions Judge(FTSC)(POCSO), South District, Saket Courts, New Delhi, whereby the appellant was convicted for the offences punishable under sections Section 363 of the Indian Penal Code, 1860 (IPC) and Section 4 of the Protection Of Children from Sexual Offences Act, 2012 (POCSO).
2. The appellant was sentenced to rigorous imprisonment for a period of twelve years for the conviction under Section 4 of the POCSO Act and to



pay a fine of Rs. 15,000/- and seven years rigorous imprisonment under Section 363 of the IPC and to pay a fine of Rs. 10000/-.

3. The brief facts of the case as set up by the prosecution are as follows:
 - 3.1 On 6th November, 2014 at about 7:00 pm, the appellant took the minor victim (PW-1) to a deserted street at Prakash Mohalla, East of Kailash. Thereafter, the appellant closed the mouth of the victim with some cloth as a result of which the minor victim became unconscious. When the victim regained consciousness, he found blood on his pants and found the pants removed. His thighs were also aching. Thereafter, some unknown person dropped the victim at his house.
 - 3.2 The victim narrated the aforesaid incident to his elder brother (PW-4). The victim informed his brother that the appellant had taken him away using a knife and had made the victim smell something due to which he lost his consciousness.
 - 3.3 The victim's brother took him to the Amar Colony Police Station. The victim was then taken to the All India Institute of Medical Sciences (AIIMS) for medical examination by the police and his brother, where his MLC (Ex. PW-2/A) was prepared by the concerned doctor. The statement of the victim under Section 161 of the Code of Criminal Procedure, 1973(CrPC), dated 7th November, 2014, was recorded at the hospital itself. The statement of the brother of the victim (PW-4) under section 161 CrPC was recorded on 7th November, 2014 as well.
 - 3.4 Thereafter the police registered FIR no. 974/2014 under sections 363/328/377 of the IPC and Section 6 of the POCSO.
 - 3.5 The appellant was arrested on 7th November, 2014.



- 3.6 The victim's statement under section 164 Section of the CrPC was recorded on 11th November and subsequently, the chargesheet was filed on 2nd January, 2015.
4. The sessions court after examining the witnesses, analysing the evidence and hearing the arguments convicted the appellant for the offences under section 363 of the IPC and Section 4 of POCSO.
5. The counsel appearing for the appellant has made the following submissions:
- i. As per the prosecution, the victim had pointed out one 'green colour cloth' (EX. 6) with which he wiped off his blood which was seized by the police. The said cloth has not been mentioned by the victim in his statements under Sections 161 and 164 of the CrPC. Further, there is no mention of the aforementioned cloth in the statement under Section 161 of the CrPC by the brother of the victim as well.
 - ii. There are material contradictions in the testimonies of the victim and his brother on one hand, and the testimonies of the Head Constable (PW-5) and Investigating Officer (PW-7) on the other. PW-5 has stated that post medical examination, at the "instance" of the victim, the victim and his brother were brought back to the spot of the incident, where the victim identified the green colour cloth (Ex.6) and the said cloth was seized. The same version is supported by the testimony of PW-7. However, the victim and his brother in their testimonies before the learned trial court have stated that post medical examination they were brought back to the police station from where the victim was sent home directly. Hence, it is submitted that the said green colour cloth (Ex.6) was planted by the Investigating Officer



- (IO) and the story of the seizure of the cloth, post-medical examination, is an after-thought.
- iii. That out of the various samples sent to the FSL, semen was not detected on the pants of the victim (Ex.1). Semen was detected only on the green colour cloth (Ex.6) recovered from the crime scene, the recovery of which is doubtful.
 - iv. That the victim has given contradictory statements with respect to his acquaintance with the appellant. In his chief examination, he has stated that the appellant was known to him only 2-3 days before the incident whereas, in his cross-examination, he stated that the appellant was known to him 15-20 days before the incident.
 - v. The contradictory statements of the victim and his brother with the Investigation Officer cast an aspersion on the arrest of the appellant. As per the IO, after conducting the spot search post medical examination of the victim, the IO, the victim and his brother conducted a search for the appellant and after some search, the victim pointed and identified the appellant near Sapna Cinema where he was arrested. Whereas as per the victim and his brother, the appellant was not arrested in their presence and they were called to the police station only post his arrest.
6. Per contra, the learned APP appearing on behalf of the state has made the following submissions:
- i. The victim in his various statements has supported the case of the prosecution and there are no inconsistencies in his statements.
 - ii. The victim has also withstood the test of cross-examination.
 - iii. From the site of the incident, a green colour cloth (Ex.6) was



recovered which had blood stains. As per the FSL Report, the DNA of the appellant was present on the same. As per the statement of the appellant under Section 313 of the CrPC, he has not denied the presence of mixed DNA and semen found on the green colour cloth (Ex.6) as per the FSL report.

iv. The appellant has not led any evidence to show any alibi or any previous history of animosity with the victim or his family.

7. I have heard the counsels for the parties and perused the material on record.

8. As per the testimony of the victim (PW-1), he deposed that his father used to work at Sapna Cinema Hall and he used to go there where he met the appellant. He has further deposed that the appellant took him to a deserted street and made him unconscious and when he regained consciousness, he found blood on his pants and his thighs were aching. He has further stated that blood was coming out of his anus. He has also confirmed that his brother and the police took him to the hospital for medical examination. The victim also confirmed the recovery of green colour cloth (Ex.6) with which he had wiped his blood. The victim had further identified the appellant through video link.

9. The victim was duly cross-examined by the counsel for the appellant and his testimony has withstood the test of cross-examination. It is pertinent to mention that no cross-examination of PW-1 was done on behalf of the appellant with respect to the identification and seizure of green colour cloth (Ex.6) by the police.

10. The testimony of the victim clearly describes the sexual crime committed by the appellant on him. Further, there is no contradiction



between the statements of the victim under sections 161 CrPC and 164 CrPC with that of his testimony given in court.

11. The aforesaid testimony of PW-1 has been corroborated by his brother (PW-4). He has corroborated that after the victim narrated the incident to him, PW-4 took him to the police station and thereafter he was taken for medical examination to AIIMS. He also identified the green colour cloth (Ex.6) stained with blood, which was seized by the police in his presence on the pointing out of the victim.

12. Both PW-5 (Head-Constable) and PW-7 (IO), in their respective testimonies, have deposed that the victim along with his brother (PW-4) came to the Police Station on 6th November, 2014. Thereafter, the victim was taken to AIIMS along with his brother where medical examination was conducted. After that, the victim was taken to the site of the incident where the victim pointed out the cloth on which blood stains were found and the same was seized. There were no questions put to PW-5 or PW-7 in the cross-examination with regard to the recovery of the green colour cloth (Ex.6).

13. The combined testimonies of PW-1, PW-4, PW-5 and PW-7 show that the aforesaid green colour cloth (Ex.6) was seized from the place of the crime and the victim identified the said cloth. Therefore, I have no doubt with regard to the recovery of green colour cloth (Ex. 6).

14. Since the date of birth of the child could not be determined due to the non-availability of school records, Ossification Test of the child victim was conducted and as per the said Report (Ex.PW10/B), age of the child was between 11 years to 14 years of the age.

15. PW-8, working at the FSL conducted the DNA examination and confirmed that mixed DNA profile was obtained from Ex.6 (cloth piece



taken from the scene of the crime). Further, alleles from the source of Ex.4 (Gauze cloth piece of the victim) and alleles from the source of Ex.9 (gauze cloth piece of the appellant) were accounted for in alleles from the source of Ex.6. PW-8 confirmed the presence of semen on Ex.6.

16. From the FSL report, it clearly emerges that the blood of the victim as well as his DNA was found on the green colour cloth (Ex.6). The semen of the appellant as well as his DNA were also found on green colour cloth (Ex.6).

17. The medical examination of the victim (Ex.PW-2/A) confirms that the injury in the anal region is on account of sexual assault on the victim. The relevant observations from the MLC are set out below:-

*“... Faecal stains present around peri-anal and perineal region. A contused abrasion of size 0.5*1cm is present, associated with tenderness is present 1’0 clock position at peri-anal region. Blood stains(dried) present on the anal sphincter. Tenderness of anal sphincter present....”*

18. In the present case, the alleged discrepancies in the testimonies of the witnesses, which have been pointed out regarding-

- i. no mention of the green colour cloth (Ex.6) by the victim in his statements under sections 161 and 164 of the CrPC,
- ii. the difference in the statement of the victim in his examination-in-chief and cross-examination with regard to the period for which he knew the appellant,
- iii. the difference in testimonies of PW-1 and PW-4 on one hand with that of PW-7 (IO) on the other with respect to the search for the appellant on the night of the incident,



are of minor character and do not make these testimonies unreliable.

19. The Supreme Court in *Phool Singh vs State of Madhya Pradesh*, (2022) 2 SCC 74, has held that the conviction can be on the basis of the sole testimony of the prosecutrix when the deposition is found to be trustworthy and credible and no independent corroboration is required for the same. In my considered view, the statement of the victim is reliable and trustworthy and has also withstood cross-examination on this aspect.

20. In any event, the aforesaid statement of the victim has been duly corroborated by the testimony of his brother (PW-4), the FSL Report and the MLC Report (Ex. PW-2/A).

21. It also has to be borne in mind that under Section 29 of the POCSO Act, there is a statutory presumption raised against the accused in respect of offences under Sections 3, 5, 7 and 9 of the POCSO Act. In the present case, the accused has failed to successfully rebut the aforesaid presumption by leading evidence or discrediting the evidence of the prosecution.

22. The appellant has not been able to shake the version of the prosecution and the prosecution has successfully proved its case beyond reasonable doubt.

23. In view of the discussion above, I find no infirmity in the impugned judgment convicting the appellant for the offences under Section 363 of the IPC and Section 4 of the POCSO Act. In view of the above, there is no merit in the appeal and the same is dismissed. All pending applications stand disposed of.

AMIT BANSAL, J.

SEPTEMBER 22, 2023/sr/at

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KUMAR
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