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

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Reserved on: 19.04.2023

Decided on: 27.04.2023

+ **CRL.A. 925/2018**

DEEPAK KUMAR

..... Appellant

Represented by: Mr. Rajesh Mahajan, Advocate/
amicus curiae with Mr. Ranjeeb
Kamal Bora & Ms. Jyoti
Babbar, Advocates.

versus

STATE NCT OF DELHI

..... Respondent

Represented by: Mr. Laksh Khanna, APP for the
-State with SI Sangeeta, PS
Shahbad Dairy

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MS. JUSTICE POONAM A. BAMBA

POONAM A. BAMBA, J :-

1.0 Vide this appeal, the appellant is assailing the judgment dated 24.07.2018 ('**impugned judgment**' in short) passed by Ld. ASJ-01/Special Judge, POCSO Act (North), Rohini Courts, Delhi, whereby the appellant was convicted for the offence under Section 6 of The Protection of Children from Sexual Offences Act, 2012 ("**POCSO Act**" in short) and u/S. 376(2)(i) of The Indian Penal Code, 1860 ("**IPC**" in short), in Sessions Case No. 59234/2016, in case FIR no. 582/2016, Police Station Shahbad Dairy; and order on sentence dated 28.07.2018, whereby the appellant was sentenced to undergo rigorous imprisonment for life u/S. 376(2)(i) IPC along with fine of Rs.20,000/-, in default of payment of fine, to undergo rigorous imprisonment for 60 days.

2.0 Briefly stating, the prosecution case is that on 01.08.2016 at about 12:00 noon, Smt. M (PW-2)/the complainant picked up her daughter victim N (PW-1) from her school and sent her back with a neighbor after handing over the keys to her advising her to get the door unlocked with the help of that neighbor and stay at home. Thereafter, she went to fetch her second daughter from her school. At about 01:30 p.m., when PW-2 returned home with her second daughter, she found victim N crying and saw that her frock and underwear had blood stains, on which she got suspicious. She then checked her private parts and noticed that she was bleeding. On enquiry, victim N told her that Deepak Bhaiya/the appellant had unlocked the door of the house and thereafter he came inside and removed her underwear and then put his *su su wali jagah in her su su wali jagah*. She felt pain and started crying on which Deepak Bhaiya, the appellant left. On hearing this, the complainant (PW-2) rushed to the house of the appellant/Deepak, who lived in the neighborhood and on finding him home she slapped him 2-3 times and questioned him as to why did he do *galat kaam* with her daughter. On which, the appellant admitted his guilt and fell on her feet and started apologizing and promised never to repeat his act. Complainant/PW-2 bolted the appellant's room from outside and called at number 100. Pursuant to which, police arrived and the appellant was handed over by the complainant to the police and she took victim N to Ambedkar Hospital, Rohini along with a Mahila Police official. On this statement/ complaint Ex.PW2/A of PW-2, the FIR (Ex.PW3/A) in the present case came to be registered. The victim N as well as the appellant/accused were got medically examined. Statement of victim (PW-1) as well as that of her mother – the complainant (PW-2) u/S.

164 Cr.PC was got recorded by the Ld. Magistrate on 06.08.2016. The exhibits of the victim as well as that of the appellant /accused were sent to FSL for expert opinion. After recording of statement of witnesses and completion of investigation, charge-sheet u/S. 376 IPC and S. 6 POCSO Act was filed.

3.0 Vide order dated 03.10.2016, the appellant/accused was initially charged for offence punishable u/S. 6 POCSO Act and in the alternative u/S. 376(2)(i) IPC. Subsequently, vide order dated 18.07.2018, the charge was amended to read as Sec. 6 POCSO Act and Sec. 376(2)(i) IPC.

4.0 The prosecution examined 13 witnesses in support of its case.

5.0. In his statement under Section 313 Cr.P.C, the appellant/accused admitted that he was residing in the same locality as that of the victim N. Appellant however denied all the incriminating evidence put to him and stated that he has been falsely implicated on account of past quarrel between his mother and the mother of the victim N (PW-2) on the issue of drainage of dirty water, which used to flow from the house of the appellant towards the house of the victim N.

6.0 The appellant/accused examined one witness Subhash Yadav/DW1, in his defence.

7.0 The appellant has primarily challenged his conviction on the ground that except victim N/PW-1's deposition there is no evidence on record to

connect the appellant to the crime. PW-1's competency to depose as a witness is itself in doubt. Her testimony also suffers from various inconsistencies/ improvements. Ld. Counsel submitted that while assessing the competency of the victim/PW-1, the Ld. ASJ had put certain questions including asking her about her date of birth. In response to which, the victim stated that "*mera birthday chhoti kanchko mein aata hai*". Whereas, as per her birth certificate Ex.PW4/A, the victim's date of birth is 25.12.2010 and not in *kanjak*. Further, in her deposition victim N/PW-1 could not give any date, month or year of the incident. These facts reflect on the victim's level of comprehension of different facts and creates doubt about her competency to depose as a witness. Further, in her deposition, victim N (PW-1) stated that the appellant/accused had poured oil on her body/private/urinating part, but MLC does not record any such oil being noticed. PW-1 in her testimony after narrating the incident even stated about what happened at the appellant's house, although she was not even present there. These inconsistencies/ improvements in the testimony of the victim show that either she was tutored or her version was the figment of her imagination. Ld. Counsel also argued that neither MLC nor DNA Examination Report of FSL connect the appellant/accused to the crime. Also, no semen was detected either on the exhibits of the appellant or that of the victim N. Further, the victim's clothes were never put to her during her testimony and were not identified by her; and therefore, FSL report Ex.PW13/J, which records presence of blood on her underwear, is of no consequence. In view of these facts and circumstances, it would be hazardous to convict the appellant/accused solely on the basis of the testimony of the victim.

7.1 Ld. Counsel for the appellant also argued that statement u/S. 164 Cr.P.C. of mother of the victim (PW-2) i.e., Ex.PW2/B itself is doubtful as in the identification by IO WSI Urmil Sharma, there is a reference to identification of one 'Smt. S' W/o 'N Singh', mother of the victim, r/o. ..., Jain Colony, Barwala, Delhi (complete name and address is redacted).

7.2 Ld. Counsel further submitted that PCR call (Ex.PW10/A) was allegedly made by the victim's mother but name of the appellant/accused, who was known, does not find mention in the same. Further, the statement of PW-2 the complainant/mother of the victim (Ex.PW2/A) / rukka on the basis of which the FIR was registered, was recorded at 01:30 p.m. But, *tehrir* was sent at 07:00 p.m. and the FIR came to be registered only at 07:30 p.m. on 01.08.2016. No explanation has come on record regarding delay in this respect. It was further argued that the victim was got examined vide MLC Ex.PW5/A, which shows that the victim was taken to hospital by Ct. Sneh Lata and the consent for her internal examination was given by her father Vinod Kumar. But neither Ct. Sneh Lata nor Vinod Kumar, father of the victim was examined as witnesses. Further, the appellant/accused was taken by Ct. Sandeep for medical examination vide MLC Ex.PW6/A. Even Ct. Sandeep was not produced as a witness. Also, MLC of the appellant/accused shows injuries on his body which have remained unexplained by the prosecution.

7.3 Ld. Counsel also argued that the fact that the appellant/accused has been falsely implicated on account of previous quarrel between mother of the

appellant and that of the victim N, has clearly come in the testimony of DW-1, the neighbor.

7.4 Lastly, the Ld. Counsel made an alternate prayer for reduction in the sentence of the appellant. It was submitted that this is not a case, which calls for maximum prescribed punishment of life imprisonment. He submitted that the appellant was a young boy of 20 years at the time of commission of offence and has aged parents to look-after. He has clean antecedents and has never been involved in any other offence. Further, the facts show that there was no extreme brutality or violence committed by the appellant. Thus, there was no reason to award highest punishment. In support, reliance was placed upon the judgments of this court in *Akhilesh Arya vs. State 2023 SCC OnLine Del 304*, *Kishan Pal vs. State, 2010 SCC Online Del 1532*, *Khem Chand vs. State of Delhi, 2008 SCC OnLine Del 1611* and *Beeru vs. State (NCT of Delhi), 2013 SCC Online Del 4995*.

8.0 *Per contra*, the Ld. Prosecutor submitted that the incident stands proved vide testimonies of PW-1/ Victim N, her mother M/PW-2 and a neighbor Ms. Nandini/PW-8. Further, version of the victim N and that of her mother is consistent right from the very first call made to the police at number 100 vide PCR Form/ Ex.PW10/A and as recorded in MLC and thereafter, their respective statements u/S. 164 Cr.PC, Ex.PW1/A and Ex.PW2/B and their deposition before the court. Ld. Prosecutor submitted that there was no occasion for any manipulation or false implication as, soon after returning home at 01:30 p.m., call at no. 100 was made by PW-2 at about 01:41 p.m. and thereafter, the medical examination of the victim N

was conducted at about 04:30 p.m., which was concluded at 06:00 p.m. and the FIR came to be registered at 07:30 p.m. Thus, there was hardly any time or scope for any manipulation.

8.1 Ld. Prosecutor further submitted that the answers given by the victim N/PW-1 to the questions put to her by the court to assess her competency, rather show that the victim N, who was aged about five years, is an intelligent child. Her response to the question regarding her date of birth, by relating it to a religious occasion and further that she was learning “A to Z” in her school, show that she is capable of comprehending and giving rational answers.

8.2 Ld. Prosecutor also submitted that the PW-1’s version is also corroborated by medical and forensic evidence. He submitted that the injuries recorded in the MLC of the victim N (Ex.PW5/A) are consistent with her and her mother/PW-2’s version. He also argued that to PW-1/victim N, it was suggested in cross-examination that she suffered injuries due to fall in the space between the table. However, the concerned witness Dr. Menka Verma (PW-5) was not cross-examined in this regard. FSL Report (Ex.PW13/J) also corroborates the prosecution version, as blood was found on the victim N’s clothes 2a, 2b, (i.e., shirt and tunic) and 3a & 3b (underwear), as has come in the victim’s mother’s (PW-2) statement that she had noticed blood on the victim N’s clothes.

8.3 Ld. Prosecutor further argued that the appellant/accused was apprehended soon after the incident. Further, MLC /Ex.PW6/A of the

appellant/accused shows injuries on his person and further records that he was beaten up by the public, which further shows his involvement in the crime.

8.4 With respect to the argument of the Ld. Counsel for the appellant that no semen was found on the exhibits of the victim N, Ld. Prosecutor submitted that the victim N has nowhere stated about ejaculation. Moreover, non-presence of semen does not impact the prosecution case in any manner and reliance was placed on the judgment in ***CRL.A. 705/2018 titled as Ram Nawal vs. State, decided on 04.01.2022.***

8.5 Ld. Prosecutor submitted that in view of the above evidence on record, a presumption u/S. 29 POCSO Act has to be drawn against the appellant/accused that he committed the offence unless contrary is proved by the appellant/accused. Further, in terms of Section 30 POCSO Act, the court shall also presume existence of culpable mental state on the part of the accused and reliance in this respect was placed on ***The State Govt. of NCT of Delhi vs. Khursheed, 2018 SCC Online Del 10347.*** Ld. Prosecutor submitted that the appellant examined his neighbor as DW-1 in his defence, who stated that he is an auto driver by profession and generally left for work in the morning and returned by 09:00-09:30 p.m. But he claimed to have returned on the date of incident in the afternoon, which is highly doubtful particularly as DW-1 stated that at about 01:30 p.m., he saw victim N sitting peacefully outside her house. If as per the appellant himself, the victim N suffered the kind of injury she suffered by hitting against a table, she could not have been sitting peacefully. In view of the same the said witness is

hardly trustworthy. Thus, the appellant has failed to discharge the onus placed upon him u/S. 29 & 30 POCSO Act that he was not guilty. Hence, in view of evidence on record, the prosecution has been able to prove its case against the appellant/accused beyond reasonable doubt.

8.6 With respect to the plea of reduction in sentence, the Ld. Prosecutor submitted that the appellant does not deserve any mercy considering the age of the victim N and the kind of injuries she suffered because of which she remained admitted in the hospital for two days.

9.0 We have duly considered the submissions made by both the sides.

10.0 Criminal justice system was set into motion on receipt of a PCR call at 13:41:21 on 01.08.2016, recorded vide PCR Form (Ex.PW10/A), proved by PW-10 Ct. Payal. PW-10 testified that on 01.08.2016 while she was working as a Wireless Operator in CPCR, at about 01:41 p.m., she received a PCR call through a mobile phone regarding commission of rape with a girl child at ..., Jain Colony, Pul Prahlad Pur, Delhi, which was recorded in Form-1/ Ex.PW10/A by her. She categorically denied that no such information was ever received by her. Relevant portion of the PCR Form Ex.PW10/A reads as under :-

*“Incident Address : ..., JAIN COLONY, PUL PRAHLAD PUR
Incident information : **LADY BOL RAHI HAI KI EK LADKE NE
MERI LADKI KA RAPE KAR DIYA HAI**
PS Name : PUL PRAHLAD PUR District South West”*

11.0 The aforesaid information was reduced into writing vide DD No. 16A/ (Ex.PW12/A). PW-12 SI Ved Prakash testified that on 01.08.2016 he was posted at PS Shahbad Dairy and was on Emergency Duty. On receipt of DD No. 16A (Ex.PW12/A), he along with W/Ct. Sneh Lata went to ..., Jain Colony, Barwala, Delhi (complete address is screened to hide the identity of the victim N), where they met complainant/PW-2 along with her daughter victim N (PW-1) aged about 5 years. They handed over the appellant/accused to him. PW-12 duly identified the appellant/accused in the court. PW-12 also stated that he sent the victim child along with her mother with W/Ct. Sneh Lata to BSA Hospital for medical examination and took the appellant/accused to the police station and handed him over to W/SI Urmil Sharma/IO (PW-13). PW-12 was not cross-examined, thus, his testimony remained uncontroverted.

12.0 Victim N/PW-1 (though could not give the date, time and year of the incident) deposed that on the day of the incident, after school, her mother helped her cross the road in front of her school and told her that she was going to bring her elder sister and that she (PW-1) should go home and unlock the door with the help of mother of Lado. She forgot to take the help of Lado's mother, who went away to her house. When she (PW-1) was about to reach home, she noticed Deepak Bhaiya (PW-1 identified the appellant /accused in court) who resided in their locality, coming towards her; she asked him to open the lock. The appellant opened the lock and the door of her house and then followed her inside the house. Firstly, he bolted the outside door and thereafter, the inside door of the house. The appellant then removed her underpants. He poured oil on her body (she pointed towards her

private/urinating part). Then the appellant inserted his urinating part in her urinating part. She cried in pain, on which, the appellant slapped her twice. Thereafter, he opened the door and fled away leaving her crying. She was bleeding due to the incident. After sometime, when her mother reached home and asked her as to why was she crying, she narrated the entire incident to her mother. Her mother leaving her with her elder sister, went to the appellant's house and called police. She (PW-1) was taken to hospital for medical examination. Her statement Ex.PW1/A (u/S. 164 Cr.PC) was recorded by the Magistrate.

12.1 Victim N/PW-1 has stood by her deposition in cross-examination. She stated that the incident happened after she returned from the school at about 11:00 p.m. (a typographical error, it is 11:00 a.m.) and that nobody was present in the house at that time. She also stated that the appellant /accused went out of her house after the incident. She categorically denied that no such incident took place and that she has deposed falsely at the instance of her mother due to enmity between her parents and the appellant. She denied that her father is a habitual drinker and used to pick up quarrel with the neighbors and picked up quarrel with the appellant/accused on several occasions. She categorically denied that she suffered injury in her private part when she fell in the space between table while playing at her home. She also stated that she had raised alarm but nobody from the neighbourhood came to her rescue.

12.2 The above version of the victim N is consistent with her statement u/S. 164 Cr.PC (Ex.PW1/A).

13.0 PW-1's testimony is corroborated by the testimony of her mother Smt. M/ PW-2. PW-2 deposed that both her daughters were studying in different schools. On 01.08.2016, at about 11:35 a.m. she took victim from her school and sent her home with her neighbor and thereafter, went to bring her elder daughter from Prahlad Pur. On returning home at about 01:30 p.m. along with her elder daughter, she (PW-2) found victim N was crying and when she took the victim N in her lap she noticed that her clothes were stained with blood and blood was also present in her urinating part. On enquiry, the victim N (PW-1) informed that the appellant, whom she identified in the court, who was residing in their locality, after opening the lock of the room came inside and inserted his urinating part into her urinating part. On hearing this, she went to the appellant's house, where he was found sitting and enquired as to why he committed such an act with her daughter and out of anger she slapped him. She also stated that meanwhile, mother of the appellant also visited their house to confirm about the incident from her daughter / victim N. She has further testified that both, the appellant/accused and her mother started apologizing for the act of the appellant. She bolted the door of the room of the appellant from outside and reported the matter to police at number 100. Police arrived and took the victim to the hospital for medical examination and recorded her statement Ex.PW2/A. She further stated that her statement u/S. 164 Cr.PC (Ex.PW2/B) was also recorded. She also deposed that the statement of her daughter victim N was also recorded by the Magistrate.

13.1 PW-2, mother of the victim also stood by her deposition in her cross-examination. In her cross-examination, PW-2 stated that the victim N was presently studying in Standard One and was in UKG, the previous year; her school was at a walking distance of ten minutes; victim N used to go to school at 07:30 a.m. and returned at 11:55 a.m. Her elder daughter used to come back from her school at about 01:30 p.m. She also stated that on the day of the incident she had sent her daughter victim N with one of her neighbours, who resided near her house and had handed over the keys of the house to the victim N. Even earlier, she had sent the victim N home, with the neighbor. She further stated that in her absence, as the victim N was not able to open the lock on her own, victim N used to take the help of any person in the locality available at that time. PW-2 further stated that she was on talking terms with the family of the appellant/accused and that there was no quarrel with the appellant's family, prior to the incident. She categorically denied that the appellant/accused has been falsely implicated due to previous enmity with his family. PW-2 also denied that her statement (Ex.PW2/A) was not read over to her and her signatures were taken on blank papers. She further denied that the victim N was unable to understand anything and speak properly due to her tender age. PW-2 however could not recollect the date of birth of the victim N, which is not of much significance as no challenge was made to the age of the victim. Thus, nothing of substance could be extracted in her cross-examination so as to impeach her testimony.

13.1.1 The above version of the PW-2 is consistent with her complaint / statement (Ex.PW2/A) as well as her statement u/S. 164 Cr.PC (Ex.PW2/B). Ld. Counsel for the appellant argued that in the statement Ex.PW2/B, maker

of the statement has been identified by the IO as one 'Smt. S W/o N Singh', which raises doubt about PW-2 being the author of the same. It is noteworthy that no clarification in this respect was sought from PW-7, the Magistrate, who recorded PW-2's statement u/S. 164 Cr.PC. Rather, PW-7 was not cross-examined at all. Interestingly, PW-2 herself was not cross-examined in this respect despite the fact that in her examination in chief, PW-2 deposed about her statement u/S. 164 Cr.P.C. and identified her signatures at point A on the same. PW-13, IO/ SI Urmil Sharma, in her cross-examination, categorically denied that she had produced a different lady namely 'S', as mother of the victim and that the statement u/S. 164 Cr.PC has been signed by the same woman. In view of the same and considering the contents of the statement and that it bears signatures of PW-2, it is apparent that Ex.PW2/B is PW-2's statement; and the discrepancy pointed out by the Ld. Counsel apparently crept into the statement (Ex.PW2/B) on account of copying/pasting of the format of the introductory part of the statement.

13.2 Version of PW-2 that after return at about 01:30 p.m. and on finding about her daughter being raped by the appellant, she had confronted the appellant at his residence and had reported the matter to police by calling at number 100, finds corroboration in PCR Form Ex.PW10/A proved by PW-10. Same specifically records, "... *JAIN COLONY... LADY BOL RAHI HAI KI EK LADKE NE MERI LADKI KA RAPE KAR DIYA HAI ...*"

14.0 The version of PW-1/victim N and her mother/PW-2 about the victim being sent home with a neighbor is corroborated by PW-8 Nandini. PW-8

has deposed that she is residing in the neighbourhood of PW-2 and her daughter and the victim N are studying in the same school. In the month of August 2016, the date she could not remember, after they picked up their respective daughters from school, victim N's mother requested her to take the victim N along and to leave her near the house, as she was to go for bringing the elder daughter. Accordingly, she dropped the victim in front of her house. Later on she came to know that the appellant, whom she duly identified, had committed a wrong act with the victim N. PW-8 also stood by her deposition and reiterated that her daughter and the victim N are studying in the same class in the same school and categorically denied that she is making a false statement in this regard. She further denied that she has deposed falsely at the instance of victim N's mother.

15.0 Testimony of PW-1/victim N further stands corroborated by medical and forensic evidence. The MLC of the victim N, Ex.PW5/A proved by Dr. Menka Verma (PW-5) records the history of MLC that – *“Acc to mother A person Deepak stay in neighbourhood has raped her daughter on 1/8/16 at 1.30 pm. Acc to mother when she picked N from school at 11:55 am and she sent her along with one lady in neighbourhood and gave her key. That lady left her at home and ask to go herself. N asked Deepak for help to open the door. Deepak opened the door and raped her in her own house. When mother reached home saw blood on N cloth. She asked her about all this N replied Deepak did all this to her. Mother called police number 100 and brought her to hospital.”* Further, relevant portion of the MLC reads as under:

“MLC no. 196/16

Name: N Son/Daughter/Wife of: ‘V’ Age: 5yrs Sex: Female

*Brought by: Police Constable Sneh Lata 2055/OD Police Station:
Sahabad Dairy*

Residence Address: Jain Colony Barwala

Date and Time of Examination: 1/8/16

Date and Hour of Arrival: 1/8/16

No. and date of police docket: DD no. 16A

No and name of Constable: Sneh Lata 2055/OD

Date of Admission: 1/8/16

Date of Discharge: 3/8/16

.....

Start Time of Exam: 4:30 pm

General Physical Examination

....

*3. Clothing fresh/torn stains of blood/semen/mud etc: **fresh blood stained***

.....

Examination for injuries

Small tear in post fourchette

B. External Genitalia

.....

*3. Fourchette, bleeding, tear: ... **tear present minimal bleeding present***

.....

Dated 1/8/16

Time of Completion: 6 pm”

15.1 From the above it is seen that the victim N was medically examined at 04:30 p.m. on 01.08.2016, soon after the incident. It records the mother’s version naming the appellant/Deepak a neighbor having raped her daughter at 01:30 p.m. and gives further details of the incident as have come in her deposition. Further, the MLC (Ex.PW5/A) records fresh blood stains on the victim N’s clothes, which corroborates the version of PW-2 that she had

noticed blood stains on the victim N's clothes. Finding of tear on 'posterior fourchette' and presence of '(minimal) bleeding', also corroborates victim N's (PW-1) version that the appellant/accused had inserted his "*su su wali jagah in her su su wali jagah*"; and that of her mother (PW-2) that she noticed blood in PW-1's urinating part. As per MLC (Ex.PW5/A), on 01.08.2016, the victim N was examined from 04:30 p.m. to 06:00 p.m. and was admitted in the hospital; she was discharged on 03.08.2016. Same reflects the kind of injuries and trauma, the victim N suffered.

15.2 Ld. Counsel for the appellant argued that the MLC of the victim N becomes doubtful as neither Ct. Sneha Lata from Police Station Shahbad Dairy, who took the victim N to hospital (as recorded in MLC) nor father of the victim N, who gave consent for her internal examination, were examined. Suffice it to state that MLC Ex.PW5/A was duly proved by PW-5 Dr.Menka Verma. PW-5 categorically stated that "*a tear was found at posterior portion of the victim as mentioned in the MLC*". PW-5 was not cross-examined and her testimony remained uncontroverted. Further, the injury suffered by the victim N (PW-1) in her private part has not been disputed by the appellant, as the appellant himself put a suggestion to the victim/PW-1 in cross-examination that she had suffered injury in her private part due to fall in the space between table while playing at her home, which she categorically denied. Further, it is significant to note that no question whether such an injury could be caused by fall on /in the space between the table, was put to the relevant witness, i.e., the doctor/PW-5. Same shows that the appellant took a false defence.

15.3 In view of the above evidence, merely because there is no finding in MLC about presence of oil in the private part of the victim N, as pleaded by the Ld. Counsel for the appellant, same does not in any manner impact the credibility of otherwise trustworthy deposition of PW-1.

16.0 Ld. Counsel for the appellant/accused argued that the victim N's clothes were never put to her during her testimony and were not identified by her; and therefore, FSL report Ex.PW13/J, which records presence of blood on her clothes, is of no consequence. Suffice it to state that it has come in the testimony of PW-13 SI Urmil Sharma that sealed exhibits of victim N were handed over to her by the concerned doctor, which were seized by her vide seizure memo Ex.PW13/A. Same were deposited in *malkhana* and were subsequently sent to FSL through Ct. Ajit. FSL result Ex.PW13/J was collected and filed in the court. Her deposition has remained uncontroverted as she was not cross-examined in this respect. Thus, the appellant has not disputed the seizure of victim N's clothes, their examination by FSL and the report furnished by FSL.

17.0 As per FSL Report dated 28.02.2017 (Ex.PW13/J), the biological examination of the exhibits records that blood was detected on Exhibit 1j (Cervical mucus), Exhibit 1m (wash from vagina), Exhibit 1p (victim's blood), Exhibit 2a (one shirt having brown stains), Exhibit 2b (one tunic having brown stains) and Exhibit 3a (one underwear), Exhibit 3b (one underwear). Same matched with blood sample of the victim N (Ex.1P). Thus, the victim N's blood was found on her clothes and private parts/vagina, which corroborate the version of PW-2, mother of the victim N that

she had noticed blood on the clothes and in victim N's urinating part; and also the version of the victim N that she was bleeding after the incident. However, no male DNA profile could be generated from the source of the aforesaid exhibits.

17.1 Ld. Counsel for the appellant ALSO argued that as per FSL report no semen was detected either on the clothes of the appellant or that of the victim N (PW-1). Same shows that the appellant was not involved in the crime and has been falsely implicated. As noted above, MLC of the victim N (Ex.PW5/A) shows presence of small tear in posterior fourchette and minimal bleeding; and fresh blood stains on victim N's clothes. Biological Examination Report of FSL (Ex.PW13/J) has also recorded presence of victim N's blood on the clothes and in the private part of the victim N. Same when considered in the light of PW-1's deposition, clearly show penetration by the appellant. Thus, absence of semen is of no consequence. Even otherwise, presence of semen is not essential to constitute an offence punishable u/S. 376 IPC and Sec. 6 POCSO Act [**Ram Nawal's case (supra)**]. In this respect, reference with benefit may also be made to the judgment of the Hon'ble Supreme Court in "**Santosh Kumar vs State of M.P. 2006 (8) JT SC 171**" wherein in para 7, it was observed :

"7. The question, which arises for consideration, is whether the proved facts establish the offence of rape. It is not necessary for us to refer to various authorities as the said question has been examined in considerable detail in Madan Gopal Kakkad v. Naval Dubey (1992) 3 SCC 204 and paragraphs 37 to 39 of the said judgment are being reproduced below:-

" 37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in Medical

Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

" Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

38. In Parikhs Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

" Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

39. In Encyclopedia of Crime and Justice (Vol. 4) at page 1356, it is stated:

".....even slight penetration is sufficient and emission is unnecessary. "

....."

17.2 Thus, non-detection of semen on the exhibits of the victim N does not in any manner dent the consistent and credible testimonies of the victim N/PW-1 and her mother/PW-2 supported by MLC (Ex.PW5/A) and also the FSL Report (Ex.PW13/J).

18.0 The appellant/accused produced his neighbor as DW-1 in his defence. DW-1 deposed that on 01.08.2016 at about 01:30 p.m., no such incident had taken place; and that he had seen the victim N sitting peacefully outside her house and there was no noise near her house; and that the appellant /accused has been falsely implicated due to previous quarrel between the mother of the victim N and the mother of the appellant/accused. As per DW-1, he was an auto-driver by profession. In his cross-examination he stated that he used to leave home everyday at about 08:30 a.m. and usually returned home by 09:00/09:30 p.m. But on the day of the incident, as he had not carried his lunch, he after leaving the passenger at Peeragarhi, straightaway reached home at 01:30 p.m. It is noteworthy that the incident had already taken place before 01:30 p.m. and there was no occasion for DW-1 to be privy to what happened with the victim prior thereto. DW-1's testimony therefore, hardly inspires any confidence.

18.1 The appellant in his statement u/S. 313 Cr.PC pleaded false implication on account of past quarrel between his mother and the mother of the victim N (PW-2) on the issue of drainage of dirty water, which used to flow from the house of the appellant towards the house of the victim N. But he failed to demonstrate the same. Said defence was not specifically put either to PW-1 or PW-2, in cross-examination. To PW-2/mother of the victim, it was simply suggested that the appellant has been falsely implicated on account of previous enmity with the family of the appellant. To PW-1/victim N, it was suggested that her father is a habitual drinker and used to pick up quarrel with the neighbours including the appellant/accused, which

was categorically denied. Same shows a false defence having been taken by the appellant/accused.

19.0 Ld. Counsel for the appellant also argued that MLC of the appellant/accused (Ex.PW6/A) shows injuries on his body which have remained unexplained by the prosecution. Suffice it to state that PW2/mother of the victim N stated that she had slapped the appellant/accused 2-3 times. Further, the appellant's MLC (Ex.PW6/A) was duly proved by PW-6/ Dr.Rupa Arora, Medical Officer, M.V. Hospital, which itself records alleged history of physical assault by public at 03:00 p.m. near Shahbad Dairy.

20.0 As far as the argument of the Ld. Counsel for the appellant/accused that no explanation has come on record regarding delay in registration of FIR is concerned, same also lacks merits. As has come on record vide above evidence, that the sexual assault on victim N came to be noticed by her mother (PW-2) at 01:30 p.m. Soon thereafter, she made a call at no. 100 at 01:40 p.m. In response thereto, the police had arrived and had taken the victim N to the hospital for medical examination, where she was examined from 04:30 p.m. to 06:00 p.m. Statement of mother was recorded and *tehrir* was sent at 07:00 p.m. Where-after, the FIR was registered at 07:30 p.m. Thus there is hardly any delay in registration of FIR. It is significant to note that the Investigating Officer/PW-13 SI Urmil Sharma was not cross-examined in this regard so as to seek explanation about delay in registration of FIR. Even otherwise, it is a settled position of law that a few hours of delay in registration of FIR does not impact the prosecution case (*Dasu vs. The State of Maharashtra, 2017 SCC OnLine Bom 7983*).

21.0 In view of the above evidence on record, prosecution has proved beyond reasonable doubt that the appellant/accused committed penetrative sexual assault on the victim N.

22.0 The fact that the date of birth of the victim N is 25.12.2010, has come on record vide her birth certificate Ex.PW4/A proved by PW-4 Sh. Meetha Lal, Asstt. Public Inspector, MCD, Narela Zone, Birth & Death Department, Delhi. Even otherwise, the appellant has not disputed the age of the victim N being around 05 years at the time of incident. Thus, as the victim N was below the age of 12 years, the offence committed by the appellant amounts to aggravated penetrative sexual assault, in terms of Section 5 (m) POCSO Act, which is punishable under Section 6 POCSO Act.

23.0 Ld. Counsel for the appellant/accused made an alternate prayer of reduction in sentence of the appellant. Referring to the judgment of co-ordinate bench of this court in *Khem Chand's case (supra)* (wherein the factors to be taken into account while sentencing came to be discussed), Ld. Counsel pleaded that the appellant was a young boy of 20 years at the time of the incident and that he is the first time offender and did not use brutality or violence. Therefore, the appellant does not deserve maximum punishment of life imprisonment.

23.1 There cannot be two opinions about the criteria, as culled out in the aforesaid judgment, which may be taken into account while sentencing, viz. manner of commission of the crime, violence, if any used, impact of the

crime on the victim, age and antecedents of the accused, possibility of recidivism etc. In the instant case, the appellant lived in the neighbourhood whom the victim N addressed as *bhaiya*. Trusting him, the victim N requested him to unlock the door of her house. The appellant taking advantage of the situation and breaching the trust of the innocent tender age victim N, sexually assaulted her. Not only that, forcible penetration by the appellant/accused resulted in injuries and bleeding to the victim N, a child of tender age of 5 years. Because of the injuries caused, the victim N remained hospitalized for two days. Considering these facts and circumstances in entirety, punishment awarded to the appellant does not call for any interference. Judgments relied upon by the appellant in this respect are not of much assistance to the appellant in the present fact situation.

23.2 As far as the judgment of this court in *Akhilesh Arya's case (supra)* is concerned, the facts in that case were very different. In that case, there was only inflammation on labia and mucosa and small abrasion was seen on the interior of left labia minora. Injuries suffered by the victim N in the instant case are much more aggravated, which required hospitalization. In *Beeru's case (supra)* also, the facts are distinguishable. There were no external injuries on the body of the victim, who was aged about 14 to 16 years. As far as the judgment in *Kishan Pal's case (supra)* is concerned, age of the victim is not clear. Moreover, the judgment of the Ld. Single Judge in that case cannot bind this court.

24.0 In view of the foregoing, we find no illegality in the impugned judgment. We are also of the considered opinion that in the facts and

circumstances of the present case, sentence of life imprisonment and fine, and imprisonment in default of payment of fine, as awarded by the Ld. Trial Court, also calls for no interference.

25.0 Appeal is accordingly dismissed.

26.0 Copy of the judgment be uploaded on the website and be also sent to the Superintendent Jail concerned for updation of record and intimation to the appellant.

(POONAM A. BAMBA)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 27, 2023/manju