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

Date of Decision: 24.02.2025

+ **CRL.A. 910/2016**

RAJESH TOOTAN

.....Appellant

Through: Ms. Rakhi Dubey (DHCLSC), Adv

versus

STATE

.....Respondent

Through: Mr. Pardeep Gahlot, APP with SI
Reena, PS Prashant Vihar.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is an appeal seeking setting aside of the judgment of conviction dated 11.07.2016 and order of sentence dated 25.07.2016 passed by learned ASJ, Rohini Courts, New Delhi in SC No.57967/2016 arising out of FIR No.175/2015 registered at Police Station Prashant Vihar wherein the learned Trial Court convicted the appellant for the offences under section 363/366 of IPC and 6 of POCSO Act and sentences to rigorous imprisonment of 7 years and 15 years respectively.
2. Brief facts are that on 09.02.2015 at 3 PM, the mother of the victim went to attend nature's call and left victim at Night Shelter, Rohini West Metro Station. After 15 minutes when she came back, she did not find victim at the spot where she left her. After making inquiries, complainant came to know that the petitioner took away the victim.



When the victim could not be found, complainant reported the matter to police. During search, victim was found with the appellant. Thereafter, the victim was medically examined wherein it was found that the victim was sexually assaulted.

3. Charge were framed under section 363/366 IPC and section 6 of POCSO Act against the petitioner. The prosecution examined total 12 witness and none by the appellant.
4. Learned Trial Court, after recording the evidence, convicted the appellant for the offences under section 363/366 of IPC and 6 of POCSO Act and sentences to rigorous imprisonment of 7 years and 15 years respectively.
5. Aggrieved by the said judgment, the appellant has preferred the instant appeal.
6. Ms. Dubey, learned counsel for the appellant states that in the present case, the prosecution has failed to prove its case beyond reasonable doubt.
7. She states that there are material contradictions in the statement of PW-1 (complainant/mother of the victim). PW-1 states that she had left the daughter at Night Shelter, Rohini West Metro Station and had gone to the washroom and subsequently, she found her child missing. In her statement under Section 164 Cr. P.C. (Ex.PW-1/C), she states that she left her daughter near Gate No.1, Ambedkar Hospital and thereafter in her statement before the Court, she again repeated the same.
8. Learned counsel further states that not much reliance can be placed on matching of the DNA sample as the appellant was in a drunken state and it cannot be ruled out that somebody, after committing the offence,



has left the victim in the lap of the appellant.

9. She further states that the PW4 (the doctor) has nowhere stated that sexual assault has been committed on the victim.
10. Lastly, assuming the entire case set up by the prosecution to be correct, the appellant has already undergone more than 10 years of sentence which is the minimum sentence under Section 06 of POCSO Act and a lenient view can be taken by the Court, considering that the respondent has an aged father.
11. Learned APP has addressed the arguments and states that the offences are serious in nature and the learned Trial Court has correctly appreciated the testimony of the complainant. He further states that no leniency should be shown in POCSO cases.
12. I have heard learned counsel for the parties.
13. It is true that in the cases of sexual offences, the sole testimony of the prosecutrix can form the basis of the conviction of the accused. However, the Courts have to be extremely careful while examining the sole testimony of the prosecutrix as cautioned in the case of ***Sadashiv Ramrao Hadbe v. State of Maharashtra, (2006) 10 SCC 92***. In this case, the Hon'ble Supreme Court has observed that the accused can be convicted solely on the testimony of the prosecutrix, if the same is inspiring confidence of the Court. Since both the prosecutrix as well as the accused have a right for a fair trial, thus, if the statement of the prosecutrix does not inspire confidence and creates a doubt, the court must look for corroborative evidence, such as, medical evidence or the surrounding circumstances. The relevant para is extracted below:-

“9. It is true that in a rape case the accused could be

convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

14. In the present case, learned counsel for the appellant has argued that the testimony of the complainant cannot be relied upon as it suffers from various contradictions.
15. The complainant while giving complaint to the police which is Ex. PW1/A has stated that she left her daughter at Night Shelter near Rohini West Metro Station whereas the complainant, in her statement recorded under section 164 of CrPC which is Ex. PW1/C, stated that she left her daughter near gate No. 1 of Ambedkar Hospital. Further, the complainant in her testimony before the Court reiterated the version of Ex. PW1/C. Relevant para of her testimony is extracted below:-

“.....The date of incident was 9th. On that day I was returning from my work, my daughters were accompanying me. I left them near gate no. 1 of Ambedkar Hospital and went to answer nature's call. When I returned my younger daughter K was missing. I asked from one of my acquaintance about the victim, she told me that one boy namely Tootan (Accused present in the Court, correctly



identified) had taken my daughter along with him by saying that my husband is calling my younger daughter. I searched for my daughter and I called my husband. When my daughter was not found and we called at 100 number about 9 pm..... At about 11 pm, we saw that accused was holding my daughter and roaming near the Rohini East Metro Station. After seeing us he started running from the spot. We raised alarm and he was caught in between by the public. There was swelling on my daughter's face due to human bite and she was bleeding profusely.....”

(Emphasis added)

16. The said contradiction is not of much significance as the same are not regarding the actual offence committed by the appellant. At best, they can be called to be ‘minor contradictions’ which do not shake the testimony of PW-1.
17. With regard to DNA, as per Ex.F-1, the DNA profile extracted from the pant of the appellant matches with the female DNA profile generated from the blood sample of the victim. This clearly shows that the blood of the victim was found on the pant of the appellant.
18. The testimony of PW-4 reads as under:-

“On 10/2/15, I examined a baby girl aged about 2 years who was brought by her mother and a police official. As per my observation, the victim had facia linjuries. She has swelling and redness around anal region and labia minora, her hymen was ruptured. The MLC was prepared by Dr. Shailja under my supervision. Her signatures are appearing at point A on



the MLC and my signatures are “appearing at point B. The MLC now Ex. PW 4/A.”

19. The nature of the injuries along with the swelling and redness around the anal region and labia minora and rupturing of the hymen clearly shows that the child was a victim of sexual assault. The MLC alone with the DNA profile clearly shows that the respondent is guilty of the aforesaid offences.
20. I cannot lose sight of the fact that the victim was also found in the custody of the appellant. There is no credible explanation or evidence to show as to how the victim was in the custody of the appellant and as to how she had received injuries.
21. I am also of the view that the appellant cannot be permitted to take advantage of his drunken state. There are documents which clearly point that the appellant is guilty of the offence and even assuming that the appellant was in an inebriated state, no satisfactory explanation has been given for the MLC and the matching DNA profile.
22. Learned Trial Court in its judgment and more particularly in para 29 has correctly concluded as under:-

“29. Thus, from discussions herein above, it emerges that:

- i) Prosecution has been able to establish that on the date of incident victim was a 2-3 years old child.*
- ii) Victim was found in custody of accused after she went missing.*
- iii) PW1, PW7 & PW10 proved recovery of victim from accused.*
- iv) Forensic evidence corroborates version of witnesses.*



v) Medical Evidence indicates penetrative sexual assault.

vi) Accused failed to give any explanation or defense.”

23. For the said reasons, there is no infirmity in the impugned judgment convicting the appellant for the offences mentioned above. The offence of the appellant has been proved beyond reasonable doubt.
24. Learned counsel for the appellant has further argued that sentence awarded to the appellant may be reduced taking a lenient view.
25. Learned Trial Court has awarded 15 years of sentence for the offence punishable under section 6 of POCSO Act. Learned Trial Court, in order of sentence, has rightly noted that the nature of offence committed by the appellant does not demand leniency as the victim, at the time of incident, was aged about 3 years. I am of the view that the act of the appellant shows extreme depravity and the offence has been committed on a child of 3 years' old.
26. I am not inclined to interfere in the order of sentence.
27. Accordingly, the appeal is dismissed.

JASMEET SINGH, J

FEBRUARY 24, 2025/pk
(corrected and released on 07.03.2025)

Click here to check corrigendum, if any