MANU/DE/0323/2023

Equivalent Citation: 2023/DHC/000516

IN THE HIGH COURT OF DELHI

Crl. A. 404/2018

Decided On: 23.01.2023

Appellants: **Akhilesh Arya**
Vs.
Respondent: **State**

Hon'ble Judges/Coram:
Mukta Gupta and Poonam A. Bamba, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Jitendra Sethi, Hemant Gulati, Keshav Sethi, Bharat Kashyap, Sidhanth Mor and Anshika Sethi, Advocates

For Respondents/Defendant: Prithu Garg, APP

Case Note:
Criminal - POCSO - Section 374 & 482 of Code of Criminal Procedure, 1973 (Cr.P.C) and Section 6 of POCSO Act - Appeal under Section 374 & 482 of Cr.P.C against conviction under Section 6 of Act sentence of life - Whether appellant was rightly convicted? - Held, under Section 6 of Act, legislature prescribed minimum sentence of ten years and may extend to imprisonment for life - When prosecutrix started crying, appellant let her go and did not force himself upon her any further - Did not resort to brutality and violence to complete the act - Appellant was 48 years old at time of incident - Has clean antecedents - First time offender - Family person having wife and two minor children and sole bread earner of family - Conduct in jail remained good - Facts and circumstance do not warrant imposition of maximum punishment - Already been incarcerated for a period of around 11 years 4 months and 8 days - Considered to be sufficient - Sentence reduced from life imprisonment to period already undergone by him - Appellantbe released forthwith. [17.2], [17.3],[17.4]

DECISION

Poonam A. Bamba, J.

1. Vide this appeal under Section 374 Cr.P.C read with Section 482 Cr.P.C, the appellant is assailing the judgment dated 22.02.2018 ('impugned judgment' in short) passed by Ld. ASJ-01, West, Special Judge under Protection of Children from Sexual Offences Act, 2012. ('POCSO Act' in short), Tis Hazari Courts, Delhi, whereby the appellant was convicted for the offence under Section 6 of POCSO Act, in new S.C. No. 56841/2016, in case FIR no. 245/2013, Police Station Uttam Nagar ; and order on sentence dated 14.03.2018, whereby the appellant was sentenced to undergo rigorous imprisonment for life under Section 6 of POCSO Act with fine of Rs. 20,000/-, in default to undergo rigorous imprisonment for one year.

2. Briefly stating, the prosecution case is that on 12.05.2013, at about 3.56 pm, an

information was received at police station Uttam Nagar regarding a quarrel near Gurudwara, (address withheld), Mohan Garden ; same was reduced into writing by the duty officer PW-1 HC Jagdish in DD register vide DD no. 34-A, which is Ex. PW-1/A. Said DD was handed over to PW-9 SI Bhupender who on receipt of same, reached at house no...., (address withheld) Gali no. 6, Mohan Garden, Uttam Nagar, Delhi, where he was informed by the public person that the prosecutrix and her mother had been taken to the police station by PCR Van. PW-9 SI Bhupender then returned to the police station, where he met the prosecutrix PW-4 and her mother/PW-2, who told him about 'galat kaam' with the prosecutrix. After bringing the matter to the knowledge of the SHO, PW-9 along with PW-5 lady constable Sarita took the prosecutrix/PW-4 to DDU Hospital, Hari Nagrar, New Delhi for medical examination. In the meanwhile, PW-13 SI Satyawati also reached the DDU Hospital. After getting the prosecutrix/PW-4 medically examined, PW-13 SI Satyawati recorded the statement of PW-2 mother of the prosecutrix as the prosecutrix being 4 years old. Thereafter, PW-13/SI Satyawati accompanied the prosecutrix and her mother/the complainant/PW-2 to the place of occurrence and prepared site plan Ex. PW-13/B.

2.1. It is further the case of prosecution that on PW-13's return to the police station, PW-9 SI Bhupender produced the appellant/accused Akhilesh Arya before her and informed her that he was brought by the public persons to the police station. The prosecutrix's mother/complainant/PW-2 identified the accused. PW-13/SI Satyawati arrested the appellant/accused vide arrest memo Ex. PW-2/B in presence of PW-2/mother of the prosecutrix. After his arrest, the appellant/accused was taken by PW-8 Ct. Rajvir to DDU Hospital for medical examination on the intervening night of 12-13.05.2013. After the appellant/accused's medical examination, MLC and one sealed parcel was handed over to PW-8, who handed it over to the IO/PW-13 SI Satyawati. The prosecutrix was got counseled through NGO counselor and her statement u/s 164 Cr.P.C Ex. PW-12/A was got recorded by PW-12 learned Magistrate.

2.2. It is also the case of the prosecution that during investigation, wearing clothes of the prosecutrix i.e. baby's top Ex. 1a, baby's skirt Ex. 1b, one baby's underwear, Ex. 3, one microslide described as labia minora swab Ex. 4, one microslide described as vulval smear Ex. 5, cotton wool swab on a wooden stick described as labia minora swab Ex. 6, cotton wool swab on a wooden stick described as vulval swab Ex. 7 and dark brown gauze cloth piece described as blood in gauze of the appellant/accused Ex. 8, were sent to the Forensic Science Laboratory (FSL), Rohini, for examination and DNA finger printing ; report Ex. PX with respect thereto was submitted.

2.3. During investigation, birth certificate of the prosecutrix Ex. PW-10/A was obtained, as per which date of birth of the prosecutrix is 01.04.2009.

2.4. After completion of investigation, charge sheet under Section 376 IPC and under Section 6 of POCSO Act was filed in the court.

2.5. The prosecution in order to prove its case examined 13 witnesses in all.

2.6. In his statement under Section 313 Cr.P.C, the appellant denied the allegations and stated that he has been falsely implicated to settle the score with him as the family of the prosecutrix had enmity with him as they owed money to him. He has stated that during reconstruction of their house, the prosecutrix's family resided in his house on rent @ Rs. 15,000/-per month for two floors ; rent of three months was pending against them, when they vacated his house, which was not paid. He also stated that after reconstruction of his house, he was left with spare marble stones, which were taken by

the family of the prosecutrix, but they did not pay the consideration for the same. When he asked for his money, the mother of the prosecutrix/PW-2 picked up a quarrel with him and his wife many a times and also in the morning of 12.05.2013, the date of alleged incident. The appellant/accused denied that he was produced in the police station by the public and stated that he himself had gone to the police station on being summoned by the police.

2.7. The appellant/accused produced one witness Mukesh/DW1 in his defence.

3. The appellant has primarily challenged his conviction on the ground that the learned Trial Court failed to appreciate that different versions were given by the PW-4 prosecutrix, that is, by way of alleged narration to her mother PW-2, while giving alleged history to the doctor as recorded in MLC Ex. PW-6/A, in her statement u/s 164 Cr.P.C and in her deposition before the Court as PW-4. Ld. Counsel argued that in the statement of complainant/PW-2/mother of the prosecutrix, it has come that she was informed by the prosecutrix PW-4 that father of Anisha induced her and took her inside his house on a pretext of meeting her with her friend Cheenu and further told that "unnone meri su su wali jagah mai ungli dali thi" firstly by making her lie down on kitchen slab and then in purple colour room. Even in her statement recorded under Section 164 Cr.P.C, prosecutrix/PW-4 mentioned about insertion of finger in her su su wali jagah, which is consistent with the complaint/FIR. Whereas, there is no mention of insertion of finger in MLC. As per the MLC Ex. PW-6/A, the prosecutrix PW-4 as well as her mother PW-2 informed the doctor that the accused fondled the prosecutrix's private part and then removed his pants and tried rubbing the private part of the prosecutrix with his penis. There is no mention of insertion of finger by the appellant/accused. Rather, there is no mention even of removal of the prosecutrix's panty by the appellant/accused. In her deposition before the Court as PW-4, prosecutrix deposed only about insertion of penis and stated that 'Tau ji ne Nu Nu dali thi' and explained 'Nu nu means Jis se shu shu karte hai." There is no mention of insertion of finger by the appellant/accused.

3.1. Ld. Counsel submitted that graver the offence, stricter the proof and argued that in view of such contradictions in the version of the PW-4 at different stages and also between the version of PW-2 and PW-4, the evidence was not of sterling quality ; and the appellant could not have been convicted on the basis of same and placed reliance upon the judgment of Hon'ble Supreme Court in Crl. Appeals No. 2486/2009 with 2487/2009, case titled as Rai Sandeep @ Deepu versus State (NCT of Delhi). Ld. Counsel also argued that the appellant thus could not have been sentenced to imprisonment for natural life and placed reliance upon the judgment of 'Ravi Shankar Shyamlal Vishwakarma vs. State of M.P. MANU/MP/0286/1997 : 1998 (4) Crimes 187 (M.P.)

3.2. Ld. Counsel for the appellant/accused argued that despite the fact that the prosecutrix did not support the prosecution version that the accused had inserted finger into her vagina (su su wali jagah), the prosecutrix was neither declared hostile, nor did the learned Prosecutor seek to re-examine/cross-examine the prosecutrix in this respect. Thus, the finding of the learned Trial Court that the appellant/accused had inserted finger and accordingly convicted him under Section 6 of POCSO Act, is without any basis and illegal, as in her deposition, the PW-4/prosecutrix stated only about the insertion of penis. In this regard, the learned counsel placed reliance upon a judgment dated 18.10.1978 of Hon'ble Supreme Court in Crl. Appeal No. 64/1974, case titled as Ganesh Bhavan Patel and Ors. Versus State of Maharashtra.

3.3. Ld. Counsel for the appellant/accused also argued that even medical evidence/MLC of the prosecutrix Ex. PW-6/A does not corroborate the PW-4's version. As per the MLC, only inflammation is seen on labia and mucosa and small abrasion is seen on the interior of left labia minora. Neither MLC Ex. PW-6/A nor the doctor/PW-6 explained the cause of inflammation/redness in the private part of the prosecutrix. He also submitted that the kind of abrasion and redness noticed in the prosecutrix's MLC Ex. PW-6/A, could have been caused by the physical examination carried out by PW-2 mother of the prosecutrix and pointed out that PW-2 in her cross-examination has stated that she had checked the prosecutrix with her hand. Thus, the redness/inflammation of the genital area of the prosecutrix cannot be said to be indicative of sexual assault. In this regard, learned counsel placed reliance upon a judgment dated 29.06.2020 of this Court in Crl. A. 554/2016, Rakesh Vs. State. Ld. Counsel further submitted that had there been insertion of finger or that of penis, there would have been bleeding and extensive damage not only to vagina but also to the accused's private part. Reliance in support was placed upon the judgments-Rahim Beg and Ors vs. State of U.P., MANU/SC/0205/1972 : AIR-1973 SC 343 para-26 ; Kallu Ahirwar vs. State of M.P. MANU/MP/1043/2003 : 2004 (3) MP LJ 209 and Sahajan Khan vs. State of Orissa MANU/OR/0367/1994 : 1994 (2) Crimes 203 (Ori). Further, as per the FSL report Ex. PX, no semen stains were found on the clothes of the prosecutrix/PW-4 or that of the accused. Thus, the appellant could not have been convicted.

3.4. Ld. Counsel for the appellant/accused further argued that IO in his cross-examination has admitted that labourers were working near the spot. Even PW-13 SI Satyawati has stated that public persons had brought the appellant/accused to the police station. Despite presence of the public persons/labourers working near the spot, no independent witness was examined.

3.5. Ld. Counsel for the appellant/accused also argued that the appellant/accused has been falsely implicated because of quarrel between the complainant and family of the accused over outstanding rent payable by the complainant's family and money owed to them on account of marble stone taken by them from the appellant/accused. Ld. Counsel submitted that the same is clear from PW-2's admission in her cross-examination that they were tenants in the appellant's house ; and she did not deny that they recently vacated the house about 10 days back and rent of Rs. 67,000/-was outstanding against them. Reference in this regard was made to the judgments-State through C.B.I. vs. Mahender Singh Dahiya (MANU/SC/0077/2011 : AIR 2011 SC 1017 and Ram Chander vs. State of Haryana, MANU/SC/0206/1981 : AIR 1981 SC 1036.

3.6. Ld. Counsel for the appellant/accused also argued that the learned Trial Court did not even appreciate that it was dangerous to accept the prosecutrix's version, who is only aged about 5 years and was vulnerable to tutoring. In this regard, ld. Counsel has placed reliance upon the judgment of Hon'ble Supreme Court in State of Bihar vs. Kapil Singh, MANU/SC/0066/1968 : AIR 1969 SC 53 as well as Caetano Predade Fernandes vs. UT of Goa, Daman & Diu, MANU/SC/0102/1976 : AIR 1977 SC 135. He furthe submitted that in such a situation, the appellant deserved benefit of doubt, which was not extended to him. Reliance in this regard is placed upon the Hon'ble Supreme Court's judgment in 'State (Delhi Administration) vs. Gulzari Lal Tandon, MANU/SC/0250/1979 : AIR 1979 SC 1382.

3.7. Ld. Counsel for the appellant/accused submitted that the appellant has already undergone sentence of about 10 years. He has clean antecedents and has been taking Yoga classes in jail and his conduct remained good in the jail. He is a family person having a wife and two minor children and is the sole bread-earner of the family.

Therefore, in the alternative, his sentence may be reduced to the period already undergone by him. In support, Ld. Counsel placed reliance upon the judgment of this Court in 'Khem Chand & Ors., vs. State of Delhi, in Crl. A. No. 5/2000 etc. decided on 07.07.2008.

4. On the other hand, Learned Prosecutor argued that the prosecution has been able to prove its case beyond reasonable doubt and the variation in the prosecutrix's statement as pointed out by the learned counsel for the appellant, cannot be said to be contradictions or material inconsistencies. Same are minor in nature and stand explained by the tender age of the prosecutrix, who was only about 4 years old at the time of incident. Rather, minor variation in the testimony of the prosecutrix over a period of time, reflects naturalness of her version. The prosecutrix/PW-4 even identified the appellant/accused before the court as the person, who had inserted his nu nu (penis) in her private part. Ld. Prosecutor also argued that to her mother, the prosecutrix had described that the appellant/accused had removed his pant and taken out his nu nu (penis) and took her to purple colour room, where she was made to lie down and then, the accused had put his finger (moti) in her vagina (su su wali jagah), on which she felt severe pain. Ld. Prosecutor submitted that the prosecutrix may not have been able to see whether it was a finger or penis, as she was made to lie down. Further, her version under Section 164 remained consistent where she talked about the insertion of the finger by the appellant/accused.

4.1. Ld. Prosecutor submitted that as far as the history recorded by the doctor in MLC Ex. PW-6/A of fondling and rubbing of the prosecutrix's private part by the appellant/accused with his penis is concerned, it at best reflects the doctor's own understanding of the event narrated by the victim/PW-4 and her mother PW-2. Same cannot be given much weightage.

4.2. Ld. Prosecutor also argued that PW-6 Dr. Pannam Sharma was not cross-examined by the appellant/accused to suggest that injuries on the private part of the prosecutrix did not show any penetration. The injuries recorded on the MLC cannot be stated to reflect definite opinion of the doctor about insertion/non-insertion and it was for the appellant/accused to elicit the same.

4.3. Ld. Prosecutor further argued that testimony of PW-2, mother of the prosecutrix, is consistent with her statement Ex. PW-2/A, on the basis of which FIR came to be registered, which remained unshaken during her cross-examination.

4.4. Ld. Prosecutor also submitted that the incident took place around 3.00 pm, the DD no. 34-A Ex. PW-1/1 came to be recorded at 3.56 pm regarding quarrel i.e. soon after the offence ; and the fact that the appellant was brought to the police station by the public persons shows that the quarrel ensued between PW-2 mother of the prosecutrix and the appellant/accused, in which the public persons also got involved in view of the seriousness of the offence. Further, the very fact that the public persons got involved itself shows that it was not on account of petty dispute between the parties on account of rent or any outstanding money as pleaded by the accused, but public enragement was on account of such a heinous offence with a child of tender age.

4.5. Ld. Prosecutor further submitted that much was argued on behalf of the appellant/accused that injuries on the private part of the prosecutrix are inconsistent with the allegations of insertion, whether of finger or penis. He submitted that the prosecutrix has been consistent in her testimony that the appellant/accused had rubbed her private part with his penis and had also inserted the finger/penis on which she felt

pain ; even the slight penetration, which may not cause such injuries/bleeding as contended on behalf of the appellant/accused, is enough to be covered under Section 3 of the POCSO Act which defines penetrative sexual assault. It categorically mentions that the penetrative sexual assault does not require complete penetration and it could be to any extent and even the slight penetration would be sufficient to constitute an offence of penetrative sexual assault. Further, if the said offence is committed on a child below the age of 12 years as in the present case, same amounts to aggravated penetrative sexual assault as defined in Section 5 of POCSO Act and is punishable under Section 6 of POCSO Act. Thus, the ld. Trial Court has rightly convicted the appellant/accused under Section 6 of POCSO Act.

4.6. Ld. Prosecutor also submitted that although the appellant raised the defence of false implication on account of money being due from the prosecutrix's family on account of rent etc, but except for a bald assertion, the appellant/accused has failed to substantiate his defence by adducing evidence. In absence of any cogent defence, the appellant has failed to discharge the reverse burden placed upon him by virtue of Sections 29 and 30 of POCSO Act. Ld. Prosecutor has placed reliance upon the judgment of 'Chand Bibi vs. State & Another, MANU/DE/0017/2019', pleading that similar contentions were dealt with by this Court holding that age of the prosecutrix has to be kept in mind while appreciating her version and also drawing of legal presumption under Section 29 of POCSO Act. He also referred the judgment of this Court in 'Court on its Own Motion v. State' MANU/DE/2719/2018 : (2018) 251 DLT 383 (DB) with respect to appreciation of evidence of child witness.

5. We have duly considered the submissions made by both the sides and have perused the record.

6. PW-2 mother of the prosecutrix was the first point of contact of the prosecutrix/PW-4 soon after the incident, to whom she narrated the happenings/sexual assault by the appellant/accused after being found few minutes past 3.00 pm. Soon thereafter, at about 3.56 pm, the matter was reported to the police as has come in the testimony of PW-1 HC Jagdish, on which DD no. 34-A Ex. PW-1/A came to be recorded which mentions that ".....Mohan Garden gurudwara ke pas jhagda'. Information was handed over to PW-9 SI Bhupender for necessary action. This fact is not disputed as PW-1 was not cross-examined.

6.1. PW-9 SI Bhupender has testified that accordingly, he went to the said house. He was informed by public persons that the prosecutrix and her mother had already been taken to the police station by PCR Van. He then returned to the police station where he met PW-2, who told him about galat kaam with the prosecutrix. After bringing the same to the notice of the SHO, he along with Lady Ct. Sarita took the prosecutrix to DDU Hospital for prosecutrix's medical examination under supervision of her mother. PW-9 further deposed that PW-13 SI Satyawati also reached the hospital. Prosecutrix was medically examined ; PW-13 SI Satyawati recorded PW-2's statement Ex. PW-2/A and prepared rukka and handed over the same to him (PW-9) for registration of FIR. He went to the police station and got the FIR Ex. PW-3/A registered and thereafter, handed over the copy of FIR and original rukka to PW-13 SI Satyawati. Nothing was put to PW-9 in his cross-examination by the appellant so as to discredit his testimony.

6.2. PW-13 SI Satyawati has testified that on 12.05.2013, on receipt of information from police station, she went to DDU Hospital, where PW-9 ASI Bhupender met her. PW-9 produced PW-2 with her daughter/prosecutrix/PW-4. Lady Ct. Sarita, who had brought the prosecutrix for her medical examination, was also present. She has also

testified that after medical examination, sealed parcels were taken into police possession vide memo Ex. PW-5/A and that she recorded the statement of complainant, i.e. the mother of the prosecutrix vide Ex. PW-2/A and prepared rukka Ex. PW-13/A and got the FIR registered through PW-9. She has also testified that after obtaining MLC of the prosecutrix from the hospital, she along with PW-2 complainant and the prosecutrix went to the spot and prepared site plan Ex. PW-13/B. On her return to the police station, she received copy of FIR and original rukka. PW-9 ASI Bhupender produced the appellant/accused before her and told her that the appellant/accused was brought by the public persons to the police station. The appellant was identified by the complainant/PW-2. She then arrested the appellant vide arrest memo Ex. PW-2/B. She sent the appellant for medical examination through PW-8 Ct. Rajvir, who after getting the appellant medically examined, handed over the MLC and other exhibits to her.

6.2.1. PW-13 SI Satyawati also deposed that she got the statement of the prosecutrix under Section 164 Cr.P.C recorded by producing the prosecutrix before the learned Magistrate and said statement is Ex. PW-12/A. She also obtained the birth certificate Ex. PW-10/A of the prosecutrix and sent the exhibits to the FSL.

6.2.2. In her cross-examination, PW-13 categorically denied that she had narrated the contents of the complaint made by PW-2. She also denied that she had tutored the prosecutrix before recording of her statement under Section 164 Cr.P.C and also before her examination in the court. She further denied that the appellant was not produced by the public persons and that PW-13 had sent police officials to the appellant's house to call him at the police station ; and that the appellant/accused had himself appeared in the police station to join investigation on receipt of notice. PW-13 also denied in her cross-examination that she, in order to avoid departmental inquiry, falsely implicated the appellant/accused by manipulating the charge sheet.

7 . Ld. Counsel for the appellant vehemently argued that there are material contradictions in the version of the prosecutrix (through her mother PW-2) i.e. Ex. PW-2/A, under Section 164 Cr.P.C, PW-2 and PW-4's version before the doctor as recorded in MLC and thereafter, before the Court. The appellant could not have been convicted on the basis of such evidence.

7.1. Let us examine whether there are material inconsistencies or contradictions in the aforesaid versions as pleaded. Statement of PW-2 Ex. PW-2/A narrating the incident as told to her by the prosecutrix, reads as under :-

> "Bayan kiya ke main pata upkrot par apne pati va 2 bacho ke saath rehti hoon. Mere pati Interior Decorator ka kaam karte hai va main ghar par hi rehti hoon. Meri Beti K.. ke umar 4 varsh va beta 11 mahine ka hai. Aaj karib 3 baje din, main ghar me khana bana rahi thi va ghar me sasur ki tabiyat kharab hone ke karan mehmaan aye hue the va meri beti K.. wahin khel rahi thi. Khana banane ke baad mujhe dhyan aaya ke K.. ghar me nahi hai, va maine turant iski talash ki va main ise dhoondne sidiyon ke niche gai, jahan niche majdoor kam kar rahe the. To maine unse pucha ki meri beti idhar aayi thi kya, to unhone kaha ki wo bahar khel rahi hai. To maine bahar jakar dekha to K.. gali me sehmi khadi thi. Maine use awaz lagai, to mere saath hi andar aa gai va sidhi toilet me gai ki mujhe su su aai hai. Iske baad bahar aakar, k... ne mujhe bataya ke Anisha ke papa mujhe apne purane ghar me le gaye va kichan ke slab par litakar, meri kachi utar di va meri su su wali jagah me ungli daal di va usne apni pant me se apna nu nu (penis) bhi nikala. Iske baad mujhe wah purple rang wale kamre me le gaye va mujhe apne ghutno par litaya va mere su su

wali jagah me apni ungli (moti) dali va mujhe bahut dard hua, mai roi. Iske baad maini K.. ko check kiya to iski su su wali jagah lal ho rakhi thi"

7.2. In her statement under Section 164 Cr.P.C before the Ld. Magistrate i.e. Ex. PW-4/A which was recorded on 13.05.2013, the very next day of the incident, the prosecutrix inter alia stated that :-

"Cheenu ke tau ne jiska naam Akhilesh hai .... usne mere su su wali jagah me apni ungli dali thi. Usne apni pant ki chain kholkar apni nu-nu bhi bahar nikali thi. Phir wo mujhe purple kamre me le gaye the,... aur phir se meri su su wali jagat ungli dali thi. Mujhe dard hua tha. Main rote rote aai thi..."

7.3. MLC of the prosecutrix Ex. PW-6/A records as under :-

"DEEN DAYAL UPADHYAY HOSPITAL, New Delhi-110064

Name: (identity hidden)

Age: 4 years Sex: Female

D/o: Suraj Gupta

E No. 109600

MLC no. 11473

Date & Time : 12.05.2013

.....

As told by self and mother, the child had gone to play outside, the neighbour "ATLESH" called her inside there house, lifted her skirt and fondled with the child's private part.

Then he removed his lower pants and tried rubbing the private parts of the child with his penis and made her sit on his laps. According to the child; she felt pain and ran out of the house. She was found standing outside their house & was crying, when seen by the mother. She was taken to bathroom, where she started crying more, while passing urine and then described the whole incidence.

-Paediatrician call for t/t of local inflammation

-to do HBsAg, HCV, VDRL, HIVR

.....

L/F
Inflammation seen on labia and mucosa
Small abrasion seen on the interior of left labia minora."

7.4. In her testimony before the court, PW-4 stated that :-

"I know the accused present (correctly identified) as he is Tau of my friend namely Cheenu. He is living in our neighbourhood. Accused took me to kitchen. TAUJI NE NU NU DALI THI. Witness has pointed towards her urinal part. I felt pain. I went to my house and told the incident to my mother. Previously I had

also come in the court. My statement was recorded by the aunty. NU NU by I mean JIS SE SHU SHU KARTE HAI"

7.5. From the above it is clear that in her version to her mother/PW-2, the prosecutrix/PW-4 has described that the appellant/accused after taking his penis out of his pants, took her to a purple colour room and made her lie down on his knees and inserted his ungli (moti) in her su su wala place/vagina and she felt severe pain and cried. From the same, it is apparent that after unzipping himself and taking his penis out, the appellant/accused took the prosecutrix to the purple colour room and made the prosecutrix lie in between/on his knees and inserted his penis in the prosecutrix's vagina, which she described as ungli (moti). PW-4's description that she felt extreme pain and cried, further points towards the fact that the appellant/accused inserted his penis, more so, because, the prosecutrix has not made any mention of severe pain on the earlier occasion in kitchen. The prosecutrix/PW-4's description of the object inserted as 'moti ungli' can be understood in the light of immense pain and trauma she underwent and also her age ; she distinguished it from only 'ungli'. Such description by the prosecutrix to her mother after the incident, appears to be quite in sync with her testimony before Court, "Nu Nu dali thi". There does not appear to be any manipulation considering spontaneity of happenings, narration of the incident to mother, reporting of the same to police, the prosecutrix being taken to the hospital for medical examination, PW-2 narrating the prosecutrix's version to the police, in quick succession. Rather, the truthfulness of the mother/PW-2 in reporting the prosecutrix's version to the police, is reflected from her statement about insertion of 'ungli (moti)' and that she did not substitute it with her own description.

7.6. Similar is the version of the prosecutrix/PW-4 in her statement under Section 164 Cr.P.C. Ex. PW-4/A which was recorded soon thereafter i.e. on the next day.

7.7. However in her testimony, which was recorded on 26.03.2014, i.e. approximately after one year, it is seen that prosecutrix/PW-4 could not give the complete details of the incident as given by her to her mother soon after the incident, and the next day, in her statement under Section 164 Cr.P.C. Prosecutrix/PW-4 while identifying the appellant/accused as Tau of her friend namely Cheenu in the court during her testimony stated that he lives in the neighbourhood. It is seen that though the prosecutrix referred to being taken to kitchen, she could not recount the happening with her in the kitchen, as stated earlier and also did not give details of the accused unzipping himself and taking his penis out and then taking her to purple room, but she did state that "Tauji ne nu nu dali thi" pointing to her urinary part i.e. vagina and that she felt pain. Considering her tender age of only four years at the time of the incident and taking into account the time lapse of about one year by the time she stepped into witness-box, the prosecutrix/PW-4 could not be expected to articulate and narrate with exactitude, the entire incident.

7.7.1. In view of the above, PW-4's inability to recount the entire incident in exact details does not in any manner reflect on the veracity of her testimony. It rather reflects the naturalness of the witness in stating whatever could be recollected by her after one year. It would not be out of place to mention here that nothing worthwhile could be extracted by the appellant/accused in PW-4's cross-examination so as to discredit her testimony. During her cross-examination, PW-4 stated that "Maine apni mummy ko thodi baat batai thi., thodi baat means jara si. Maine bataya ki tau ne nu nu dali thi'. Ld. Counsel argued that the prosecutrix was tutored to say about insertion of penis in order to falsely frame the appellant/accused. Suffice it to state that had the prosecutrix been tutored, she rather would have narrated the entire incident in detail as was done by her

to her mother and thereafter, before the Ld. Magistrate under Section 164 Cr.P.C soon after the incident. Merely because the witness is a minor, it cannot be assumed that she was tutored. In view of the same, judgments in Kapil Singh's case (supra) and Caetano Predade Fernandes's case (supra) are hardly of any assistance to the appellant.

7.8. No doubt, testimony of a child has to be evaluated carefully. But, deposition of a child witness, who is found to be competent to depose, can always be relied upon. Credibility of evidence of a child witness would depend upon the circumstances of each case. If the witness is reliable and his/her demeanor is like that of any competent witness, there is no reason to suspect such witness and discard her testimony. (Dattu Ramrao Sakhare v. State of Maharashtra, MANU/SC/1185/1997 : (1997) 5 SCC 341)

7.8.1. The manner in which the children recall any happening with them and more so, unpleasant and traumatic experiences cannot be lost sight of and the same needs to be kept in mind by the Court while examining children and dealing with their testimony. What to talk of a child, even adults describe their experiences differently, at different times and after a time lapse, depending upon various factors viz., one's sensibility, life experiences, emotional quotient, life perceptions, to name a few. Courts cannot adopt hypertechnical approach and reject the child's testimony on the ground of variation which does not shake the core of the prosecution case. Even in judgment of this Court in 'Court on its Own Motion (supra) (as relied upon by the learned Prosecutor), while dealing with dynamics of child sexual abuse and the way children recount their trauma, this Court noted that, "To accord the same treatment to a child as one would to an adult would result in grave injustice." The court further noted in para 93A as under :-

> "93. A seemingly contradictory initial account is not a reason in itself to disbelieve the subsequent accounts by the victims. The multiple statements placed by the investigating agency should be carefully scrutinized by the Trial Courts in order to ensure that complete justice is done."

7.9. Considering the above in entirety, Ld. Counsel for the appellant has failed to demonstrate any reason to discard the testimony of PW-4, which inspires confidence.

8. Let us now deal with the argument of the learned counsel for the appellant/accused that an altogether different version has come in the history recorded in the MLC Ex. PW-6/A, as was given by prosecutrix/PW-4 and her mother PW-2, where she has not mentioned about inserting of either finger or penis ; MLC only records fondling of child's private part with penis by the appellant/accused. Relevant potion of the MLC Ex. PW-6/A records that :-

> As told by self and mother, the child had gone to play outside, the neighbour "ATLESH" called her inside there house, lifted her skirt and fondled with the child's private part.
>
> Then he removed his lower pants and tried rubbing the private parts with of the child with his penis and made her sit on his laps. According to the child; she felt pain and ran out of the house. She was found standing outside there house & was crying, when seen by the mother. She was taken to bathroom, where she started crying more, while passing urine and then described the whole incidence."

8.1. As far as the version of the prosecutrix and her mother recorded by the doctor in MLC Ex. PW-6/A is concerned, suffice it to state that the same cannot be considered in isolation. It has to be kept in mind that the child, who was subjected to sexual assault

and a parent, whose tender age child was sexually assaulted ; and who are required to visit the police station and thereafter the hospital, not the best of the places one would like to visit, were already undergoing immense physical pain and mental pain and trauma. In that physical and mental state, the doctor was informed about the happenings. It has to be understood from the point of view of the doctors also, who are also under stress. Further, the limitation of verbal communication in such stressful times and individual perception of human beings including doctors, cannot be lost sight of.

8.2. Keeping the above in mind, the history in Ex. PW-6/A MLC is quite consistent with PW-2's statement/complaint Ex. PW-2/A, her testimony and even the testimony of PW-4, the prosecutrix. It is seen that the appellant/accused has been named by them in MLC, though mentioned as 'Atlesh'. Reporting to the doctor that the appellant/accused removed his lower pants and tried rubbing PW-4's private part with penis and she felt pain and ran out of the house supports PW-4's deposition before the Court, where she stated that 'Tauji ne NU NU dali thi' pointing towards her urinary part. Mention of 'penis' in the MLC and thereafter in PW-4's testimony before court clearly show that she rather has maintained her version before the court. Rather mention in MLC that the prosecutrix felt pain on the appellant/accused rubbing her private part with his penis and that she ran out of the house lends credence to the PW-4/prosecutrix's version before the Court that "Tauji ne nunu dali thi.... I felt pain. I went to my house and told the incident to my mother'. Thus, there is hardly any contradiction/ improvement much less material contradictions in the prosecutrix/PW-4's version before the doctor and before the Court, as pleaded by the learned counsel for the appellant/accused. Further, mention in MLC about the appellant/accused removing his lower pant and rubbing PW-4/prosecutrix's private part with his penis, rather support the prosecutrix's version to her mother as has come on record vide PW-2's unshaken testimony. PW-2 has testified that prosecutrix/PW-4 had inter alia, told her that the appellant/accused had opened his pant and opened his Nu Nu i.e. taken out his penis, and thereafter took her to purple colour room where she/PW-4 was made to lie on his knees and thereafter, 'the appellant/accused ne mere su su wali jagah me apni ungli (moti) dali va mujhe bahut dard hua, mai roi.' The fact that appellant/accused had made the prosecutrix lie down on his knees, is also found reflected/recorded in MLC, though in a different manner ; MLC records that the appellant/accused had made the prosecutrix/PW-4 sit in his lap.

8.3. It may also be mentioned that nothing in this respect was put to PW-6 the concerned doctor, Dr. Pannam Sharma in cross-examination. Instead of seeking any clarification on the above aspect, it was suggested to PW-6 that she had recorded the aforesaid history at the instance of IO without examining the prosecutrix. In response to which, PW-6 stated that the alleged history was told by the mother of the victim and also by the victim/prosecutrix. The above suggestion to PW-6 is contrary to the appellant's own stand that prosecutrix/PW-4 gave a different version to the doctor in order to falsely implicate him.

9 . Version of PW-4/prosecutrix that the appellant/accused had inserted penis in her vagina finds corroboration in the testimony of PW-2, who while reiterating the whole incident as given in her statement Ex. PW-2/A, stated that prosecutrix told her that 'he took her to a room ..... he sat on the floor and made her lie between his knees and prosecutrix told me that the father of Anisha put a part which was thick like finger in her private part and she felt pain.' In her cross-examination, PW-2 has stated that 'I went to the hospital with my daughter for medical examination. Doctor made enquiries from me about the incident and I told the same. Doctor also made enquiries from my daughter.' She was not confronted with history recorded in MLC Ex. PW-6/A to point out

that it does not record about insertion of finger like thick part.

10. The prosecutrix has testified that she felt pain when the appellant/accused inserted his penis and that she had informed the same to her mother. PW-2, mother of the prosecutrix, has stated that she noted redness in the private part of the prosecutrix/PW-4 and that she/PW-4 was having pain. Testimony of PW-2 and PW-4 is corroborated by medical evidence-MLC Ex. PW-6/A and testimony of PW-6. MLC Ex. PW-6/A records as follows after PW-4/prosecutrix's medical examination :

> "Inflammation seen on labia and mucosa.
>
> Small abrasion seen on the interior of left labia minora."

10.1. It is note-worthy that PW-6 was not cross-examined with respect to the aforesaid injuries/inflammation/abrasion.

10.2. It may be worthwhile to make reference to medical jurisprudence with respect to the nature of injuries young child may suffer on sexual assault, as also came to be referred to in Chand Bibi's case (supra), A Textbook of Medical Jurisprudence and Toxicology" by Modi, in 24th edition page 668 notes that-

> 'in small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum'

Further, in Parikhs's textbook of "Medical Jurisprudence, Forensic Medicine and Toxicology" 6th edition page 5.38, observes:

> ***"in young children as the vagina is very small and hymen deeply situated,*** *the* ***adult penis cannot penetrate*** *it. In rare cases of great violence, the organs may be forcibly introduced, causing rupture of the vaginal vault and associated visceral injuries.* ***Usually, violence is not used and the penis placed either within the vulva or between the thighs. And as such, only redness and tenderness of the vulva may be caused.*** *The hymen is usually intact..... There may be no signs or very few signs of general violence, since the child has no idea of the act is also unable to offer resistance."*
>
> (emphasis supplied)

10.3. Aforesaid injuries i.e. inflammation seen on labia and mucosa and small abrasion seen on the interior of left labia minora of the prosecutrix/PW-4, point towards the fact that when the appellant inserted the penis in her vagina, the prosecutrix started crying pursuant to severe pain, he let her go saving her of any further injury. Same when considered in the light of the above description of injuries which a child of such age may suffer, the argument of the learned counsel for the appellant/accused that prosecutrix would have suffered extensive damage and bleeding, had there been insertion of penis, hardly carries any weight. Thus, the judgments in Rahim Beg and Ors (supra) ; Kallu Ahirwar (supra) and Sahajan Khan (supra) relied upon by the appellant are of no assistance to him. In these facts, even, judgment in Nikka Ram vs. State of H.P. Crl. App no. 321/2017, is of no help to the appellant.

10.4. Further, neither was any clarification sought from PW-6/Dr. Pannam Sharma, as to the nature of injuries the prosecutrix would have suffered in case of insertion of finger or that of penis ; and whether despite penetration, only such

injuries/inflammation/abrasion could happen. In view of same, we are inclined to accept the argument of the learned Prosecutor that the injuries suffered by the prosecutrix/PW-4 points towards the slight insertion of penis by the appellant/accused, on which the prosecutrix felt severe pain and started crying, whereafter appellant/accused let the prosecutrix go.

10.5. In view of the above, argument of the Ld. Counsel for the appellant that inflammation on labia and mucosa and small abrasion on the interior of left labia minora, could have been caused by the physical examination carried out by PW-2 mother of the prosecutrix, not only holds no water, but also in preposterous. Thus, the judgement in Sanya vs. State of Orissa, 1993 Cr.L.J. 2784, also is of no assistance to the appellant/accused. Even the judgment in Rakesh's case (supra) is of no help, the facts being distinguishable. In that case, both the parents of the prosecutrix did not support the prosecution case ; further, there was no medical opinion suggesting sexual assault and also taking into account other attending facts and circumstances of the case, this Court allowed the appeal.

11. In view of the above, it is established that the appellant/accused had sexually assaulted the prosecutrix/PW-4 by inserting his penis in the prosecutrix's vagina and when she started crying because of severe pain, he let her go.

12. As far as the plea of false implication of the appellant/accused because of dispute between the parties over payment of outstanding rent/money dues is concerned, same also is evidently unsustainable in view of the consistent testimony of the prosecutrix/PW-4 and her mother about the incident and other evidence on record as noted above. More so, as the appellant/accused failed to place on record any evidence/material regarding any such dispute except for his bald and unsubstantiated averment in this regard. Although, PW-2 could not comment whether any amount of Rs. 67,000/-was outstanding towards rent, she explained that the rent was always paid in advance. She categorically denied that they had taken any marble stone from the appellant. The appellant/accused in his statement under Section 313 Cr.P.C in reply to question no. 15 stated that the prosecutrix's family resided in his house on rent @ 15,000/-per month and that rent for 3 months was outstanding against them, meaning thereby, the rent of Rs. 45,000/-was outstanding against the prosecutrix's family. Whereas to PW-2 in her cross-examination, it was suggested that a sum of Rs. 67,000/-was outstanding towards rent. Further, in response to the above question, in his statement under Section 313 Cr.P.C, the appellant/accused also stated that the family of the prosecutrix mainly PW-2 picked up quarrel with him and his wife and more specifically in the morning of the date of incident i.e. 12.05.2013. But, no such suggestion of picking up of quarrel by PW-2 on the said account on the day of incident, was put to her in cross-examination. These facts falsify the appellant/accused's plea of false implication. In view of the same, the judgment in Mahender Singh Dahiya (supra) and Ram Chander's case (supra) are of no assistance to the appellant.

12.1. The appellant/accused thus failed to offer any plausible explanation of his false implication by PW-2 and PW-4 even at the cost of facing ignominy and embarrassment for the prosecutrix, who was just 4 years old. The parents are hardly likely to subject their own child to the trauma of medical examination, police interrogation, court exposure involving recording of the statement and cross-examination by foisting false allegations against the accused without any strong motivation.

13. It may be mentioned that a feeble attempt was made by the appellant to create a defence of alibi. In that regard, the appellant/accused produced defence witness Sh.

Mukesh as DW-1 to show that the appellant/accused was not present at the spot on that day. DW-1 testified that on 12.05.2013, he was working as a painter doing whitewash in the appellant/accused's house and used to work from 9.00 am to 5.00 pm. The appellant/accused used to leave for work around same time and never returned in his presence in the evening ; and that he did not see the appellant/accused with any girl child while he was executing the aforesaid work at the appellant's house. During his cross-examination, DW-1 admitted that Sunday was the off day for the accused. It has not been disputed that 12.05.2013 i.e., the date of incident, was a Sunday. Thus, 12.05.2013 being an off day for the appellant/accused, he was not required to go for work on that day. It has further come in the cross-examination of DW-1 that DW-1 used to take lunch (by sitting) during 1.00/1.30 pm and used to take rest for about one hour. In view of same, the presence of DW-1 himself during 1.00-1.30 to 2.30 pm at the spot i.e., around the time the incident took place, is doubtful. In view of the testimony of DW-1 himself, the absence of the appellant/accused from the spot on that day on account of work is ruled out more so in absence of any evidence produced by the appellant in that regard. It is also noteworthy that no suggestion was put to PW-2/mother of the prosecutrix in cross-examination that the appellant was not present at the spot around the time of incident. This is despite the fact that the PW-2 in her testimony has categorically stated that on coming to know about the incident-'I took the prosecutrix downstairs and she identified the accused in my presence and thereafter, I informed at number 100". In light of the same, the testimony of DW-1 is hardly of any assistance to the appellant. The appellant has utterly failed to prove his plea of alibi.

14. In the instant case, the appellant was charged under Section 6 POCSO Act i.e. for offence of aggravated penetrative sexual assault as defined under Section 5 POCSO Act. The POCSO Act raises a presumption under Section 29 that when a person is prosecuted for committing inter alia, an offence under Section 5, the Special Court shall presume that such person has committed or abetted etc, the offence, unless the contrary is proved. Thus, a legal presumption under Section 29 arose against the appellant/accused that he was guilty of the offence punishable under Section 6. The prosecution proved the foundational facts ; it was for the appellant/accused to rebut the presumption under Section 29 by proving to the contrary, which the appellant/accused miserably failed to do.

14.1. In view of the above evidence on record, it has been established that the appellant/accused inserted his penis into the vagina of the prosecutrix. The extent of penetration is immaterial, in view of Section 3 of POCSO Act, which defines penetrative sexual assault ; and as per which, penetration with penis or any other object, to any extent, into the vagina etc. of a child is sufficient, to be punished for aggravated penetrative sexual under clause (m) of Section 5 POCSO Act, in case the child is below the age of 12 years ; and the same is punishable under Section 6 POCSO Act. The fact that the date of birth of the prosecutrix is 01.04.2009, has come on record vide her birth certificate Ex. PW-10/A proved by PW-10 Rajesh Kumar, Sub-Registrar, West Zone, Rajouri Garden, New Delhi, who was not cross-examined. Even otherwise, the appellant has not disputed that age of the prosecutrix being around 4 years at the time of incident. Thus, the offence committed by the appellant squarely falls under Section 5 (m) POCSO Act attracting punishment under Section 6 POCSO Act.

14.2. In view of the above, the judgment in case of Chotu (supra) relied upon by the appellant, is of no assistance to the appellant as the said case involved only rubbing of his private part with the anus of the victim aged about 8 years. Whereas in the instant case, it has been established that the appellant committed penetrative sexual assault.

15. Ld. Counsel for the appellant also argued that the appellant could not have been convicted under Section 6 of POCSO Act because as per the FSL report Ex. PX, nc semen stains were found on the clothes of the prosecutrix/PW-4 or that of the accused. As already noted above that the appellant/accused let the prosecutrix go, when she started crying due to severe pain on account of insertion of penis by him, non-detection of semen on the prosecutrix's or appellant/accused's clothes, does not impact the prosecution case, in view of the credible and consistent testimonies of the prosecutrix/PW-4 and her mother/PW-2 supported by medical evidence.

16. Learned counsel belaboured to further his argument that despite its own case that the public persons were present at the spot ; and it is the public persons who brought the appellant/accused to police station, the prosecution failed to join any public person. Same itself castes a grave doubt about the prosecution story. Suffice it to state that non-joining of witness is not always fatal to the prosecution case, if other witnesses are trust-worthy. In view of the above findings, non-joining of any public witness does not materially impact the prosecution case. Thus, judgement in Ravi Shankar Shyamlal Vishwakarma's case (supra) relied upon by the appellant is of no assistance to the appellant. For similar reason, even judgment in Om Prakash's case (supra), relied upon by the Ld. Counsel is of no help to the appellant/accused facts being distinguishable.

17. Ld. Counsel for the appellant argued that in the alternative, sentence of the appellant, who has already been in judicial custody for about 10 years, be reduced to the period already undergone. The appellant/accused has clean antecedents and has been taking Yoga classes in jail and his conduct remained good in the jail. He is a family person having a wife and two minor children and is the sole bread-earner of the family. In support, ld. Counsel placed reliance upon the judgement of this Court in Khem Chand's (supra).

17.1. Sentencing is an important task while convicting a person for a crime. It is trite that sentence has to be commensurate with the nature and gravity of offence and also the manner in which the crime is committed ; victim's condition and age of the accused and other relevant factors. There is no straight jacket formula for sentencing the accused, however, twin objectives of the sentencing policy i.e. deterrence and correction need to be kept in mind. What sentence would meet the ends of justice depends on facts of each case. The court has to consider aggravating as well as mitigating factors, while sentencing. The Hon'ble Supreme Court in Mohd. Firoz v. State of Madhya Pradesh, MANU/SC/0509/2022 : (2022) 7 SCC 443 while converting the imprisonment from remainder of natural life to a period of 20 years, observed in para 61 as under :-

> "61. One of the basic principles of restorative justice as developed by this Court over the years, also is to give an opportunity to the offender to repair the damage caused, and to become a socially useful individual, when he is released from the jail. The maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche of the offender. Hence, while balancing the scales of retributive justice and restorative justice, we deem it appropriate to impose upon the appellant-accused, the sentence of imprisonment for a period of twenty years instead of imprisonment for the remainder of his natural life for the offence under section 376A, IPC ..... "

17.2. For the offence punishable under Section 6 POCSO Act, the legislature has prescribed the minimum sentence of rigorous imprisonment for a term which shall not

be less than ten years and which may extend to imprisonment for life.

17.3. It is seen that when the prosecutrix/PW-4 started crying, the appellant/accused let her go and did not force himself upon her any further. He did not resort to brutality and violence to complete the act. Further, the appellant/accused was 48 years old at the time of incident ; he has clean antecedents and is first time offender ; he is a family person having wife and two minor children and is the sole bread earner of the family, his conduct in jail has remained good and he has been taking yoga classes in jail. Considering these facts in entirety, we are of the considered opinion that the present facts and circumstance do not warrant imposition of maximum punishment i.e. imprisonment for life as awarded by the Ld. Trial Court.

17.4. The appellant has already been incarcerated for a period of around 11 years 4 months and 8 days, which we consider to be sufficient in the present fact situation. Accordingly, the sentence of the appellant is reduced from life imprisonment to the period already undergone by him. The appellant/accused be released forthwith, if not required to be detained in any other case or proceedings.

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