



2025:DHC:4872



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

Reserved on: 23rd April, 2025

Pronounced on: 3rd June, 2025

+ CRL.A. 754/2024

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.....Appellant

Through: Mr. Harsh Prabhakar, Adv.
(DHCLSC), Mr. Dhruv Chaudhary,
Mr. Shubham Sourav, Adv.

versus

THE STATE NCT OF DELHI

.....Respondent

Through: Mr. Sanjeev Sabharwal, APP for the
State with Ms. Mansi Sharma,
Advocate.

Ms. Vagisha Kochar, Adv. (*amicus curiae*) for the Survivor.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present appeal under Section 415(2) read with Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023, (for short, 'BNSS') has been filed assailing the judgment of conviction dated 27.09.2023 and order on sentence dated 04.03.2024 passed by learned Additional Sessions Judge-04 (POCSO), South District, Saket Courts, New Delhi, whereby the appellant has been convicted in Sessions Case No. 7617/2016, arising out of FIR No. 1082/15, under Sections 376/506 of the Indian Penal Code, 1860, (for short, 'IPC') and



Section 6 of the Protection of Children from Sexual Offences Act, 2012, (for short, 'POCSO Act'), registered at Police Station Ambedkar Nagar.

2. *Vide* the impugned judgment of conviction and order on sentence, the appellant was convicted for the offences punishable under Sections 376(2)/506 of the IPC and Section 6 read with Section 5 of the POCSO Act and sentenced to rigorous imprisonment for 11 years along with fine of Rs.10,000/- and in default of payment of fine, to undergo rigorous imprisonment of 30 days for the offence punishable under Section 6 of the POCSO Act. The appellant has also been sentenced to rigorous imprisonment for 3 years for the offence punishable under Section 506 of the IPC. Learned ASJ had also awarded compensation of Rs.5 Lakhs to the survivor under Delhi Victim Compensation Scheme, 2018.

FACTUAL BACKGROUND

3. Brief facts necessary for the adjudication of the present appeal are as under: -

i) FIR in the present case was registered on the basis of the statement of the mother of the survivor wherein, it was stated that she is living with her parents and was working as guard in Peeli Building School, Madangeer, New Delhi, and on 30.10.2015, she was at her home, but at around 01:00-01:30PM, she could not see her 5 year old daughter, 'K', and her 2 year old son, 'G', who were playing near the staircase. She sent her elder daughter to her husband's noodle stall to



look for her children, however, on returning, her elder daughter told her that both her children were not at her husband's stall. Then, she sent her elder daughter to look for children in the upper side of their house, who returned in a very surprising state and told her mother that the present appellant (*mama*) is doing wrong act with her younger daughter. This she had allegedly seen from the window of the second floor. Complainant along with her elder daughter rushed to the second floor of the house and saw that the door of the room was bolted from inside and window was open. From the window, her daughter was seen naked and the appellant, who is her uncle's son (*chacha's* son), was closing his pants zip. The appellant had locked from inside, so they called his mother and after breaking the iron net on the window they unlocked the door, and found that there was natural and unnatural sex committed on her daughter, K. When they asked 'K', she told that the appellant by removing her underwear had inserted his penis in her.

ii) It was further stated that complainant further clarified from her daughter in respect of natural and unnatural sex and then called number 100 and on arrival of police, the present appellant was handed over to them for further legal action and for medical examination of complainant's daughter.

iii) Earlier, *vide* DD No. 30A dated 30.10.2015, an information was received at PS Ambedkar Nagar regarding the aforesaid incident and in pursuance of the same, SI Saroj Bala and Ct. Sevarati went to the house



of the complainant where they met the complainant, her daughters and others.

iv) Survivor was then taken to AIIMS, where her medical examination was conducted and in MLC No. 14582/2015, no active bleeding was found. However, a small tear in the hymen at a 7'o'clock position was recorded. Bruising and a small laceration of 0.5 centimetres was also observed in the *labia minora* of the survivor. Concerned doctor took nail clipping and other exhibits of the survivor for forensic examination.

v) Based on the statement of the complainant, mother of the survivor, DD entry and MLC of the survivor, FIR for the offences punishable under Section 376 of the IPC and Section 6 of the POCSO Act was registered and the survivor was then taken to a Counsellor for counselling.

vi) During investigation, the appellant was arrested from his house after identification by the child survivor and during his arrest the appellant pointed out towards a brown coloured jute cloth with which he had cleaned his private part after committing the alleged act with the survivor. The said jute cloth was taken into custody. Potency test of the appellant was conducted vide MLC No. 14595/15, and various exhibits were taken which were sent to forensics for examination.

vii) Statement of the survivor under Section 164 of the CrPC was recorded before the learned Metropolitan Magistrate wherein she stated



that, the appellant had inserted his hand, leg and penis in her vagina. He had also hit her foot with his foot and had told her that if she screamed, then he will kill her. She further stated that he will take her to watch *motu-patlu* and *bheem*. Further, statement of mother of the survivor, complainant, under Section 164 of the CrPC was also recorded wherein she stated that on 30.10.2015, she had fast on *Karva Chauth*. Shops were open outside. Her elder daughter was sitting in the shop. Her younger daughter and son were playing near staircase. She called her elder daughter as she was not able to find her lipstick. In the meantime, the appellant came and took her younger daughter and son to watch *Chhota Bheem*. When she came outside and started looking her children and on not finding them, she sent her elder daughter to look for them. Thereafter, the appellant was caught closing his pants zip and her younger daughter was seen naked in his room and police were informed.

viii) On the basis of the statements of the survivor and her mother under Section 164 of the CrPC, offence punishable under Section 506 of the IPC was added. During investigation, birth certificate of the survivor was verified and FSL results were also obtained. On completion of investigation, chargesheet for the offences punishable under Sections 376/506 of the IPC and Section 6 of the POCSO Act was filed arraying the appellant as accused before the Court of competent jurisdiction.



4. Learned Trial Court *vide* order dated 10.02.2016, framed charges for the offences punishable under Sections 376(2)/506 of the IPC and Section 6 read with Section 5 of the POCSO Act against the present appellant. He pleaded not guilty to the charges framed against him and claimed trial. Prosecution in order to prove the guilt of the appellant examined 12 witnesses. In order to disprove the case of the prosecution, the appellant examined 3 witness in his defence. The said witnesses are his mother, DW-1; HC Subhash Chand, DW-2; his sister, DW-3.

5. Learned Trial Court, after analysing the statements of the prosecution witnesses, evidence led by the prosecution and the statement of the appellant/accused recorded under Section 313 of the CrPC as well as the defence evidence led by the appellant, convicted the appellant for the offences punishable under Sections 376(2)/506 of the IPC and Section 6 of the POCSO Act and sentenced him accordingly, as noted hereinabove. Hence, the present appeal has been filed assailing the impugned judgment of conviction and order on sentence.

SUBMISSIONS OF BEHALF OF THE APPELLANT

6. Learned counsel for the appellant has submitted that the learned Trial Court has erred in passing the impugned judgment of conviction as it has completely ignored the inconsistencies and contradictions in the statements of material prosecution witnesses. It is submitted that there are material contradictions in the version of the incident narrated by the survivor/PW-1 in her statements recorded under Section 161 and Section 164 of the CrPC and



in her testimony recorded before the learned Trial Court and the same have been pointed out in the written submissions placed on record on behalf of the appellant. It is pointed out that the survivor has materially improved the allegations made by her in earlier statements as the allegation of hitting/beating the survivor on her index finger of the right hand and bleeding were not there in her initial statements recorded under Sections 161/164 of the CrPC. It is further submitted that survivor has stated that the appellant had opened the door of the room, however, her elder sister, PW-2, and mother, PW-6, in their statements have stated that the door was locked from inside and they had opened the door after tearing the iron net.

7. It is further submitted that there are various intrinsic contradictions in the version of the incident narrated by survivor, her elder sister, and, mother. It is further submitted that the mother of survivor, PW-6, was not on talking terms with the appellant and his mother, DW-1, and in her testimony, she had stated that she asked her husband, PW-3, not to make complaint as the appellant is the son of her paternal uncle and she had also called the police and informed them not to come to house stating that it was an incident of simple quarrel between the family members.

8. Learned counsel has further submitted that a child witness may be susceptible to tutoring specially when parties are on inimical terms and in the present case, survivor, her elder sister, have admitted in their testimonies that their mother, PW-6, does not speak to the appellant or his mother. It is pointed out that the survivor has admitted in her deposition that her mother had told her what to state before the Police as well as to the Court. Thus, the



testimony of the survivor in the present case is not of sterling quality and the same is also not corroborated adequately and is fraught with several contradictions. Reliance has been placed on **Chaggan Dame v. State of Gujarat**¹, and **Pradeep v. State of Haryana**² in support of this contention.

9. Learned counsel has further submitted that the case of the prosecution is also not supported by medical evidence inasmuch as the MLC (Ex. PW-12/A) of the survivor does not show/suggest any fresh injury which would be expected if a child of such a tender age is subjected to penetrative sexual assault as stated hereinabove. It is pointed out that the doctor had recorded that there was no active bleeding and no fresh bruise was found in person on the survivor. Reliance has been placed on the judgment of Hon'ble Supreme Court in **State (GNCT of Delhi) v. Vipin @ Lalla**³, to contend that in the said case acquittal of the accused was upheld in the wake of the contradictions in the evidence of the survivor even though the medical report recorded that the hymen is torn. It is further the case of the appellant that the allegation of the survivor that she suffered an injury on her right index finger and bleeding have not been corroborated by her MLC.

10. Insofar as the recovery of the jute bag from the room of the appellant is concerned, it is submitted that there is material contradiction in the case of prosecution itself in the recovery of the said bag. It is pointed out that as per the police personnel, the recovery was effected on the same day of the incident, *i.e.*, 30.10.2015, however, PW-6, mother of the survivor, in her

¹ 1995 SCC (Cri) 182

² 2023 SCC OnLine SC 777

³ Order dated 07.01.2025 passed by Hon'ble Supreme Court in Criminal Appeal No. 94 of 2025



testimony had stated that the recovery was effected on the next day of the incident in the absence of the appellant. With respect to FSL report, it is submitted that the prosecution has not placed on record *maalkhana* register to show the chain of custody of the articles/things sent for examination to FSL and in absence of same, it is submitted that it would be unsafe to rely on the the results of FSL. It is further the case of the appellant that the survivor had not stated in her deposition that the appellant had used the said jute bag to wipe his private part after the commission of the alleged act and even otherwise, said jute bag was not put for identification when the testimony of the survivor was recorded. It is further submitted that no photographs of the place of the incident have been placed on record by the prosecution or investigating officer during the course of trial, however, PW-3, father of the survivor, had stated that photography of the scene of crime was conducted.

11. Without prejudice to the aforesaid contentions, it is submitted that the appellant is an adult of 28 years of age and was merely 19 years at the time of alleged incident and his family comprises of his aged mother, who is also suffering from various ailments, and two married sister and one brother, who has shifted from house of his mother, and now he is the only one to look after his mother. It is further submitted that besides the present case, the appellant has clean antecedents and is not involved in any other case/offence. In view of above, it is thus, prayed that this Court may take a lenient view in respect of the order on sentence is concerned and sentence the appellant to the custody period already undergone.



SUBMISSIONS ON BEHALF OF THE STATE

12. *Per contra*, learned APP for the State, assisted by learned *Amicus Curiae* appointed by the Court to represent the survivor, has submitted that the learned Trial Court has rightly convicted the appellant after proper appreciation of facts and evidence led by the prosecution as well as the appellant. It is further submitted that the survivor has been consistent throughout in her statement under Section 164 of the CrPC as well as in her testimony recorded before the learned Trial Court with regard to the insertion of private part of the appellant in her private part and has withstood the test of cross-examination. It is further submitted that nothing adverse has been elicited out of her cross-examination which would have caused dent in the case of the prosecution and insofar as the minor contradictions is concerned, it is submitted that the survivor was merely 5 years old at the time of examination before the learned Trial Court. Reliance has been placed on **State of Punjab v. Gurmeet Singh**⁴, to contend that the minor contradictions or insignificant discrepancies in the statement of the survivor should not be a ground for throwing out an otherwise reliable prosecution case.

13. It is further submitted that the version of the incident narrated by the survivor is also corroborated by the eye-witness, *i.e.*, her elder sister, PW-2, who had seen that the appellant had removed the legging (*pyjami*) of the survivor and his trousers were down to his knees and he had inserted his penis into the vagina of the survivor. It is also submitted that after her rescue, the survivor had immediately informed her parents that the accused had

⁴ (1996) 2 SCC 384



committed penetrative sexual assault on her. It is the case of the prosecution that their case is also supported by MLC of the survivor and the FSL report as in the MLC, the injuries sustained by the survivor were recorded and the presence of semen was also found on the jute bag recovered from the room of the appellant and he had failed to explain the presence of semen on the said jute bag which was recovered from his room at his instance only.

14. Learned APP for the State has further submitted that the appellant has not been able to rebut the presumption under Sections 29/30 of the POCSO Act as the defence evidence led by the appellant was not found credible. It is further submitted that the appellant is the maternal uncle (*mama*) of the survivor and has committed aggravated penetrative sexual assault on his niece. It is further submitted that the impugned judgment has been passed after appreciating all the contentions and evidence led both the appellant and prosecution. It is thus prayed that the present appeal be dismissed and the impugned judgment be upheld.

ANALYSIS AND FINDINGS

15. Heard learned counsel for the parties and perused the record.

16. The case of the prosecution is that the present appellant who is related to the survivor/PW-1 as maternal uncle, had committed penetrative sexual assault on her, thereby, bringing the case under Section 5(m) read with Section 6 of the POCSO Act. It is further the case of the prosecution that the



said act was witnessed by PW-2/sister of the survivor, PW-3/father of the survivor and PW-6/mother of the survivor.

17. The survivor in this case was stated to be 5 years old and was examined as PW-1. She testified that she was living alongwith her parents and siblings on the ground floor. She further deposed before the learned Trial Court that the appellatant had threatened that if she would raise alarm, he would kill her and then, he inserted his penis into her vagina and also into her body part used for defecation. She further stated that the appellatant had hit her on the index finger of her right hand and then, she had narrated the incident immediately to her mother, who had called the police. She stated that the incident took place in the room constructed above her house in which she was living with her parents.

18. PW-2, who is the sister of the survivor and was around 15 years old at that time, deposed that the incident had taken place on 30.10.2015 at about 01:00 PM or 01:30 PM. She stated that she was at the provisional shop of her *naani* and her younger sister, *i.e.*, PW-1, survivor, and her brother was also with her. After some time, she returned to the shop after bringing some articles and found that her younger sister (survivor) and brother were not there. She stated that she informed her mother about this fact and thereafter, her mother came to the shop and asked her to search for her younger sister (survivor) and her brother. During the search, she went to the *rehdi* (noodle stall) of her father, who used to sell *chowmin* near the school but her younger brother and sister (survivor) were not there. It is further stated that, thereafter, she returned to the house and her mother asked her to go upstairs and search



for her siblings. When she reached the second floor of the building, she saw that the room was closed from inside and the window was open. When she peeped inside the room through the window, she saw that the legging of her sister/PW-1 had been removed and the trousers of the appellant were down at his knees and he was doing wrongful act on her sister, PW-1. She further stated that the appellant had inserted his penis into the vagina of her sister and she came downstairs to inform her mother of the incident. Thereafter, her mother called her father and told him about the incident. It is further stated that her father, thereafter, went upstairs and broke the window of the room as the same was not being opened by the appellant and then, the police was called.

19. PW-3/father of the survivor stated that on 30.10.2015 at about 1:30 PM, PW-2 came to him and told him that his younger children were missing. It is stated that when he reached the house, at the instance of PW-2, he went upstairs to the third-floor, where the appellant, his brother-in-law, used to reside. He states he knocked on the door of the room but the appellant did not open the same. Thereafter, he broke the window and brought out the appellant alongwith the survivor/PW-1. On inquiry, the survivor told him that the appellant had inserted his penis into her vagina. He further stated that thereafter, his wife/PW-6 called the paternal uncle of the appellant and after coming to the spot, said uncle had called the police.

20. PW-6, mother of the survivor, stated that on 30.10.2015 at about 12/12.30 PM, she was present at the house and the survivor and her youngest son, who is about 1.5 years old, were playing near a staircase of their house.



She stated that it was the festival of *Karwa Chauth* on that day and she was busy getting food ready for *katha*. At about 1.00/1.30 PM, she found that both her children were not near the staircase and so she sent her eldest daughter, PW-2, to find out if her younger daughter, PW-1, and son were playing in the neighbourhood. Her daughter, PW-2, returned back and told her that they were not there. On this, she further asked PW-2 to go to the *rehdi* of her father to see if the children were present there. PW-2 came back to her and informed her that the both of them were not there. On this, she sent PW-2 to go upstairs to search for them. She stated that PW-2 hurriedly came to her and told her that she had seen the appellant who had removed his clothes and survivor, PW-1, in naked condition in a room on the second floor. PW-2 informed her that she had seen them through the window of the room. PW-6 further stated that she alongwith her husband, PW-3, went to the room and saw that appellant by that time had put on his pants and the survivor was only wearing her top and was naked from down her waist. It is further stated that they knocked on the door of the room but found that it was bolted from the inside and saw survivor and the appellant in the said condition through the window. Thereafter, it is stated that they broke the grill of the window and brought out the appellant. When she enquired from the survivor/PW-1, the latter informed her mother, PW-6, that the appellant had inserted his penis into her vagina and then, she started weeping. This witness further stated that the elder brother of the appellant was called to their house who subsequently called the mother of the appellant as well and during this time, her husband, PW-3, informed the police at 100 number. She stated that she asked her husband not to make a complaint as the appellant was the son of her paternal uncle and she also called the police and informed them not to come to their house by saying,



“hamare bahan bhai ka jhagda hai”. She stated that the mother of the appellant, DW-1, came to her house and told her to shift somewhere for 3-4 months as the appellant was residing on the second floor of the same building. She further stated that the mother of the appellant, DW-1, told them that they were lying and that they should get the medical examination of the survivor done to ascertain the truth and at that point, she called the police at 100 number and a PCR van came to her house and took the appellant.

21. The prosecution relies on the MLC, Ex.PW-12/A, wherein, it has been recorded as under: -

“Labia Minora.....Bruise+small laceration 0.5 cm... no active bleeding
Hymen....small tear at 7’o clock position... no active bleeding”

22. The prosecution further relies on the FSL result, Ex.PW-9/A as per which the genetic material of the appellant was found on the jute bag recovered at his instance from his room.

23. Appellant’s statement under Section 313 of the CrPC was recorded. Relevant portion of the same are as under:-

“Q. 4: It is in evidence against you as deposed by pw1 (the victim), namely "K" that she raised alarm. She narrated the incident to her mother immediately after the incident. Her mother called the police. The police made inquiry from her. She appeared before a Judge aunty and told her about your acts committed against her. The incident took place in the room constructed above her house in which she is still living with her parents. What do you have to say?

Ans. It is wrong. Sister of the victim had come and her mother had not come to my room. The victim was in my room at that time. The victim had come to my room of her own. I was lying down on the bed. The door was unlocked.



Q.13: It is further in evidence against you as deposed by PW-3 (father of victim), namely, Sh. "M" (full particulars are mentioned at serial number 03 in the list of witnesses in the police report under section 173 Of Cr.P.C., and withheld here to protect the identity Of victim) that on 30.10.2015, he was working at his rehri and on that day, at about 1:30 pm, his step daughter "B" came to him and she told that his both kids, that is, his victim daughter and son "G" were missing. On this information, he reached his house and at the instance of "B" he went upstairs at third floor, where his brother-in-law, that is, You used to reside there. He knocked the door of your room but You did not open the door. He broke the window and then opened the door of the room and brought You out and his victim daughter K. His victim daughter was wearing her clothes. What do you have to say?

Ans. It is wrong. My real sister Jyoti had opened the window of my room. I was alone in the room at that time. "B" had already taken G and K from my room. At that time, the door was opened and I was lying on the bed. G and K were going up stairs and had stopped in front of my room. "B" had come to see where they were and she had taken them away with her.

Q.14: It is further in evidence against you as deposed by PW-3 (father of victim), namely, Sh. "M" that on inquiry his victim daughter had told him that You had inserted your susu, that is, penis into her vagina. Thereafter, his wife called your Mama and after Your mama came at the spot he had called the police. What do you have to say?

Ans. It is wrong. I was beaten by MA and Mu as B told them that I had done wrong act (sex) with K. I had done nothing wrong.

Q. 23: It is further in evidence against you as deposed by PW-6, namely, Ms. "M" (mother of the victim) that she along with her husband immediately went there on the second floor and saw that You by that time had already put on your pant and her victim daughter was only wearing her top and she was naked from down her waist. Firstly, they knocked the door of the room but when they found it bolted from the inside, they saw her victim daughter and You in the said condition through the window. They broke open the grill of the window and her husband opened the door by unbolting the door through his hand. They brought the victim downstairs. She told the incident to her mother and also informed your elder brother, namely, Vijay. What do you have to say?

Ans. It is wrong. The door was already opened when Mu and MA came there.



Q. 25: It is further in evidence against you as deposed by PW-6, namely, Ms. "M" (mother of the victim) that your elder brother, namely, Vijay came to her house. Thereafter, he also called his mother at her house. Before the arrival of your elder brother, her husband also informed the police at 100 number. She asked her husband not to make complaint as You were son of her paternal uncle. She also called the police and informed them not to come to her house stating that "humare bahan bhai ka jhagda hai". What do you have to say?

Ans. It is wrong. My mama Jaggi had called the police but I do not know what he told the police.

Q. 32: It is further in evidence against you as deposed by pw-6, namely, Ms. "M" (mother of the victim) that the pajami of her victim daughter was lying on the floor of the room and she also brought the same along with her daughter and made her to wear the same. She identified one pajami of black colour produced in sealed pullanda by the MHCM which was having cut mark as the same pajami which was worn by her victim daughter on the day of incident. The said pajami is Ex.MO- 02. What do you have to say?

Ans. K was wearing a black colour pajami on the day of the incident.

Q. 37: It is further in evidence against you as deposed by pw-9, namely, Dr. Indresh Kumar Mishra, Assistant Director (Biology), RFSL that on 26.11.2015 he was working as Sr. Scientific Officer (Biology). On that day 12 sealed parcel's were received in their office along with sample seal and the same were marked to him for analysis. The parcels were tallied with the sample seal. The said parcels were opened and he had examined the same and prepared his report on 06.09.2017. At that time, he became Assistant Director (Biology). The FSL report no. 2015re-7590 810 No. 2216/2015 dated 06.09.2017 is exhibited as Ex.PW9/A which bears his signatures at points A, 8 and C. After examination of the exhibits he found that "DNA profiles (STR analysis) generated from the source of exhibit '8' (i.e. jute bag) was found to be similar with the DNA profile generated from the source of exhibit '11' (i.e. blood in gauze of accused). However, DNA profile could not be generated from the source of exhibits "1", "2", "3", "4", "5", "6", "7", "9" and "12"." After examination of the exhibits, the remnants of the exhibits were sealed with the seal of "IKM FSL DELHI". What do you have to say?

Ans. I do not know how my genetical material was found on the Bori.



Q. 55: Why the witnesses have deposed against you?

Ans: I do not know.

Q. 56: Do you want to lead evidence in your defence?

Ans : Yes.

Q. 57: Do you want to say anything else?

Ans: I am innocent. I have been falsely implicated. We have a dispute with family of K on issue of property that is the house at Madangiri. The father of K wanted to purchase the house but we refuse for the same as they were offering very little money. I do not want to say anything else.”

24. Thereafter, the appellant examined DW-1, Smt. Bimla, his mother, who stated that on 30th of one month in 2015, the exact month of which she does not remember, she had gone to her in-laws’ house. She received a phone call from her elder daughter calling her home. Then she went to her room and saw that the appellant, her son, was locked in a room on the third floor and survivor was with her grandmother and was fine. She stated that the door was bolted from the inside and she opened the same. She tried to get the same opened but her son was unconscious. She tried to get him to open the room, and thereafter, her younger daughter came and put her hand in the window and opened the lock of the door. Thereafter, she brought her son to his senses. She further stated that the appellant informed her that the mother of the survivor, PW-6, had beaten him and had left the room after bolting it from outside. She further stated that the grandmother of the survivor wanted her to vacate the house and she was offering Rs.6 Lakhs to leave the house but she did not agree for the same. She further stated that the grandmother of the survivor was causing hinderance in the marriage of her younger daughter and she had made a complaint in this regard which was exhibited as Mark A.

25. DW-2 was HC Subhash Chand, who deposed that all the records of all complaints upto 31.12.2018 have been destroyed as per rules and tendered the



verified copy of the order directing destructions of the record issued by the then ADCP is Ex.DW-2/A.

26. DW-3 is Jyoti, who is the sister of the appellant, and stated that on 30.10.2015, her mother had come to her in-laws house for the festival of *Karwa Chauth* and was sitting there. She stated that Asha @ Manju, daughter of her aunt (*Tai*) "G" called her mother, and thereafter, she alongwith her mother went to the house of her mother and then, saw that her brother/the present appellant was locked in a room by parents of the survivor and they were told by them that her brother had done "*galat kaam*" with the survivor. She stated that she asked the parents of the survivor to take her to the doctor but they refused. She also asked them to lodge a complaint but they also refused for the same. Thereafter, she stated that she took the survivor to Dr. Nadeem near the house of her mother. The doctor said that nothing had happened with survivor and asked her and parents of the survivor to take her back.

27. So far as the issue of the age of the survivor is concerned, no challenge has been raised with regard to the same, and therefore, it is established beyond reasonable doubt that the survivor at the date of the incident was less than 12 years of age.

28. Learned counsel appearing on behalf of the appellant has pointed out various inconsistencies in the statement of the survivor. The survivor in her statement under Section 164 of the CrPC (Ex. PW-4/C) has stated as under: -

“Deepak ne mere susu karne wali jagah par apne susu kame wali jagah, haath aur taang dali thi. Usne mere pair par apna pair bhi maara tha aur



bola tha ki chilayi gayi toh maar doonga. “G” ko bhi upar le gaya. “J” aur Amma ne Deepak ko maara. Usne mujhe kaha tha ki weh usse motu patlu aur bhim dikhayega. Deepak bola tha ki agar chilayi gayi toh tujhe maar doonga.”

29. It was submitted on behalf of learned counsel appearing on behalf of the appellant/applicant that the stand of the survivor was not consistent as in the statement recorded before the learned Trial Court the allegation with respect to hitting on her foot with his foot and putting his hand and foot in her private part is not mentioned. It is pertinent to note that the survivor at the time of incident was around 4 years and 9 months old and at the time, she was examined before the learned Trial Court, she was approximately 5 years and 3 months old. In these circumstances, looking at the age of the survivor as well as lapse of time from the date of the said incident to her examination should be borne in mind. It is noted that the survivor otherwise has been consistent in her testimony with regard to the appellant inserting his private part into her private part. The MLC (Ex.PW-12/A) as pointed out hereinabove, on genital examination of the survivor corroborates the testimony of the survivor.

30. Learned counsel appearing on behalf of the appellant had challenged the FSL report, Ex.PW-9/A, on account of the fact that the semen on the jute bag was planted and that the chain of custody in the present case is missing as the register at the *maalkhana* has not been exhibited, and therefore, there is no evidence of record as to whether the case property was kept in safe custody or not. In this regard, the prosecution has examined PW-5/Naresh Kumar who took the appellant for his medical examination and has deposed that after the examination the doctor handed over to him 4 sealed *pullandas* along with sample seal which was seized by the IO *vide* seizure memo Ex. PW 5/A.



31. Next witness in this regard is PW-10/ASI Shaji T.A., who deposed that on 30.10.2015, the appellant had pointed out one Jute Bag which was lying in his room. It is the case of the prosecution that Investigating Officer/PW-11-Inspector Saroj Bala thereafter, seized the aforesaid jute bag and sealed with the seal of SB which was then seized by the IO *vide* seizure memo Ex.PW10/C which was then deposited with the *maalkhana*. In the cross-examination of the PW-11, no question was put with regard to the deposition of the case properties before the *maalkhana* or any suggestion to the effect that the same was not deposited in the *maalkhana*.

32. Another witness is PW-8/HC Raj Singh who took the samples to FSL *vide* RC No. 259/21/15 (Ex. PW-8/A). The said witness deposed that the samples were deposited by him at FSL Rohini and acknowledgment of the same was proved by Ex.PW-8/B. Thus, the chain of custody with regard to the seizure of the jute bag till its deposition with the FSL has been established and nothing has been brought on record by the defence by way of cross-examination of these witnesses to show that the case property was not deposited with the *maalkhana* or that it was tampered with.

33. PW-9/Dr. Indresh Kumar Mishra, who had given the FSL report, Ex.PW-9/A, had also deposed that test samples/exhibits of the appellant and the survivor and the jute bag was received at the FSL in a sealed condition and the same were tallied with the sample seal. On DNA examination, the aforesaid report establishes the genetic material of the appellant was found on the jute bag.



34. Learned counsel appearing on behalf of the appellant further contended that the genetic material may be present in the jute bag for many reasons as the place from where it was recovered was his room, however, the said defense was not put to the Investigating Officer, during her cross-examination and it was alleged that the semen had been put on the jute bag in order to falsely implicate the appellant. As noted hereinabove, in response to question number 37, the appellant had stated that he did not know how the genetic material was found on the said jute bag/*bori*. Learned Trial Court has correctly observed that it does not appeal to reason that the investigating agency would go to such an extra length to procure the jute bag/*bori* and plant it in the room of the appellant, and thereafter, put genetic material on it.

35. Next contention raised by learned counsel appearing on behalf of the appellant was that the survivor was a tutored witness as in her cross-examination, she had admitted that her mother had told her what to tell the police or judge aunty as well as in the Court on the day of her examination. Such a statement of the survivor, who is aged about 5 years, at the time of her cross-examination will not bear any significance keeping in view the fact the MLC as well as FSL report fully corroborates her testimony. The learned Trial Court before recording the survivor's testimony had satisfied itself after putting various questions to her with regard to her being a competent witness. The testimony of the sister of the survivor/PW-2 as well as the mother of the survivor/PW-6, and also, father of the survivor/PW-3 supports the case of the prosecution. Learned counsel appearing on behalf of the appellant had contended that there are various discrepancies in the evidence of these



witnesses as well. The discrepancies as pointed out by learned counsel with regard to how the father of the survivor, PW-3, reached the spot and the manner in which the door was opened and the appellant was taken out will not go to the root of the matter. The main testimony is of the survivor which has been corroborated by the MLC as well as FSL report on record. The defence of the appellant was that the family of the survivor wanted to evict him from the portion of the house where they were living and that they were also objecting to the marriage of his sister, namely, Jyoti. The appellant, as pointed out hereinabove, has examined his mother as DW-1 and DW-3 as Jyoti. It is pertinent to note that the presence of the appellant was not disputed even by his family members on the date of the incident in his room from where the alleged jute bag had been recovered or his location at that particular point of time. The assertion on behalf of the appellant is that he was falsely implicated on account of the aforesaid reasons does not seem probable. Section 29 of the POCSO Act raises presumption as to offences committed by any person under Sections 3, 5, 7 and 9 of the Act.

36. Sections 29 and 30 of the POCSO Act reads as under:-

“29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

30. Presumption of culpable mental state.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.



(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, “culpable mental state” includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

37. In the considered opinion of this Court, the defence taken by the appellant has failed to prove to the contrary, the presumption raised under the POCSO Act.

38. Section 3 of the POCSO Act defines penetrative sexual assault as under:-

“3. **Penetrative sexual assault.**—A person is said to commit “penetrative sexual assault” if— (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

39. Section 5(m) of the POCSO Act provides as under:-

“5. **Aggravated penetrative sexual assault-**

.....

(m) whoever commits penetrative sexual assault on a child below twelve years;

40. Section 5(n) of the POCSO Act provides as under:-

“5. **Aggravated penetrative sexual assault-**

.....



(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child;”

41. Section 376(2)(i) of the IPC provides as under:

“Section 376(2) Whoever—

(i) commits rape on a woman when she is under sixteen years of age;
or

(prior to its amendment w.e.f. 21.04.2018)”

42. The prosecution has been able to successfully prove that the appellant had committed the offence punishable under Sections 376(2)/506 of the IPC and Section 5 read with Section 6 of the POCSO Act.

43. Learned Trial Court while passing the order on sentence has taken into account the circumstances and keeping in mind that the appellant was aged 19 years at the time of the incident *i.e.*, on 30.10.2015 has awarded him the sentence in the following manner:-

Sr. No.	Offence	Substantive Sentence	Fine	Sentence in default of payment of fine
1.	Section 6 of POCSO Act	11 years (RI)	Rs. 10,000/-	30 days (SI)
2.	Section 506 IPC	03 Years (RI)	Nil	Nil

44. In view of the aforesaid, there is no infirmity in the judgement of conviction dated 27.09.2023 and order on sentence dated 04.03.2024 passed



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by the learned Additional Sessions Judge-04 (POCSO), South District, Saket Courts, New Delhi.

45. In view of the above, the present appeal is dismissed and disposed of.
46. Pending application(s), if any, also stand disposed of.
47. Copy of the judgment be communicated to the concerned Jail Superintendent for necessary information and compliance, *forthwith*.
48. Copy of the judgment be also sent to the Secretary, Delhi High Court Legal Services Committee, who shall apprise the appellant regarding the legal remedy and assistance of legal aid counsel available to him in respect of the present judgment.
49. Judgement be uploaded on the website of this Court *forthwith*.

AMIT SHARMA, J.

JUNE 03 , 2025/sn