



2025:DHC:7870



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

% Reserved on : 11.08.2025
Pronounced on : 09.09.2025

+ **CRL.A. 1192/2019**

SULEMAN @ MONUAppellant
Through: Mr. Sumer Kumar Sethi, Advocate
(DHCLSC) with appellant in person.

versus

STATERespondent
Through: Mr. Pradeep Gahalot, APP for State
Ms. Sowjhanya Shankaran, Mr.
Akash Sachan, Ms. Anuka Bachawat
and Ms. Charu Sinha, Advocates for
victim.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The present appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 by the appellant challenging the judgment of conviction dated 04.08.2017 and the order on sentence dated 08.08.2017 passed by the ASJ, Special Court (POCSO Act), North, Rohini, New Delhi in S.C. No 58344/16, arising out of FIR No. 1056/2014 registered at P.S. Narela, Delhi under Sections 376 IPC & 10 POCSO Act.

Vide the impugned judgment, the appellant was convicted for the offence under Section 9 (m) punishable under Section 10 of the POCSO Act. By the order of sentence, he was sentenced to undergo Rigorous



Imprisonment for a period of five years alongwith payment of fine of Rs.30,000/-, in default in payment whereof, he was directed to undergo simple imprisonment of 60 days. The Benefit of Section 428 Cr.P.C. was extended to the appellant.

This Court, while admitting the present appeal vide order dated 17.10.2019, had suspended the sentence of the appellant.

2. The facts as noted by the Trial Court in the impugned judgment are extracted herewith:

“2. The brief facts of the case, as borne out from the record, are that complainant Mrs. 'S' is living at Punjabi Colony, Narela alongwith her husband and her two daughters and is a housewife. On 13.08.14 her daughter/victim aged about 5 years, sustained injuries on her chin while playing at home, due to which the complainant alongwith her husband took the child A to Sudhershnan Clinic where the doctor concerned, tended to the injuries and stitched them up.

3. On 17.08.14 around 5.20p.m. the complainant took victim A to Sudershnan Clinic again for the dressing of the wound. At around 5.30p.m. the accused who was working in the clinic took the child inside a room, for the dressing and after 10-15 minutes, the child was sent outside the room and the complainant alongwith the child went back home. On their way back home, the victim A, allegedly informed the complainant, that the uncle, who had bandaged her chin had removed her Pajami and touched her urinary part with his mouth, tongue and his hands. She immediately informed her husband and told him the entire incident and the moment her husband returned home, they went to the clinic where her husband made a call at 100 no .. In the meantime the accused Suleman @ Manu tried to run away from the spot, but on raising alarm he was apprehended by the public persons and was beaten up. On arrival of police accused has handed over their custody.”

3. The charge was framed vide order dated 14.11.2014, under Section 9 (m) read with Section 10 of the POCSO Act, to which the appellant pleaded not guilty and claimed trial. In support of its case, the prosecution examined as many as 13 witnesses, including the child victim who was examined as PW1. The mother and father of the child victim were examined as PW2 and



PW3, respectively. Dr. Anil Garg, who was running the clinic where the appellant was employed, was examined as PW7. Dr. Rajesh SR, SRHC Hospital who proved the MLC of the child victim was examined as PW8. The rest of the witnesses were formal in nature and deposed about the various aspects of investigation. In defence, statement of the appellant was recorded in Section 313 Cr.P.C., wherein he alleged false implication by contending that the parents of the child victim, in order to avoid paying the fees, were bringing a bad name to the nursing home. He did not examine any witnesses in his defence.

4. Learned counsel for the appellant has assailed the conviction by contending that the child victim failed to identify the appellant and moreover, there are material contradictions in the statements of mother and father of the child victim, which would go to the root of the matter and discredit their testimonies.

5. Learned APP for the State on the other hand has supported the impugned judgment by contending that the presence of the accused at the clinic on 17.08.2020 has been established through the testimony of the child witness and her mother as well as the attendance register. It is further submitted that no suggestion with respect to any alleged non-payment of dues was put to either the mother or the father of the child victim in their cross-examination. It is also contended that the testimony of the mother of the child victim would be admissible as *Res Gestae* evidence under Section 6 of the Evidence Act. Reliance in this regard is placed on a decision of a Coordinate Bench of this Court in Jitender v. State of NCT of Delhi.¹

6. The child victim was examined by the prosecution as PW1. She

¹2017 SCC OnLine Del 8723



deposed that she had gone to the Doctor because she had wounded her chin when she fell while playing. At the Doctor's place, the 'doctor uncle' bandaged her chin and thereafter licked her urinary part with his tongue. Pertinently, the child was not able to identify the appellant through a wooden partition. Thereafter, the wooden partition was removed and the child witness, this time assisted by her mother, was again asked to identify the appellant. However, she was yet again unable to identify him.

7. The mother of the child victim was examined as PW2, she deposed that her younger daughter, 2 days prior to the incident, had a fall from the stairs and was injured. On the date of the incident, she took the child victim to the nursing home at 5.30 P.M. for dressing of the wounds. The appellant, who worked as a compounder, took the child victim inside a room for dressing and came out after 10-15 minutes whereafter she left for home with her daughter. It was further stated that on the way back, her daughter had disclosed that the person who had bandaged her chin had licked her urinary part with his tongue. She informed her husband and both went to nursing home where they called the police and appellant was arrested.

In her cross examination, she admitted that she was a regular at the nursing home and had seen the appellant there earlier as well. She further stated that the prior to the incident, the behaviour of the appellant was normal with her children. She was given suggestions as to her husband not paying the bill of the nursing home and that she was falsely implicating the accused. The same was denied.

8. The father of the child victim, who was examined as PW3, deposed on the same lines as PW2. In his cross examination, however, he admitted that on the date of incident he did not go with his wife and daughter to the



nursing home and he himself was not witness to the appellant taking his daughter for dressing.

9. Dr. Anil Garg, who ran the nursing home where the incident is alleged to have taken place, was examined by the prosecution as PW7. He deposed as to the appellant being employed at the place since the last 3-4 years, and referred to the attendance register (Ex.PW7/A) and OPD register (Ex.PW7/B) to state that the presence of appellant as well as the child victim was recorded in the said registers on the date of the incident.

10. The MLC of the child victim was proved through Dr. Rajesh SR, SRHC Hospital who was examined as PW8. The MLC (Ex. PW2/C) notes that the internal medical examination was refused by the mother and father of the child victim. It further notes that except the cloth sample, no other sample could be taken as the attendant guardians had refused consent for other samples to be taken.

11. Section 29 of the POCSO Act provides that Court shall presume that the accused has committed the offence for which he is charged with, until contrary is proved. However, it is not to be forgotten that prosecution has the onus to prove the foundational facts of the commission of the crime and the establishment of the appellant's identity through the evidence collected during the investigation before the presumption under Section 29 can come into effect. A 3-Judge Bench of the Supreme Court in Sambhubhai Raisangbhai Padhiyar v. State of Gujarat² has held that section 29 of the POCSO Act comes into play once the foundational facts are established. It holds as follows:-

²(2025) 2 SCC 399



35. *It will be seen that presumption under Section 29 is available where the foundational facts exist for commission of offence under Section 5 of the POCSO Act. Section 5 of the POCSO Act deals with aggravated penetrative sexual assault and Section 6 speaks of punishment for aggravated penetrative sexual assault. Section 3 of the POCSO Act defines what penetrative sexual assault is.*

12. Gainful reference in this regard may also be made to the decision of a Co-ordinate Bench of this Court in Veerpal v. State³, wherein it was held as under:-

20. Section 29 of POCSO Act provides that Court shall presume that the accused has committed the offence for which he is charged with, until contrary is proved. However, the presumption would operate only when the prosecution proves the foundational facts in the context of allegation against the accused beyond reasonable doubt. After the prosecution establishes the foundational facts, the presumption raised against the accused can be rebutted by discrediting the prosecution witnesses through cross-examination and demonstrating the gaps in prosecution version or improbability of the incident or lead defence evidence in order to rebut the presumption by way of preponderance of probability.

13. Coming to the present case, the child victim (PW-1) has failed to identify the appellant, not only through the wooden partition, but also when the partition was removed and she was assisted by her mother. She has deposed that the 'Doctor Uncle' bandaged her chin and then licked her urinary part with the tongue. However, there is no further indication that the appellant was the 'Doctor Uncle' who committed this act. On the date of the incident, the child victim was accompanied by her mother, PW2. She deposed to the effect that the compounder (present appellant) took her

³2024 SCC OnLine Del 2686



daughter inside a room for dressing. However, she was not a witness to the alleged act.

She has deposed that the child victim informed her about the incident on the way back. Although the prosecution, relying on Jitender (Supra) would contend that the testimony of the mother of the child victim would be admissible as *Res Gestae* evidence under Section 6 of the Evidence Act, however, the said decision can be distinguished factually since in that case, though the child victim had initially not recognised the accused therein, however on the APP pointing him out, the victim had said that he perhaps was the person who misbehaved with her. In the present case, despite being assisted by the mother, the child victim has been unable to identify the appellant.

14. Since a doubt has arisen as to the identity of the appellant, it was for the prosecution to prove the commission of offence by other evidence. The attendance register only proves the presence of the appellant in the clinic but does not prove that he committed the offence. Similarly, the MLC is also of no assistance since the internal examination was refused and there are no outward signs hinting at the commission of offence. In the opinion of this Court, the prosecution has failed to establish the foundational fact that it was the appellant who committed the said offence. Consequently, the presumption under Section 29 POCSO Act would not apply.

15. In view of the abovesaid facts and considering that a failure to identify the appellant by the prosecutrix coupled with absence of any other incriminating evidence against the appellant to connect him with the commission of offence, his conviction under Sections 9 (m) read with Section 10 POCSO Act cannot be sustained and therefore, the appellant is



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acquitted for the commission of said offences.

16. Resultantly, the appeal is allowed. Since the sentence of the appellant was already suspended, his bail bonds be cancelled and sureties discharged.

17. A copy of this judgment be communicated to the concerned Trial Court as well as to the concerned Jail Superintendent.

18. Copy of this judgment be also uploaded on the website forthwith.

**MANOJ KUMAR OHRI
(JUDGE)**

SEPTEMBER 09, 2025/rd