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

Reserved on: 13.01.2026
Pronounced on: 27.02.2026

\+ **CRL.A. 414/2021 & CRL.M. (BAIL) 2407/2025**

VIKAS ..... Appellant

Through: Mr.Ashwin Vaish, Mr.V Thomas, Mr.Uttam Panwar, Ms.Shubhi, Ms.Yashaswi Dasari, Ms.Aaditya Sharma, Advs.

versus

STATE & ANR. .....Respondents

Through: Mr.Aman Usman, APP with Mr.Manvendra Yadav, Mr.Atiq Ur Rehman, Advs. and SI Rahul Rathi, PS Sangam Vihar. Ms.Tara Narula, Ms.Shivangi Sharma, Mr.Shivanjali Bhalerao, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

NAVIN CHAWLA, J.

1. The appellant has approached this Court by way of the present appeal, assailing the Order dated 27.09.2021 passed by the learned Additional Sessions Judge-04 (POCSO), South District, Saket Courts

Complex, New Delhi (hereinafter referred to as the 'Trial Court') in Sessions Case No. 127/2019, titled ***State v. Vikas***, arising out of FIR No. 564/2018, registered at Police Station Sangam Vihar, Delhi, under Sections 376AB and 342 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act'), whereby the appellant has been convicted under Section 6 of the POCSO Act and Section 376AB of the IPC, for committing rape on a girl below 12 years of age, and Section 342 of the IPC for wrongfully confining the victim 'A' (name withheld as the victim was a minor).

2. The appellant also challenges the order on sentence dated 09.12.2021, whereby the appellant has been sentenced to undergo rigorous imprisonment for a period of 30 years (thirty years) for the offence under Section 376AB of the IPC, and rigorous imprisonment for a period of 01 year (one year) for the offence under Section 342 of the IPC, with both the sentences directed to run concurrently. A fine of Rs. 1,000/- has also been imposed under Section 342 of the IPC, with simple imprisonment for 15 days in default of payment of fine; a fine of Rs. 3,02,334.61/- (Rupees Three Lakh Two Thousand Three Hundred Thirty-Four and Sixty-One Paise) under Section 376AB of the IPC, with simple imprisonment for two months in default of payment of fine; and a further fine of Rs. 3,334.61/- (Rupees Three Thousand Three Hundred Thirty-Four and Sixty-One Paise) payable to the State towards defraying the expenses incurred in the prosecution has also been imposed on the appellant.

FACTUAL BACKGROUND:

3. Briefly stated, it is the case of the prosecution that the child victim, Ms. 'A', along with her mother, Smt. 'K' (name withheld to conceal the identity of the child victim) and her father, arrived at the police station on 24.12.2018 and disclosed an offence of 'Aggravated Penetrative Sexual Assault' committed upon the victim. Thereafter, IO/W/SI Jitendra Negi (PW-5) recorded the statement/complaint of the child victim. The child victim, along with her mother, was sent for medical examination at the All India Institute of Medical Sciences. After receiving the MLC of the victim, an endorsement was made on the rukka, and the FIR was registered by the Duty Officer at approximately 01:00 A.M. on 25.12.2018. The appellant came to the police station along with his brother- Sh. Rakesh. The child victim identified the appellant at the police station as 'Chhotu Bhaiya'. The child victim also stated that he removed her pyjama after closing the door and inserted his penis into her vagina. The appellant was arrested on 25.12.2018. The disclosure statement of the appellant was recorded. The medical examination/potency test of the appellant was conducted. The exhibits from the appellant were collected and handed over to IO/W/SI Jitendra Negi, who seized the same. The exhibits were deposited in the malkhana. The victim's statement under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') was recorded before the learned Metropolitan Magistrate, South District, Saket Court Complex, Delhi, on 26.12.2018. The age-related documents of the victim were obtained from her school, showing her date of birth as 08.08.2012.

4. Upon completion of the investigation, a Chargesheet was filed on 23/02/2019.

5. The learned Trial Court, *vide* Order dated 28.05.2019, framed Charges under Sections 342/376AB of the IPC, read with Section 6, read with Section 5 (m) of the POCSO Act, against the appellant, who pleaded not guilty and claimed trial.

6. During the trial, the prosecution examined six witnesses. The statement of the appellant under Section 294 of the Cr.P.C., regarding admission and denial of documents, was recorded on 19.03.2021, and thereafter, his statement under Section 313 of the Cr.P.C. was recorded on 28.08.2021. The appellant led defence evidence and examined one defence witness.

7. Upon conclusion of the trial, the learned Trial Court, *vide* Order dated 27.09.2021, convicted the appellant and, *vide* order on sentence dated 09.12.2021, imposed the sentences as noted above.

8. Aggrieved by his conviction and sentence, the appellant has preferred the present appeal.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE APPELLANT:

9. The learned counsel for the appellant submits that there was a violation of Section 212 of the Cr.P.C., as the order framing the charge itself is defective. He submits that the charge failed to specify the exact place of the alleged offence, that is, the particular floor and room of the building where the offence was allegedly committed. He further submits that there is a discrepancy in the statement of the

victim herself on the place of the offence, inasmuch as it was initially claimed that the assault took place in the room of the appellant situated on the ground floor, whereas later the version was changed to the first floor, where the aunt of the victim (Chachi) resides. Placing reliance on the judgment of ***Main Pal v. State of Haryana,*** (2010) 10 SCC 130; ***Kalicharan & Ors. v. State of U.P.,*** (2023) 2 SCC 583, and ***Bindersingh Nirmalsingh Kaili & Anr. v. State of Maharashtra,*** 1998 SCC OnLine Bom 205, he submits that the place of commission of the offence must be specifically incorporated in the charge.

10. He submits that no scale site plan was prepared. The rough site plan was prepared at the instance of the mother of the victim (PW-3), instead of the victim herself. It is an admitted position that PW-3 was not a witness to the alleged crime and, therefore, was incompetent to point out the place of the alleged incident. In support of this contention, reliance is placed on the judgments of the Supreme Court in ***State of Madhya Pradesh v. Ghudan,*** (2003) 12 SCC 485, and of the High Court of Madhya Pradesh in ***Vijay Singh v. State of MP,*** 2004 SCC OnLine MP 308.

11. He submits that while it is the case of the prosecution that the alleged offence took place between 03.00 P.M. and 04.00 P.M., the victim was produced for medical examination only at 09.45 P.M., that is, after a considerable delay. The Rukka (Ex.PW-5/A) was recorded on the statement of the witness only at 01.05 A.M., reflecting a further delay. Although it is the case of the prosecution that the child, along with her parents, had came to the police station at around 06.00 P.M.,

no reason has been assigned for not recording the statement of the victim at that time.

12. He further submits that PW-3 refused the medical examination of the victim and, for the said reason, an adverse inference is liable to be drawn against the prosecution. In support of this submission, reliance is placed on ***The State of Himachal Pradesh v. Rajesh Kumar @ Munnu,*** 2025 INSC 331.

13. He further submits that although the alleged offence is stated to have taken place in the room of the aunt of the victim, the said aunt was never examined by the prosecution nor summoned as a Court witness by the learned Trial Court. According to the learned counsel for the appellant, this lapse is fatal to the prosecution's case. In support, he placed reliance on the judgments of the Supreme Court in ***Gaurav Maini v. State of Haryana,*** 2024 SCC OnLine SC 1669, and ***The State of Madhya Pradesh v. Balveer Singh,*** 2025 INSC 261.

14. He submits that the testimony of the defence witness, namely Sh.Rakesh Mohan (brother of the accused) examined as DW-1, was also wrongly discarded by the learned Trial Court only on the ground that he is the brother of the appellant. Placing reliance on the judgments of the Supreme Court in ***Mano Dutt & Anr. v. State of U.P.***, (2012) 4 SCC 79, and ***Kartik Malhar v. State of Bihar,*** (1996) 1 SCC 614, he submits that the testimony of a relative cannot be discarded merely on the ground of being an interested witness. He further submits that DW-1 had categorically stated that, at the time of the alleged incident, the appellant had in fact gone to the residence of his sister who lives nearby. DW-1 also stated that at the police station,

the victim had pointed out the helper engaged by DW-1 in his business, namely Chotu @ Rahul as the culprit, however, the police wrongly implicated the appellant in the present case.

15. He further submits that during the trial, the appellant was also denied a fair opportunity to defend himself, as the appellant was not permitted to confront the victim (PW-1) with her prior statements. In support of this submission, reliance is placed on the judgment of the Supreme Court in ***Balveer Singh*** (supra).

16. Without prejudice to his above submission, the learned counsel for the appellant submits that, as per the initial version of the victim, the appellant had merely placed his penis on the vagina of the victim. However, in her subsequent statement, she improved upon her version by alleging penetration. Placing reliance on the judgments of this Court in ***Ram Preet v. State,*** 2024:DHC:9936-DB; ***Raja Halder v. State NCT of Delhi,*** 2024:DHC:10017, and ***Haldar Rajbhar v. State.*** 2025:DHC:10674, he submits that in the absence of any medical corroboration and in view of the victim's initial statement, the appellant, at best, could be convicted under Sections 7/8 or Sections 9(m)/10 of the POCSO Act, and not under Section 6 for aggravated penetrative sexual assault.

17. On the question of sentence, the learned counsel for the appellant submits that at the time of commission of the alleged offence, the minimum punishment prescribed under Section 6 of the POCSO Act was not less than 10 years, which was subsequently enhanced to not less than 20 years. He submits that this subsequent enhancement appears to have influenced the learned Trial Court in

awarding a sentence of 30 years' imprisonment to the appellant. Placing reliance on the judgments of this Court in ***Md. Murshid v. State of NCT of Delhi,*** 2025:DHC:8509, ***Jahangir v. State (NCT of Delhi),*** 2025:DHC:8268, and ***Rahul v. State (NCT of Delhi),*** 2025 SCC OnLine Del 6517, he submits that in similar factual circumstances, this Court has awarded a sentence of only 10 years' imprisonment to the accused therein.

SUBMISSIONS OF THE LEARNED APP FOR THE STATE:

18. Mr.Aman Usman, the learned APP, submits that in the present case, the prosecution's case has been fully proved from the statement of the victim (PW-1) herself. He submits that the presence of the appellant at the house, and the fact that he had come to the house only a few days prior to the date of the incident, stand admitted. It is for this reason that the victim did not know the name of the appellant. No advantage can be given to the appellant for the same. He submits that the story set up by the appellant that it was one Chotu @ Rahul, who had been working with the brother of the appellant for more than four years, who was involved in the offence, stand rebutted by the fact that the victim (PW-1) would have known about him and would have clearly identified him, rather than the appellant herein, as the perpetrator of the crime.

19. He further submits that much emphasis has been sought to be laid on whether the aunt (chachi) of the victim was present in her room and what she was doing at the time of the offence. He submits that the same is clearly irrelevant, as the victim has stated that the

chachi was not in the room but was bathing. Merely because this fact was not stated in her earlier statements, cannot be termed as an improvement or inconsistency. Even otherwise, the case set up by the appellant before the learned Trial Court was that there was some enmity between the parents of the victim and the aunt. In fact, the aunt was named as a witness by the appellant, but was later dropped. Therefore, as admittedly the aunt had not seen the incident, she was not considered important by the prosecution. If she was so important for the appellant, it was for the appellant to have examined her to show her presence in the room. He submits that, therefore, merely because the aunt was not examined, it does not in any manner come to the aid to the appellant.

20. He further submits that it was only in the statement of the brother of the appellant (DW-1) that, for the first time, a vague plea of *alibi* was sought to be introduced by stating that the appellant had gone to the house of his sister on the day of the incident. Apart from this vague statement, no other evidence was led by the appellant in support of the said plea, including the examination of the so-called sister. He submits that, on the other hand, the statement of DW-1 also corroborates the version of the victim and her mother (PW-3) to a large extent, particularly with regard to the appellant being immediately confronted after the victim reported the incident to her mother, as well as on various other aspects.

21. He submits that merely because the mother of the victim did not wish the victim to suffer further on account of a medical examination, and therefore refused the same, no adverse inference can be drawn

against the prosecution, especially when the victim, a child, has remained steadfast in her statement. He submits that this was a case where all the ingredients for drawing the presumption under Sections 29 and 30 of the POCSO Act were made out.

22. He further submits that the mere denial by the learned Trial Court of permission to the appellant to put aggressive questions to the child victim, cannot be said to amount to a denial of a fair opportunity of defence to the appellant. He submits that in terms of Section 33 of the POCSO Act, the powers of the Special Court are wide, and in fact, a duty is cast upon the Special Court to ensure that the victim is not subjected to aggressive questioning or character assassination during the trial.

23. He submits that a mere alleged discrepancy in the statement of the victim regarding the exact location of the offence is also of no aid to the appellant.

24. He further submits that the statement of the victim was consistent on the fact that the appellant had touched her vagina with his penis. From a child of such tender age, it cannot be expected that she would fully narrate that the penis had also entered her vagina. In fact, this clarification came from the victim herself while recording her testimony before the Court, and the same cannot be doubted merely because it was not stated with such clarity in her earlier statement.

25. On the question of sentence, placing reliance on Section 42 of the POCSO Act, he submits that the appellant was liable to be sentenced under Sections 376AB of the IPC, which prescribes a more

severe punishment, and therefore, keeping in view the entirety of the evidence on record, the learned Trial Court has rightly imposed the sentence upon the appellant.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE VICTIM:

26. Ms.Tara Narula, the learned counsel for the victim, while adopting the submissions of the learned APP, has further submitted that the victim in the present case has remained steadfast on her statement and, therefore, the conviction can be based on her sole testimony. In support thereof, she placed reliance on the judgments of the Supreme Court in ***B.C. Deva Alias Dyava v. State of Karnataka,*** (2007) 12 SCC 122; ***Rajinder Alias Raju v. State of H.P.,*** (2009) 16 SCC 69, and of this Court in ***Lokesh v. State***, 2019 SCC OnLine Del 8917.

27. She submits that no benefit can be derived from minor discrepancies in the statement of the victim. In support, she placed reliance on the judgments of the Supreme Court in ***Shamim v. State (Govt. of NCT of Delhi),*** (2018) 10 SCC 509; and ***Ganesan v. State Represented by its Inspector of Police,*** (2020) 10 SCC 573, and of this Court in ***Laxman v. State (Govt. of NCT of Delhi)***, 2020:DHC:3572.

28. She further supports the learned APP in submitting that this is a fit case where the presumption of guilt under Section 29 of the POCSO Act was liable to be drawn, and the same has not been rebutted by the appellant. In support, she placed reliance on the

judgment of the Supreme Court in ***Attorney General for India v. Satish,*** (2022) 5 SCC 545.

29. On the question of there being no penetration, she placed reliance on the judgments of the Supreme Court in ***Madan Gopal Kakkad v. Naval Dubey & Anr.,*** (1992) 3 SCC 204; and in ***State of U.P. v. Babul Nath,*** (1994) 6 SCC 29, to submit that it is not necessary that there should be complete penetration of the male organ, as even partial or slight penetration is sufficient to constitute the offence of rape. She submits that it is equally not necessary that the victim must suffer injuries, as in the case of a child victim, it is quite possible that no injury is sustained. In fact, placing reliance on Parikh's textbook *Medical Jurisprudence, Forensic Medicine and Toxicology*, she submits that in a young child, as the vagina is very small and the hymen is deeply situated, therefore, penetration by an adult penis may not be possible.

ANALYSIS AND FINDINGS:

30. We have considered the submissions made on behalf of the appellant, the victim, and the State, and have perused the material available on record.

31. The prime witness in the present case is the victim herself, who was around 6 years old on the day of the incident. She was examined as PW-1. She stated that the building in which she was residing consisted of three floors. She stated that she, along with her parents and brother, was residing on the first floor of the building. The aunt (chachi) was residing separately in the middle room on the first floor

of the building, while her friend ‘A’, along with her brother ‘R’, and their parents, was residing on the ground floor of the building. She states that on the day of the incident, after coming back from school, she was playing with ‘A’, when the appellant, whom she identified in Court, called her to the room and sent ‘A’ outside the room. He thereafter bolted the room from inside and took off his pants and the pyjama of PW-1. He made her sit on a sofa and then kissed her on the lips. In the later part of her statement, she further stated that “after putting off my pajama, “*bhaiya ne apni susu wali jagah ko mere susu wali jagah me dala” due to which I felt a little pain.* “*maine jab pucha kya kar rahe ho to bhaiya ne kaha kuch nahi”.* She stated that she shouted for help by calling “*Chachi-Chachi”* but at that time she was taking bath, and she might not have listened to her voice. She further states that ‘A’ knocked on the door, on which the appellant wore his pants and put on her pyjama. As he opened the door, ‘A’ fell down on the floor. She immediately went upstairs. The appellant asked her to come back, however, she went to her mother and informed her of the happenings. Her mother called the appellant through her brother. The appellant came up and the mother confronted him. Thereafter, PW-1, along with her parents and the father of ‘A’, and the appellant, went to the police station, where they made a complaint. She was taken to the hospital along with her mother and a woman constable for her medical examination. The next day her statement was also recorded before the Magistrate. Her mother showed the spot of the incident to the police.

32. In her cross-examination, she states that the appellant used to reside at some other place and had come to stay with the family of ‘A’ on the morning of the day of the incident.

33. Ms. ‘K’ (mother of the victim) was examined as PW-3. She deposed that on December 24, 2018, at approximately 3:00-3:30 P.M., her daughter/ victim was playing with her friend ‘AR’ on the staircase of her aunt's (Chachi's) residence, which led to the first floor. The staircase provided access to all floors of the building. Her family resided on the second floor, 'AR' lived on the ground floor, and her daughter's aunt lived on the first floor. She testified that her daughter came to her and reported that while playing with 'AR', the uncle (Chacha) of 'AR' came and told 'AR' to go to her ground floor room and took victim 'A' by the hand to her aunt's room and latched the door from inside. The appellant removed her underwear and pyjamas, as well as his own pants, and then inserted his private part into hers. The victim told him that she was in severe pain and asked him not to do this. The appellant also kissed victim ‘A’ on the lips. 'AR' came to the room and repeatedly knocked on the door. The appellant opened it after some time, and due to the force, 'AR' fell on the floor. The victim left through the other side of the door and ran to PW-3. The appellant followed her, asking her to come to him and not to go upstairs. The victim was very frightened and told PW-3 of the happenings. PW-3 went to the house of the father of ‘AR’ and asked who was residing with him. She informed him that the said person, called Chotu, had committed a *‘wrong act’ (Galat Kaam)* with her daughter and narrated the incident. He called Chotu and confronted him, but the appellant

denied everything. She then called her husband, and she along with the victim went to the police station, while her husband reached there from his office. She later came to know that the appellant was the brother of the father of 'AR'.

34. She testified that at the police station, a female officer first questioned her, and then called her daughter to inquire about the incident. Victim 'A' gave her statement, and both signed it. The police then called the appellant to the police station. Initially, he remained silent, then denied the allegations, however, the female officer later informed her that the appellant had confessed after she left the room. The police took her and victim 'A' to AIIMS for medical examination, however, she refused the internal/gynaecological examination of her daughter to avoid causing her further pain and provided written refusal as she did not want her to suffer more pain.

35. She states that the next day, she, victim 'A', her husband, and a female police officer went to the Court for recording statements under Section 164 of the Cr.P.C. She also identified the appellant in court.

36. She admitted that she only occasionally used to speak to the aunt of victim 'A'. She further stated that she had seen the appellant playing with victim 'A' on the staircase and came to know that he had come to the ground floor. It is from this that she knew that the victim was referring to the appellant as '*Chotu Bhaiya'.* She admitted that she had not noticed any injury on or near the vagina or any part of the body of the victim, nor saw any blood. She denied the suggestion that the boy 'Rahul' was called as 'Chotu' by the brother of the appellant and his family.

37. PW-1 and PW-3, in their testimony, are consistent and inspire confidence. Though the learned counsel for the appellant has strenuously urged that there were contradictions in the statement of the victim (PW-1) recorded before the doctor at the time of her MLC and the statement recorded under Section 164 of the Cr.P.C., when compared with her statement before the learned Trial Court, we do not find any such inconsistency that would make us doubt the veracity of her statement. A child victim is not expected to narrate the incident each time like a parrot. We must be mindful of the age of the victim and the mental trauma she must have been undergoing when she was taken to the hospital for her MLC and later to the Magistrate for recording her statement under Section 164 of the Cr.P.C.

38. PW-3 (the mother) has also been consistent in her statements to the police, before the learned Metropolitan Magistrate, and before the learned Trial Court.

39. In contrast, the appellant, through DW-1, sought to set up a plea of *alibi* by stating that the appellant had gone to his sister's house on the day of the incident. Apart from the fact that the sister was not examined as a witness, even otherwise, the said plea of *alibi* does not inspire confidence. It is not that the statement of DW-1 is to be ignored merely because he is a relative of the appellant; on the contrary, the testimony of DW-1, to a large extent, corroborates the statements of PW-1 and PW-3. DW-1 states that the mother of the victim came to their house along with 'A' and stated, '*Tumhare ladke ne meri beti ke saath yeh kya kiya'*. She further stated, *'woh ladka floor par aaya tha aur meri beti ko galat bola tha'*. He further states

that thereafter, the mother of the victim started threatening him and stated that she would call the police. DW-1 replied that he himself was ready to go to the police station and, accordingly, he went to the police station along with his brother (the appellant) and Chotu @ Rahul. In the meantime, 'A', along with her mother 'K', father, and brother, also reached the police station. At the police station, after some interrogation, the Investigating Officer told DW-1 and his help, Chotu @ Rahul, to go home, while the appellant was asked to remain at the police station. DW-1 accordingly left the police station. He admitted that he did not make any complaint to any senior police officer or inform any court alleging that the appellant was being falsely implicated in the present case.

40. The above statement of DW-1 clearly corroborates the testimony of the victim and her mother on vital aspects, including the facts that an immediate allegation of the appellant being the person who did something wrong with the victim being attributed to the appellant, and that the appellant was taken to the police station, where he was apprehended.

41. Though an attempt was made to raise a defence that the offence had been committed by Chotu @ Rahul, a helper who had been staying in the house of DW-1, the said defence stands falsified by the admissions made by DW-1 himself. DW-1 stated that he had told the mother of the victim that the offence could not have been committed by the appellant, as the appellant had just returned from his sister's house. If no accusation had been made against the appellant, there was no reason for him to offer such an explanation to the mother, who had

confronted him immediately after the incident. Further, there is no explanation as to why DW-1 went to the police station along with the appellant, or why the police detained the appellant and not Chotu @ Rahul?

42. The statement of the appellant was recorded under Section 313 of the Cr.P.C. on 28.08.2021. In his statement, the appellant admitted that immediately after the incident, the brother of the victim came and asked him to come to the victim's house. When he went there, the mother of the victim told him that he had to go to the police station and also slapped him. She then took the appellant to the house of DW-1 (his brother), who also slapped him. When asked whether, at the police station, the victim had identified him as "*Chhotu Bhaiya*", he stated that he did not remember. He further admitted that he was thereafter arrested. The said statement, therefore, also corroborates the testimony of the victim and her mother to a large extent.

43. Sections 29 and 30 of the POCSO Act are set out below:

> *"**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 appellant, the Special Court shall presume the existence of such mental state but it shall be a defence for the appellant 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."*

44. In light of the above provisions, the prosecution has established the foundational facts, namely, that the victim was a minor, that she gave a consistent account of sexual assault, and that such account stands corroborated by the statements of the appellant as well as DW-1, the statutory presumptions under Sections 29 and 30 of the POCSO Act stand attracted. The burden, therefore, shifts upon the appellant to rebut these presumptions. However, as will be discussed in the subsequent portion of this judgment, the appellant has failed to do so.

45. The submission of the learned counsel for the appellant that there was an inconsistency with respect to the place of the incident, is ill-founded. Though the MLC report mentions that the alleged incident took place at the house of the appellant, in her statement before the learned Metropolitan Magistrate, the victim stated that the appellant had taken her to the room of her aunt's son, and when he attempted to commit the act, she cried out for her aunt. Even in the rough sketch of the site plan, it is the room of the aunt that is shown as the place of occurrence.

46. Coming to the alleged ambiguity in the Charge with regard to the place of the offence, it has not been shown as to what prejudice, if

any, was caused to the appellant during the trial on account of the same. Section 215 of the Cr.P.C., which deals with errors or omissions in a Charge, provides that such errors or omissions shall not vitiate the trial, unless the accused is shown to have been misled by such error or omission and unless it has occasioned a failure of justice. In the present case, neither can the appellant be said to have been misled by the omission to mention the exact location of the commission of the crime, nor do we find that any failure of justice was occasioned by such omission in the charge. We quote Section 215 of the Cr.P.C. as under:-

> *" **215. Effect of errors.—** No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."*

47. In ***Bindersing*** (supra), a case arising out of the NDPS Act, the Charge was defective not only for not specifying the place of the offence, but also for failing to mention the time when the raid was carried out and the quantity of contraband seized.

48. In ***Main Pal*** (supra), the allegation against the accused was of outraging the modesty of P, but the conviction was for outraging the modesty of S. The prejudice to the accused was, therefore, writ large.

49. Similarly, in ***Kalicharan*** (supra), a charge of murdering the deceased by firing bullets from a pistol was framed against A2, however, it was found that the deceased had been murdered by A1, A3, and A4 using sharp weapons. The Court held that, in the absence

of such a Charge against them, and as the case was not put to them under Section 313 of the Cr.P.C., their conviction could not be sustained.

50. The cited cases, therefore, have no application to the facts of the present case.

51. Similarly, the submission of the learned counsel for the appellant that the site plan could not have been prepared at the instance of the mother of the victim pointing out the place of occurrence, or that no scaled plan was prepared, does not also appeal to us. Once again, the appellant has been unable to demonstrate any prejudice caused to him on account of the above. In ***Gaudhan*** **(**supra**)**, the question of the presence of light was vital to the case, and its omission was found to be fatal to the prosecution. In ***Vijay Singh*** **(**supra**)**, the Court found serious discrepancies between the statement of the witness and the site plan. These judgments, therefore, do not come to the aid of the appellant.

52. As regards the submission of the learned counsel for the appellant that an adverse inference ought to be drawn against the prosecution since the mother of the victim had refused consent for the internal medical examination of the child victim, we find no merit in the said contention. PW-3 has herself explained that she did not wish the victim to undergo further trauma by being subjected to such a medical examination. This explanation does not appear to be unnatural on the part of the mother. In any event, once the testimony of the victim is found to be truthful and consistent, the mere refusal to permit a medical examination cannot be fatal to the prosecution case.

53. In ***B.C. Deva*** (supra), it has been held that even in the absence of corroboration of medical evidence, the oral testimony of the victim, if found to be cogent, reliable, convincing, and trustworthy, can be safely relied upon. In ***Shamim*** (supra), the Supreme Court has held as under:

> *"12. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal. The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter,*

however, no such benefit may be available to it."

54. In ***Balveer Singh*** (supra), the Supreme Court emphasised the precautions to be followed while recording the testimony of a child witness. It was further emphasised that if the child witness is not found to have been tutored, his or her testimony can be relied upon without insisting on further corroboration. We quote from the judgment as under:

"58. We summarize our conclusion as under: -
(I) The Evidence Act does not prescribe any minimum age for a witness, and as such a child witness is a competent witness and his or her evidence and cannot be rejected outrightly.

(II) As per Section 118 of the Evidence Act, before the evidence of the child witness is recorded, a preliminary examination must be conducted by the Trial Court to ascertain if the child-witness is capable of understanding sanctity of giving evidence and the import of the questions that are being put to him.

(III) Before the evidence of the child witness is recorded, the Trial Court must record its opinion and satisfaction that the child witness understands the duty of speaking the truth and must clearly state why he is of such opinion.

(IV) The questions put to the child in the course of the preliminary examination and the demeanour of the child and their ability to respond to questions coherently and rationally must be recorded by the Trial Court. The correctness of the opinion formed by the Trial Court as to why it is satisfied that the child witness was capable of giving evidence may be gone into by the appellate court by either scrutinizing the preliminary examination conducted by the Trial Court, or from the testimony of the child witness or the

demeanour of the child during the deposition and cross-examination as recorded by the Trial Court.

(V) The testimony of a child witness who is found to be competent to depose i.e., capable of understanding the questions put to it and able to give coherent and rational answers would be admissible in evidence.

(VI) The Trial Court must also record the demeanour of the child witness during the course of its deposition and cross-examination and whether the evidence of such child witness is his voluntary expression and not borne out of the influence of others.

(VII) There is no requirement or condition that the evidence of a child witness must be corroborated before it can be considered. A child witness who exhibits the demeanour of any other competent witness and whose evidence inspires confidence can be relied upon without any need for corroboration and can form the sole basis for conviction. If the evidence of the child explains the relevant events of the crime without improvements or embellishments, the same does not require any corroboration whatsoever.

(VIII)Corroboration of the evidence of the child witness may be insisted upon by the courts as measure of caution and prudence where the evidence of the child is found to be either tutored or riddled with material discrepancies or contradictions. There is no hard and fast rule when such corroboration would be desirous or required, and would depend upon the peculiar facts and circumstances of each case.

(IX) Child witnesses are considered as dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded and as such the courts must rule out the possibility of tutoring. If the courts after a careful scrutiny, find that there is neither any

tutoring nor any attempt to use the child witness for ulterior purposes by the prosecution, then the courts must rely on the confidence-inspiring testimony of such a witness in determining the guilt or innocence of the accused. In the absence of any allegations by the accused in this regard, an inference as to whether the child has been tutored or not, can be drawn from the contents of his deposition.

(X) The evidence of a child witness is considered tutored if their testimony is shaped or influenced at the instance of someone else or is otherwise fabricated. Where there has been any tutoring of a witness, the same may possibly produce two broad effects in their testimony; ***(i)*** *improvisation or* ***(ii)*** *fabrication.*

> *(i) Improvisation in testimony whereby facts have been altered or new details are added inconsistent with the version of events not previously stated must be eradicated by first confronting the witness with that part of its previous statement that omits or contradicts the improvisation by bringing it to its notice and giving the witness an opportunity to either admit or deny the omission or contradiction. If such omission or contradiction is admitted there is no further need to prove the contradiction. If the witness denies the omission or contradiction the same has to be proved in the deposition of the investigating officer by proving that part of police statement of the witness in question. Only thereafter, may the improvisation be discarded from evidence or such omission or contradiction be relied upon as evidence in terms of Section 11 of Evidence Act.*
>
> *(ii) Whereas the evidence of a child witness which is alleged to be doctored or tutored in toto, then such evidence may be discarded as unreliable only if*

the presence of the following two factors have to be established being as under: -

• ***Opportunity of Tutoring of the Child Witness in question*** *whereby certain foundational facts suggesting or demonstrating the probability that a part of the testimony of the witness might have been tutored have to be established. This may be done either by showing that there was a delay in recording the statement of such witness or that the presence of such witness was doubtful, or by imputing any motive on the part of such witness to depose falsely, or the susceptibility of such witness in falling prey to tutoring. However, a mere bald assertion that there is a possibility of the witness in question being tutored is not sufficient.*

• ***Reasonable likelihood of tutoring*** *wherein the foundational facts suggesting a possibility of tutoring as established have to be further proven or cogently substantiated. This may be done by leading evidence to prove a strong and palpable motive to depose falsely, or by establishing that the delay in recording the statement is not only unexplained but indicative and suggestive of some unfair practice or by proving that the witness fell prey to tutoring and was influenced by someone else either by cross-examining such witness at length that leads to either material discrepancies or contradictions, or exposes a doubtful demeanour of such witness rife with sterile repetition and confidence lacking testimony, or through such degree of incompatibility of the version of the witness with the other material on record and attending circumstances that negates their presence as unnatural.*

> *(XI) Merely because a child witness is found to be repeating certain parts of what somebody asked her to say is no reason to discard her testimony as tutored, if it is found that what is in substance being deposed by the child witness is something that he or she had actually witnessed. A child witness who has withstood his or her cross-examination at length and able to describe the scenario implicating the accused in detail as the author of crime, then minor discrepancies or parts of coached deposition that have crept in will not by itself affect the credibility of such child witness.*
>
> *(XII) Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored or untainted part inspires confidence. The untutored part of the evidence of the child witness can be believed and taken into consideration or the purpose of corroboration as in the case of a hostile witness."*

55. On the plea of the learned counsel for the appellant that the learned Trial Court did not permit the child witness to be confronted with her previous statements, we must once again emphasise that no prejudice has been caused to the appellant on account of the same. In fact, such confrontation would have afforded the child witness an opportunity to explain her statement. On the contrary, by not permitting the child witness to be confronted with her previous statements, the learned Trial Court denied her the opportunity to explain any perceived discrepancy that may have existed between the two statements. The learned Trial Court proceeded on the basis that the child had either not stated or differently stated the facts in her

previous statements. Therefore, the purpose of the appellant confronting the victim with her previous statements was met. In this regard, we must also be mindful of the mandate of Section 33(6) of the POCSO Act, which casts a duty upon the Special Court to not permit aggressive questioning or character assassination of the child and to ensure that the dignity of the child is maintained at all times during the trial.

56. The learned counsel for the appellant has also contended that although the offence is alleged to have taken place between 3.00 P.M. and 4.00 P.M., the medical examination of the victim was conducted only at about 9.00 P.M., and the rukka was registered at 1.05 A.M. on the following day. It has been submitted that there was an inordinate delay, thereby suggesting a false implication of the appellant. We are not impressed with the said submission. As noted hereinabove, the victim and her mother have clearly explained the entire sequence of events from the occurrence of the incident, the taking of the child to the police station, thereafter to the hospital, and subsequently back to the police station. The said sequence stands corroborated not only by the testimony of DW-1, but also by the appellant's own statement, as discussed hereinabove.

57. The submission of the learned counsel for the appellant that the aunt was not examined as a witness, also does not impress us. As per the prosecution, the said aunt neither witnessed the incident nor any events immediately thereafter and, therefore, was not a material witness for the prosecution. In fact, during the trial, the appellant sought to suggest that he had been falsely implicated due to a dispute

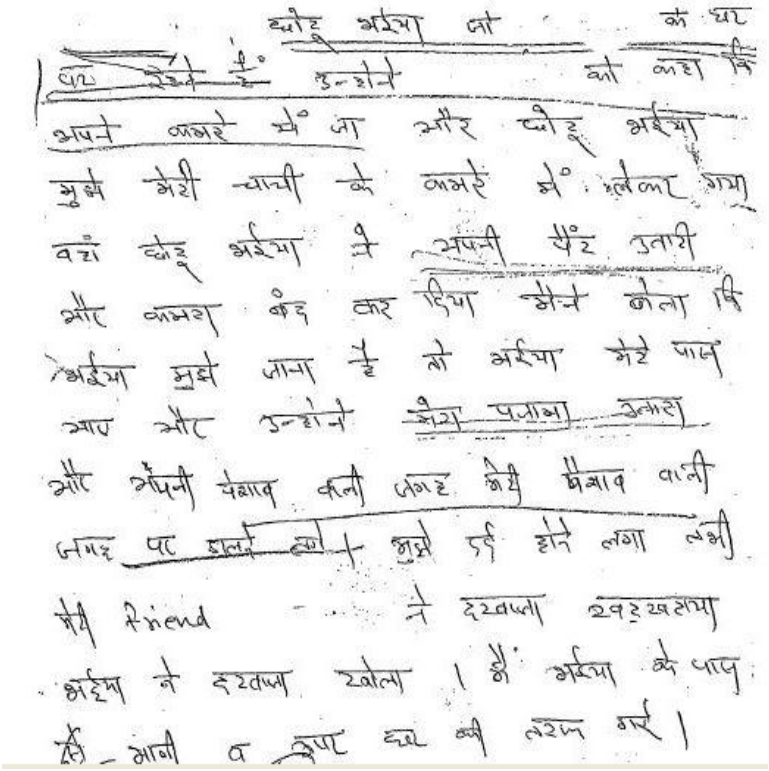
between the parents of the victim and the family of the aunt regarding the tenancy of the appellant's brother. If that were so, it was incumbent upon the appellant to produce the aunt as a witness. Although she was named as one of the defence witnesses, she was ultimately not examined. Any presumption, if at all, would therefore operate against the appellant.

58. In ***Gaurav Maini*** (supra), the grandfather of the kidnapped boy, who was the first person to disclose the incident to the police, had not been examined. The Court held that it was an obligation of the Court under Section 311 of the Cr.P.C. and Section 165 of the Indian Evidence Act, 1872, to ensure that neither any extraneous material is permitted to be brought on record nor any relevant fact is left out. As noted above, in the present case, it was not the case of the prosecution that the aunt had witnessed anything and, therefore, according to the prosecution, she was not a crucial witness.

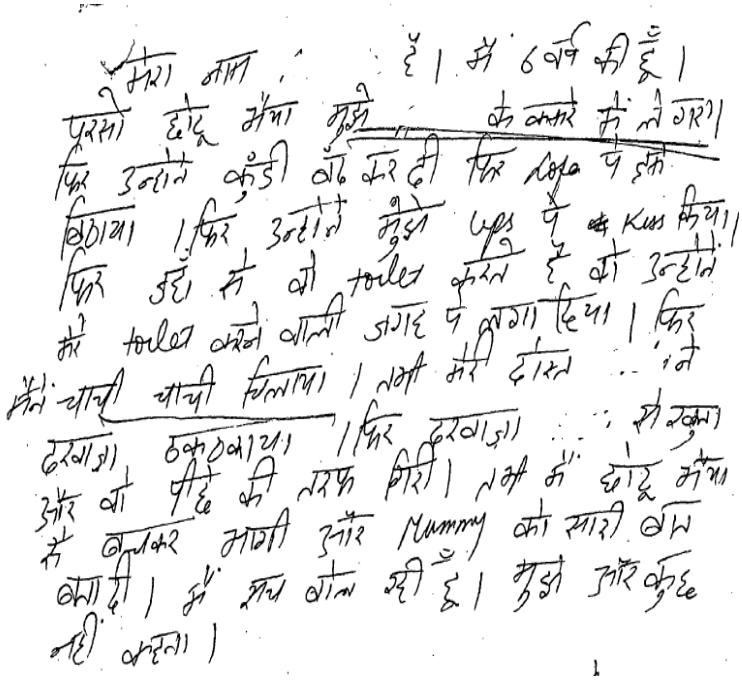
59. Now we come to the submission of the learned counsel for the appellant that in the MLC of the victim, no injury was found on her and that there was no bleeding, which, according to him, would have indicated penetration. He has submitted that in her statement before the learned Metropolitan Magistrate, the victim had stated that the appellant had placed his penis on her vagina and had not stated that there was penetration, and further, the clothes of the victim or of the appellant were not seized by the police, which, according to the learned counsel, would have shown whether penetration had in fact taken place, thereby implying that no penetration had occurred. On the basis of the above submissions, it has been argued that the appellant

could not have been convicted under Section 6 of the POCSO Act for 'aggravated penetrative sexual assault' and that, at best, the offence would fall under Section 7 of the POCSO Act, relating to 'sexual assault', or under Section 18 of the POCSO Act, relating to an 'attempt to commit aggravated penetrative sexual assault'.

60. In her statement to the police (Ex.PW1/A), the victim had stated that the appellant started putting his penis into her vagina. The relevant extract is reproduced hereinbelow:



61. In her statement under Section 164 of the Cr.P.C. (Ex. PW1/C), victim (PW-1) again stated as under:



62. Similarly, in her statement before the Court, that PW-1 first stated as follow:

> *"....Thereafter, he bolted the room from inside, he took out his pant. He also took out my Pajama. "Bhaiya ne mujhe sofe pe baithaya or phir bhaiya ne mere lips pe data lagaya".....After some time my friend "A" knocked the door, Bhaiya ne apna pant pehna or mujhe bhi pajama pehnaya"...."*

63. It is only in the later part of her testimony, that PW-1 further stated as under:

> *"After putting off my pajama "bhaiya ne apni susu wali jagah ko mere susu wali jagah me dala" due to which I felt little pain."*

64. Though the learned counsel for the appellant submitted that the above statements of the victim appeared to be in response to direct questions put either by the Court or by the learned Prosecutor, no such objection was recorded before the learned Trial Court. It appears that

the victim, on her own, made the above statement upon recollecting the incident during the course of recording of her testimony.

65. At the same time, the above three statements create a doubt as to whether there was actual penetration in the present case. The benefit of such doubt must necessarily go to the appellant. In the absence of proof of penetration, and in view of the consistent statements of the victim that the appellant had at least removed the victim's pyjama and his own pant and placed his penis on the vagina of the victim before the friend of the victim intervened by knocking on the door, thereby preventing the appellant from completing the act, we hold that the appellant is guilty of an attempt to commit aggravated penetrative sexual assault and is, therefore, liable to be punished under Section 18 of the POCSO Act. While there is no doubt that even the slightest penetration of the penis into the vagina, without rupturing the hymen, would constitute Aggravated Penetrative Sexual Assault, however, from the above stray statement of the victim, we are unable to conclude that there was a penetrative sexual assault upon the victim in the present case. The judgment of ***Madan Gopal Kakkad*** (supra), therefore, does not come to the assistance of the prosecution.

66. Accordingly, we set aside the conviction of the appellant under Section 6 of the POCSO Act and under Section 376AB of the IPC, and instead hold him guilty under Section 18 of the POCSO Act.

67. At the relevant time, the punishment prescribed for aggravated penetrative sexual assault under Section 6 of the POCSO Act was imprisonment for a term not less than ten years, which may extend to imprisonment for life. Keeping in view the totality of circumstances,

including the age of the victim, we reduce the sentence of the appellant to ten years' rigorous imprisonment.

68. Insofar as the conviction of the appellant under Section 342 of the IPC is concerned, the same is upheld, along with the sentence imposed thereunder.

69. All sentences shall run concurrently.

70. In case the appellant had not undergone the aforesaid period of sentence prior to the suspension of his sentence by this Court, the appellant shall surrender on his own within two weeks from today to undergo the remaining period of sentence. In the event of failure to surrender within two weeks of the date of this judgment, appropriate steps shall be taken by the State to ensure his arrest for undergoing the remaining sentence.

71. The remaining directions of the learned Trial Court in the order on sentence, that is, with respect to the fine amount and compensation in terms of the Victim Compensation Scheme, are also sustained.

72. The present appeal is partly allowed in the above terms. All pending applications, if any, are also disposed of having been rendered infructuous.

73. A copy of this judgment be communicated to the learned Trial Court and the concerned Jail Superintendent.

NAVIN CHAWLA, J.

RAVINDER DUDEJA, J.

FEBRUARY 27, 2026/Arya/DG