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

% *Judgment delivered on: 03.07.2025*

\+ **CRL.A. 1029/2023 & CRL.M.(BAIL) 1732/2023**

DEEPAK IN JC .....Appellant

Through: Mr. S S Sastry, Mr. Ankur Gosain, Mr. Brijesh Tiwari and MS. Chhavi, Advocates

versus

STATE GOVT. OF NCT DELHI .....Respondent

Through: Mr. Naresh Kumar Chahar, APP for the State along with SI Khushbu.

CORAM:
HON'BLE DR. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

DR. SWARANA KANTA SHARMA, J

1. By way of the present appeal, the appellant seeks setting aside the judgment of conviction dated 21.08.2023 and order on sentence dated 16.11.2023 passed by the learned Additional Sessions Judge-01 (POCSO), South-East District, Saket, Delhi [hereafter '*Trial Court*'] in Sessions Case No. 26/2016, arising out of FIR No. 1085/2015, registered at Police Station Kalkaji, Delhi for the offences punishable under Sections 376 of the Indian Penal Code, 1860 [hereafter '*IPC*'] and Section 4 of the Protection of Children from Sexual Offences Act, 2012 [hereafter '*POCSO Act*'].

2. The case of the prosecution, shorn of unnecessary details, is that on 11.12.2015, the complainant had lodged a written complaint at Police Station Kalkaji, Delhi, alleging that her minor daughter 'A', aged about 2.5 years, had been raped. It was alleged that on 09.12.2015, at around 5:30 PM, while playing, the child went to the *jhuggi* of one Deepak (the appellant herein), which was located next to the complainant's *jhuggi*. When the child did not return, the complainant went to Sarvodaya Camp Park in search of her, when her brother-in-law 'S' informed her that the accused had taken the child to Hansraj City Park. Upon 'S' contacting the appellant herein, he had informed the complainant and her brother-in-law that he was bringing the child back. However, when the child did not return within 10–15 minutes, the complainant went to a taxi stand near the Hansraj City Park, where she saw the appellant Deepak returning with the child. After returning home, the child went to sleep. It was alleged that when she woke up around 7:00 PM, she started crying and pulling her pyjami. Upon checking, the complainant noticed blood stains on the pyjami. When asked, the child allegedly told her that the appellant Deepak had put his private part inside her private part. Thereafter, the complainant took the child to a nearby doctor, who advised her to report the matter to the police. It is further alleged that the family members of the accused tried to pressure the complainant's family into compromising the matter. On the basis of these allegations, the present FIR was registered.

3. During the course of investigation, the medical examination of

the child victim was conducted on 11.12.2015 and the accused was arrested, and he was sent to judicial custody. The statements of witnesses were recorded under Section 161 of the Cr.P.C. The statement of complainant i.e. mother of the child victim was also recorded under Section 164 of the Cr.P.C. After completion of investigation, chargesheet was filed by the police for offence under Sections 363/376/506 of IPC and Section 4/5 of the POCSO Act. Charges were framed against the appellant for offence under Sections 363/506 of IPC and Section 6 of POCSO Act.

4. During the course of trial, the Prosecution examined 13 witnesses in support of its case. Defence evidence was not led by the appellant. Upon conclusion of trial, the learned Trial Court held the appellant guilty for commission of offences under Section 363 of IPC and Section 6 of the POCSO Act. The concluding portion of the impugned judgment records as under:

> "60. In view of the clear and unimpeached testimony of the PW-5 and PW-6, it has been established and proved that the accused had kidnapped the victim from the lawful guardianship of her parents and had taken her to Hansraj City Park and she remained in the custody of accused till the time, he brought her back and handed over the victim to her mother in the presence of PW-6A 'S'. Further, the victim felt pain at her horne and even could not urinate and her mother noticed blood spots on the pyjami and this fact as well as redishness on her vagina was observed and corroborated by PW- I, this Court is of the considered opinion that accused had committed aggravated penetrative sexual assault upon the victim and same is covered by Section 5 (m) of the POCSO Act and as such, the same can be said to be 'aggravated penetrative sexual assault' punishable under Section 6 of the POCSO Act. I am of the considered opinion that accused is guilty of offence punishable u/s 6 of

POCSO Act.

61. So far as offence u/s 506 lPC is concerned, PW-5 has deposed that family members of of the accused including Badi mummy came and threatened us to withdraw the case. There is no evidence to the effect that accused had himself threatened the parents of the victim. Therefore, 1 am of the considered opinion that prosecution has failed to prove the charge u/s 506 IPC against the accused.

CONCLUSION :

62. Considering the entire facts and circumstances, this court is of the considered opinion that prosecution has been able to bring home the guilt of the accused beyond reasonable doubt. Hence, accused is held guilty and convicted for offences punishable u/s 363 IPC and 6 of POCSO Act and stands acquitted for offence punishable u/s 506 IPC. Let he be heard on the point of sentence."

5. By way of impugned order on sentence dated 16.11.2023, the appellant herein was sentenced to undergo rigorous imprisonment for a period of 10 years, and to pay fine of ₹5,000/-, and in default of payment of fine, to undergo simple imprisonment for a period of 06 months – for offence punishable under Section 6 of the POCSO Act. He was further directed to undergo rigorous imprisonment for a period of 01 year, and to pay fine of ₹3,000/-, in default of payment of fine, to undergo simple imprisonment for a period of 03 months – for offence punishable under Section 363 of the IPC.

6. Aggrieved by the conviction, the learned counsel appearing for the appellant argues that the appellant has been falsely implicated in the present case due to a prior dispute between the family members of the child victim and the appellant. It is submitted that the complainant is an immediate neighbour of the appellant and that both

families, i.e., the family of the child victim and the family of the appellant, have had ongoing disputes over the placement of water-filled utensils in front of their respective *jhuggis*. It is submitted that the child victim, owing to her tender age, was unable to speak or disclose any facts, and therefore, her statement under Section 164 of Cr.P.C. was not recorded. Despite this, the learned Trial Court has relied upon the version of events as narrated by the complainant (mother of the victim) and other interested witnesses, without properly appreciating the testimonies of official witnesses such as PW-2, PW-3, PW-6, PW-7 (HC Dharmendra), PW-8, PW-9, PW-10, PW-11, and PW-12. The learned counsel for the appellant further argues that the medical evidence does not support the prosecution's case, as the medical report placed on record reflects that the hymen of the child victim was intact and there were no signs of redness or injury. Moreover, the FSL report of the pyjami worn by the child victim at the time of the alleged incident did not reveal the presence of blood or any male DNA. It is contended that the learned Trial Court has overlooked these medical findings while passing the impugned judgment, as both the MLC and the medical opinion fail to corroborate the allegations of sexual assault. It is also contended that the statements of the mother and the child's uncle (chacha) are unreliable, as they are interested witnesses and have allegedly colluded to falsely implicate the appellant. The learned counsel for the appellant also draws this Court's attention to the fact that no Call Detail Records (CDR) were produced to substantiate the

prosecution's claim that the appellant was contacted regarding the child's whereabouts. It is further argued that the learned Trial Court ignored several inconsistencies in the statements of the mother, uncle, and the doctor who initially examined the child victim, particularly regarding the timing of events. In view of the above, the learned counsel for the appellant prays that the impugned judgment and order on sentence be set aside and the appellant be acquitted.

7. The learned APP for the State, on the other hand, opposes the contentions raised by the learned counsel for the appellant and submits that in cases under the POCSO Act, Section 29 provides for a presumption of guilt against the accused, and in the present case, the facts and circumstances support the invocation of such a presumption. The learned APP submits that the child victim was taken away from the lawful custody of her mother, to a park, by the appellant. The eye-witnesses to this incident are PW-5 and PW-6, i.e., the mother of the victim and the child's uncle (chacha), respectively. The learned APP for the State further contends that the prosecution version stands corroborated by the statements of other witnesses. It is specifically pointed out that PW-1, the doctor who examined the victim and is an independent witness, categorically stated that the victim was wearing a pyjami on which he noticed blood spots on the front side. It was submitted that this fact alone negates the defence argument that there is no medical evidence to support the prosecution's case. It is further submitted that the deposition of the victim's mother remained consistent with her earlier

statement recorded under Section 164 of Cr.P.C., and she stood firm during her cross-examination. On the strength of the aforesaid submissions, the learned APP prays that the present appeal be dismissed and that the impugned judgment and order on sentence passed by the learned Trial Court be upheld.

8. This Court has **heard** arguments addressed on behalf of both the parties and has perused the material available on record.

9. The learned Trial Court, by way of the impugned judgment, held the appellant guilty for offences under Section 363 of IPC, and Section 6 [for offence under Section 5(m)] of the POCSO Act, while acquitting him for an offence punishable under Section 506 of IPC.

10. Before delving into the merits of the case, it is pertinent to set out the ***essential ingredients of the offences*** in question. The offence of kidnapping from lawful guardianship is defined under Section 361 of IPC, and the punishment for the same is provided under Section 363 of IPC. The relevant provisions are reproduced as under:

> "**361**. Kidnapping from lawful guardianship.-- Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
>
> Explanation.-- The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.
>
> Exception.-- This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be

> entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.
>
> **363**. Punishment for kidnapping.-- Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

11. It is apparent from a reading of Section 361 of IPC, that the essential ingredients required to constitute the offence of kidnapping from lawful guardianship are as under:

- The person taken or enticed is a male under sixteen years of age, a female under eighteen years of age, or a person of unsound mind.
- Such person was in the lawful keeping or custody of a lawful guardian at the time of the alleged incident.
- The accused has taken or enticed the minor or person of unsound mind from the lawful custody of the guardian.
- Such taking or enticing has been done without the consent of the lawful guardian.

12. Further, Section 6 of the POCSO Act prescribes the punishment for the offence of aggravated penetrative sexual assault. The definition of 'aggravated penetrative sexual assault' is contained in Section 5 of the Act, which outlines specific circumstances under which penetrative sexual assault is considered aggravated. Thus, for the offence under Section 5 of the POCSO Act to be made out, the following essential ingredients are required to be satisfied:

- Act of Penetrative Sexual Assault: The accused has committed an act which amounts to 'penetrative sexual assault' as defined under Section 3 of the POCSO Act. This includes penetration of the penis or any object into the vagina, mouth, urethra, or anus of the child, or manipulation of any body part for such penetration.
- Aggravating Circumstances: The assault is accompanied by aggravating factors enumerated under Section 5 of the Act, which *inter alia* includes – the victim being below twelve years of age.

13. In light of the legal position discussed above, it is now necessary to assess the present case on the touchstone of the evidence brought on record.

14. At the outset, this Court notes that the age of the victim child has been recorded as 2.5 years in both the FIR and the MLC of the victim. This age of the victim has not been disputed by the accused or the learned defence counsel, either before the learned Trial Court or before this Court.

15. This Court has carefully gone through the ***testimonies of the material witnesses***, so as to adjudicate the rival contentions raised before this Court. In the present case, since the victim was of tender age, neither her statement could be recorded by the police, nor could she be examined before the learned Trial Court. The complainant i.e. mother of the victim child was examined before the learned Trial

Court as PW-5, who deposed that on 09.12.2015, at around 5:30 p.m., while she was at home and her husband was on duty, her daughter was playing outside their *jhuggi* and she had gone to the *jhuggi* of the appellant Deepak, whom she correctly identified in Court. She deposed that while she was occupied with household work, she noticed that the child had gone missing and she had begun searching for her. During the search, she had met her brother-in-law 'S' at a nearby park and informed him that the child had gone missing. He told her that the accused, Deepak, had taken the child to Hansraj City Park. Her brother-in-law had called the accused, asking him to return the child, but when the child did not come back, both of them had gone to the park. Near the entrance, they had seen the appellant bringing the child back, and he stated that he had taken her to the park as he had lit a fire there. PW-5 further stated that she had brought the child home, given her some milk, and put her to sleep. She further deposed that around 7:00 p.m., the child victim had woken up and asked to go to the toilet but it appeared that she was having difficulty while urinating. Thereafter, the child victim had put her hands on her private part, and started crying, and stated that *"chacha (Deepak i.e. the accused/appellant) ne yaha per maara hai, meri susu ki jageh chacha ne apna susu wah jageli lagai hai".* The mother of the victim also noticed that there was blood on the child's pyjami. Thereafter, when her husband returned home, she had informed him about the entire incident, and the child victim was taken to a nearby doctor, i.e Dr. Rajesh (PW-1). After the medical

examination, the parents were informed that the matter was serious and needed to be reported to the police, as it was a police case. It was further stated that while they were returning from the doctor's clinic and on their way to the police station, the family members of the appellant had threatened them to not take the matter forward, and compromise. Consequently, on 11.12.2015, the complainant had reported the matter to the police.

16. Similarly, the uncle of the victim child, i.e. Mr. 'S', who was examined as PW-6A, has deposed that on 09.12.2015, at around 5:30 p.m., while he was at a park in Sarvodaya Camp, Kalkaji, his sister-in-law had arrived and informed him that her daughter (the victim child) had gone missing while playing outside their house. He further deposed that he had seen the appellant, Deepak, who he had identified before the learned Trial Court, taking the child towards Hansraj City Park. He had then called the appellant from one Vinay's phone and had instructed him to bring the child back immediately. Despite waiting for 10 to 15 minutes, the child had not returned. Thereafter, he and PW-5 had proceeded towards Hansraj City Park and near the taxi stand, they had seen the appellant returning with the child. He also stated that the victim was crying at that point of time, and subsequently, PW-5 took the child home, while he resumed his work.

17. Another material witness in this case is PW-1 Dr. Rajesh Parthsarthy, who deposed before the learned Trial Court that on

09.12.2015, at around 4–5 p.m., the mother of the victim child had visited his clinic along with her minor daughter ‘A’, who was aged about 3 years. He deposed that the minor child was wearing a pyjami, and blood stains were visible on its front portion. Upon examination, he had found redness on her vagina. Thereafter, her mother had disclosed to the doctor that her daughter had gone with her uncle to Hansraj Sethi Park and had returned weeping and clutching her pyjami. He had then advised the mother to immediately report the matter to the police. He further stated that he himself had also informed P.S. Kalkaji that one minor child had come to his diagnostic centre and she was probably a victim of sexual assault.

18. ***Insofar as the offence of kidnapping is concerned***, this Court notes that the prosecution has established its case through the consistent and corroborated testimonies of PW-5 and PW-6A. It has come on record that the victim, a female child aged approximately two and a half years at the time of the incident, was playing outside her *jhuggi* when she entered the *jhuggi* of the appellant. The appellant thereafter took the child away from the vicinity of her home, without the knowledge or consent of her lawful guardians.

19. PW-5, the mother of the child, categorically deposed that she was unaware of her daughter’s whereabouts and had not permitted the appellant to take the child. PW-6A, the maternal uncle of the victim, also stated that upon learning that the child was missing, he made a phone call to the appellant using the phone of one Vinay.

During that conversation, the appellant confirmed that the minor child was with him. Subsequently, both PW-5 and PW-6A went to Hansraj Sethi Park, where they saw the appellant bringing the victim child back. Their testimonies clearly establish that the appellant had taken the minor child from the lawful guardianship of her parents. During trial, both witnesses correctly identified the appellant and consistently narrated the sequence of events, lending credibility to the prosecution's version.

20. On an overall appreciation of the evidence, this Court finds that the appellant, without any authority or consent, took the minor child from the custody of her lawful guardians. The essential ingredients of the offence of kidnapping from lawful guardianship, as defined under Section 361 of IPC, thus stand satisfied. The learned Trial Court has, therefore, rightly convicted the appellant for the offence punishable under Section 363 of IPC.

21. As regards the ***offence of aggravated penetrative sexual assault***, firstly, attention must be drawn to Section 29 of the POCSO Act, which creates a statutory presumption in prosecutions under certain provisions of the POCSO Act, including Section 5. Under the POCSO Act, the legislature has introduced the presumption that shifts the burden of proof to some extent. Section 29 of the Act states as follows:

> "**29**. Presumption as to certain offences—Where a person is prosecuted for committing, abetting, or attempting to commit any offence under Sections 3, 5, 7, and 9 of this Act, the

> Special Court shall presume that such person has committed, abetted, or attempted to commit the offence, as the case may be, unless the contrary is proved."

22. This means that once the prosecution proves the foundational facts necessary to establish the commission of an offence under any of the above sections, a legal presumption of guilt arises against the accused. Thereafter, the burden shifts to the accused to rebut this presumption by leading cogent and credible evidence to the contrary. In light of this, this Court has to now examine whether the prosecution in the present case has successfully established the foundational facts to attract the presumption under Section 29 of POCSO Act, and if so, whether the appellant has discharged the burden of rebutting the said presumption by leading evidence to the contrary or raising any credible defence.

23. In the present case, the complainant i.e. mother of the victim child had alleged that the accused had committed penetrative sexual assault upon the child, which finds partial corroboration in the testimony of PW-1, the doctor who had medically examined the victim child on the same day. This Court also notes that the MLC of the victim child was conducted after a delay of two days from the date of the alleged incident, i.e. on 11.12.2015. In this background, this Court is mindful that with the passage of time, the possibility of detecting blood stains, physical injuries, or other medical indicators of recent assault is significantly reduced.

24. Nevertheless, the absence of conclusive medical findings in

such circumstances cannot be treated as fatal to the prosecution's case, particularly in cases of sexual assault involving a child as young as two and a half years of age. In cases such as the present one, little delay in reporting the matter and consequent medical examination in such cases is neither uncommon nor unnatural and is often a consequence of trauma, fear, or social stigma experienced by the victim's family.

25. As noted in preceding discussion, this Court has also carefully considered the testimony of PW-1, Dr. Rajesh Parthsarthy, who categorically deposed that upon clinical examination of the child victim, he had observed redness in her private parts, which had prompted him to advise the victim's mother to report the matter to the police. He also clearly stated that blood stains were visible on the front portion of the child's pyjami at the time of examination. Thus, the testimony of PW-1 also lends partial corroboration to the version of events as narrated by the mother of the victim. The observations of PW-1 indicate that the condition of the child at the day of incident was consistent with the allegations levelled by the complainant, even though subsequent medical examination conducted after two days did not reveal signs of recent injury.

26. One of the main contentions of the learned counsel for the appellant is that the FSL report does not support the prosecution case as no blood was detected on the pyjami of the victim. In this regard, this Court is conscious of the fact that the matter was reported to the

police after a delay of about 2 days, and her medical examination was conducted thereafter. The MLC of the victim also reveals that the doctor concerned has noted as follows: '*Whether clothing's changed - Yes*' and '*Whether Clothes washed - Yes*', in the period between the alleged assault and the medical examination. Given the socio-economic background of the victim's family, it is quite possible that the mother, in the natural course of events, may have washed the pyjami of her child, especially considering that the child had just undergone a traumatic experience of sexual assault. In such circumstances, the absence of forensic evidence on the pyjami cannot be treated as a decisive factor to discredit the prosecution's case.

27. This Court is also of the opinion that a child of such a tender age is not capable of speaking clearly about incidents, especially something as serious as a sexual assault. Moreover, children at this age do not have the mental ability or words to explain such a traumatic event. Therefore, in a case such as the present one, instead, the evidence given by people who observed the child immediately after the incident becomes relevant. In this case, the mother of the child (PW-5) and the doctor (PW-1) who examined her provided their clear and reliable statements. The mother had noticed blood on the child's clothes and unusual behavior, and the doctor had found signs of injury on the private parts of the child. Therefore, in the absence of a direct testimony of the minor victim, the consistent and timely statements of the mother and the doctor become the key deciding factors in this case.

28. In this Court's view, it is evident from the testimony of PW-5, the mother of the victim child, which remains consistent on the material aspects, that the minor child had communicated, to the extent possible for a child of such tender years, the nature of the assault perpetrated upon her. The version of PW-5 stands corroborated by the testimony of PW-1, the doctor who examined the child on the date of the incident and observed redness near the private parts, and blood stains on the victim's pyjami.

29. Further, this Court notes that the victim was merely 2.5 years of age at the time of the incident, which constitutes an aggravating factor as per Section 5(m) of the POCSO Act, attracting the enhanced punishment prescribed under Section 6 of the Act.

30. Insofar as the defence of the accused in his statement under Section 313 of Cr.P.C., he stated nothing except that he has been falsely implicated. Further, in the questions put to PW-5 and PW-6 in their cross-examination, it was merely asserted that there was a dispute between the parties since PW-5 used to keep the utensils and containers outside the *jhuggi* of the accused and that on that account a quarrel had taken place 2 days prior to the incident. However, as rightly noted by the learned Trial Court, these suggestions were denied by PW-5 and 6. Moreover, the accused did not lead defence evidence and did not call upon any defence witness to testify to this effect.

31. The learned counsel for the appellant had also argued that the

learned Trial Court has relied upon interested witnesses, namely the mother of the child victim and uncle of the child victim; however, this Court is of the opinion that mere familial connection does not render their testimonies inadmissible or unreliable, unless material contradictions or improvements are demonstrated. Upon careful perusal of the record, no material inconsistencies have emerged which would justify discarding the depositions of these witnesses, both of whom have remained majorly consistent in their respective versions and have been subjected to cross-examination. The learned Trial Court also, in paragraph 40 and 41 of the impugned judgment, rightly took note of the decision of Hon'ble Supreme Court in case of ***Seeman alias Veeranam v. State:*** *(2005) 11 SCC 142* in this regard. Thus, this argument of the learned counsel for the appellant is unmerited.

32. Lastly, the contention regarding contradictions in the statements of witnesses, including alleged discrepancies in timings, has been considered by this Court. However, this Court is of the opinion that minor inconsistencies on peripheral aspects, such as timings, are natural and expected, especially considering the traumatic circumstances surrounding the incident. Such trivial contradictions do not demolish the core of the prosecution's case.

33. Therefore, in view of the aforesaid, this Court is of the view that appellant has clearly failed to rebut the statutory presumption of guilt under Section 29 of the POCSO Act, and no plausible

explanation or defence has been set up to dislodge the prosecution's case.

34. Accordingly, this Court finds no perversity, infirmity, or illegality in the judgment of conviction dated 21.08.2023 passed by the learned Trial Court. The conviction of the appellant for the offences punishable under Section 363 of the IPC and Section 6 of the POCSO Act, is accordingly upheld.

35. Insofar as the order on sentence is concerned, the learned Trial Court has already awarded the minimum sentence of rigorous imprisonment of ten years to the appellant. Thus, no interference is called for in the same.

36. In view of the above, the present appeal stands dismissed, alongwith pending application.

37. The judgment be uploaded on the website forthwith.

DR. SWARANA KANTA SHARMA, J

JULY 03, 2025/ns