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

Reserved on: 07.08.2025

% Pronounced on: 14.08.2025

\+ **CRL.A. 946/2023**

PAWAN .....Appellant

Through: Mr. Sunil Choudhary and Mr. Lalit Kumar, Advocate from DHCLSC.

versus

STATE (NCT OF DELHI) .....Respondent

Through: Mr. Pradeep Gahalot, APP for State.
Ms. Cauveri Birbal, Ms. Nistha Dhal, Ms. Preksha Gaur and Mr. Kamlendu Panday, Advocates for Victim.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. The present appeal filed under Section 374(2) read with Section 482 Cr.P.C., has been instituted assailing the order of conviction dated 02.08.2023 vide which he has been convicted for offences punishable under 342/365/506/376 of IPC and Section 4 of the POCSO Act and order of sentence dated 15.09.2023 in Sessions Case No. 55/2018 arising out of FIR No.355/2017 registered under Sections 367/376/506/342 IPC & Section 6 of POCSO Act at P.S. Khyala.

Vide order on sentence, while granting benefit of Section 428 CrPC, the appellant was sentenced to undergo:

(i) Rigorous Imprisonment (RI) for 20 years with a fine of Rs.5,000/- for the offence under Section 376(2)(i) IPC, in case of default to pay fine, he shall undergo Simple Imprisonment (SI) for 5 Months;

(ii) RI for 5 years with a fine of Rs.2,000/- for the offence under Section 365 IPC, in case of default to pay fine, he shall undergo SI for 2 Months;

(iii) RI for 2 years for the offence under Section 506 IPC; and

(iv) RI 1 year for the offence under Section 342 IPC.

2. The trial court collated the facts and noted them as under:

"1. On 01.12.2017, victim along with her parents went to PS Khyala and reported the offence of rape whereafter IO/SI Satyawati took the victim along with her month to DDU hospital where the victim was medically examined and her exhibits were seized. Thereafter IO along with victim and her mother came back to PS and IO deposited the exhibits in the malkhana. Thereafter victim was given counselling and her statement was recorded by the IO. She stated that she is 13 years old, studying in eighth standard and she was not feeling well on that day and had not attended school. She further stated that at about 11:30 AM, she was going to the house of her grandmother (nani), which was at a distance of few meters from her house. She stated that on the way she met accused Pawan, who kept a cloth on her month from behind and took her to his home and also threatened her to kill her in case she disclosed about it to anyone. She also stated that he took off her pajama, pressed her neck and also threatened to kill her and also committed rape on her. She further stated that thereafter she came back home at about 1:30 PM and she called her father from the phone of some person. Her father and her maternal uncle (mama) reached house of the accused and took him to police station and victim, her grandmother and mother also reached the PS. She also stated that accused is the person who was a tenant in the house of her grandmother and had

vacated the house a day before the incident and had taken a new house. On the basis of this statement, the present FIR under section 367, 376, 506, 340 IPC and 6 of POCSO Act was registered."

3. During the trial, the prosecution examined a total of 15 witnesses, including the child victim as PW-1, mother and father of the child victim as PW-2 & PW-3 respectively, the grandmother (*nani*) of child victim as PW-4 and uncle of the child victim was examined as PW-13.

The age of the child victim was proved through the testimony of the Principal (PW-5) of the school where the child was admitted in the Nursery class. Her age at the time of incident was 13 years. To prove the MLC of the child victim, the prosecution examined Dr *Naved Lone* as PW-6 and Dr *Pankit Ghelani* as PW-7. The Investigating Officer (IO) i.e., SI Satyavati, was examined as PW-14, while Head Constable Krishan was examined as PW-15.

4. The appellant, while denying the prosecution's case, claimed it to be a case of false implication. Apart from examining himself under Section 315 Cr.P.C. as DW-3, the appellant also examined two witnesses in support i.e., appellant's wife as DW-1 and his brother as DW-2. The prosecution's case is also stated to be an afterthought, as the appellant, despite being already known to the victim, was not named in the MLC, while giving brief history of the incident.

5. Learned counsel for the appellant has primarily attacked the testimony of the child victim by contending that the same does not inspire confidence, being full of material inconsistencies over her previous statements as well as motivated on account of prior monetary dispute between her father and the appellant. The testimony is further sought to be discredited as it is not

corroborated by the material facts as revealed in the medical and forensic examination reports. It is contended that though the case of the prosecution was that the incident occurred while the child victim was going to her grandmother's (*nani*) house, the child victim has given different and inconsistent reasons for going to her grandmother's (*nani*) house. The testimony of the child victim is also sought to be discredited by contending that, though she had stated that the appellant after committing the offence, had discharged (semen) inside her vagina, however, as per the FSL report (Ex.PW-8/A), neither semen was found nor was any male DNA extracted in the vaginal swab of the victim. Even the MLC (Ex.PW-1/A) does not record fresh injury.

6. Another contention raised on behalf of the appellant is the improbability of the narration of events, as the child victim has stated that her mouth was gagged with a handkerchief while she was being taken by the appellant to his room. However, on the way, she had met with a *Bhaiya*, who did not stop the appellant from doing so and even the police made no efforts to cite him as a prosecution witness during the trial. Besides the child victim, the testimonies of other relatives were also doubted on account of monetary disputes as the father of the child victim wanted to avoid his liability to pay the appellant towards the medical expense that was incurred in the context of road accident suffered by the appellant as well as by the father of the child victim as revealed in the testimony of defence witnesses.

7. The appellant's contentions were refuted by the learned APP as well as learned counsel for the complainant. Learned counsels would rather contend that the testimony of the child victim as well as other prosecution witnesses is coherent, consistent and inspires confidence.

8. First and foremost, the competence of the child victim as duly noted by the trial court before recording her statement, is not under contest. The child victim came to be examined as PW-1. A perusal of her statement would reveal that she stated that her grandmother's (*nani*) house was at a walking distance of two minutes from her house. On 01.12.2017 at about 11.30 AM while the child victim was going to her grandmother's (*nani*) house, the appellant came from behind, and keeping a cloth on her mouth muffled her and took her to his house, which was in the next *gali* and was at a distance of one minute from her *nani's* house. On the way, one *Bhaiya* met them and asked the appellant where he was taking the child victim. The appellant told that person that the victim was his *Bhanji* and that he was taking her to his house. The victim further stated that the appellant had gagged her mouth by inserting the cloth in it and then the appellant forcibly removed her clothes including undergarment as well as his own clothes. He was completely naked and thereafter, he laid upon her. The relevant extract of the testimony is:

> *"…Us ne mere saath bahut galat kam kiya. Usne apna pura mere andar daal diya. Ld. Predecessor of this court had put a question to her asking "Kya accused 'P' Ne Apni susu wali jagah aapki susu wali jagah ke andar daal dee? To which the witness replied in affirmative…."*

9. The child victim further stated that after the rape had been committed, she was confined to the room for a long time. Thereafter, she picked an object lying inside the room, hit the same on the appellant's head. Thereafter, she managed to wear her clothes and came out of the room and locked it from outside. She requested a passerby to give her a phone to call her father. Father of the child victim along with his uncle and *nani* reached

the spot and took the appellant to the police station. She further deposed that the appellant was already known being the tenant of her *nani*, who had vacated her *nani's* house a day or two prior to the incident. She identified the appellant as well as her clothes being T-shirt, *pajami* and underwear. The witness was cross-examined at length. While taking the court through cross-examination, learned counsel for the appellant would contend that the timeline stated by the child victim of her coming from school and then going to her *nani's* house, and informing her parents about the incident, does not match the timelines stated by the father of the child victim. Though she admitted the occurrence of the accident, she denied any quarrel between the appellant and her father.

10. Father of the child victim, while appearing as PW-2, deposed that he had four children, the child victim, 13 years old at the time of incident, being the eldest of them. He further deposed that on the date of the incident, he received a phone call from the child victim about the incident at about 1.30 P.M. As the witness, however, was not very forthcoming, the trial court noted his demeanour and observed that he was very hesitant in speaking about the details of the incident. In cross-examination, he denied the suggestion that any quarrel had taken place between his brother-in-law and the appellant over payment of loan. Interestingly, though entire fulcrum of defence is a prior monetary dispute however, no suggestion was given to the witness on the aspect of any expenses incurred by the appellant towards PW2's medical treatment, which were not paid back.

11. The child victim's mother (PW3) had accompanied the victim at the time of medical examination. In her cross-examination, though she admitted the suggestion to the extent that both her husband and the appellant had

suffered an accident, however, denied that her husband suffered any injury and asked for financial help from the appellant. She specifically denied the suggestion that a sum of Rs.50,000/- was spent on the medical treatment on her husband, which was borne by the appellant.

12. The child victim's grandmother (*nani*) was examined as PW-4. She stated that the appellant used to be her tenant for about two years. The rape was committed after the appellant had vacated the rented accommodation. She denied the knowledge of any accident being suffered by the father of the child victim and the appellant or that Rs.50,000/- was spent by the appellant on the treatment of the father of the child victim due to injury sustained in the accident. She denied the suggestion that to avoid any payment, the appellant was falsely implicated.

13. Uncle of child victim (*mama*) was examined as PW-13. He deposed that on the day of the incident, when he was at his workplace, he received a call from the father of the child victim asking him to come to home and informing him about the incident of rape. He went to the house of the appellant whereafter apprehended and took him to the PS Khayala.

14. The child victim was medically examined on the day of the incident at DDU Hospital. The prosecution examined PW-6 and PW-7 in this regard. While PW-6 was not even cross-examined, nothing was elicited in the cross-examination of PW-7.

The remaining being police witnesses deposed relating to other aspects of examination including arrest, which is not under contest.

15. Pertinently, the child victim and other witnesses have identified the appellant. The appellant has taken defence of false implication. Though suggestions have been given to the effect that sometime earlier, the father of

the child victim and the appellant while undertaking a journey to Bulandshahar had met with an accident and an expenditure of Rs.50,000/- was incurred towards medical treatment of father of victim, which was paid by appellant. However, interestingly, though the said suggestion was given to everyone else, but not to the most relevant person, i.e., the father of the child victim.

Curiously, at the stage of recording of his statement under Section 313 CrPC, the appellant for the first time set up a plea of alibi. It was stated that at the time of incident, he was not in the room i.e., the place of incident , but had gone with her wife, daughter and parents-in-law to drop them at Anand Vihar Bus stand as they were going to their native village. After dropping them, he returned back at 4:30 PM.

16. The appellant' wife during her deposition stated that in the year 2016-17, the parents of the child victim and her husband had gone to *Bulandshahar* to attend a marriage and on their way back, the appellant and the father of the child victim met with an accident and suffered injuries. She further stated that since the father of child victim had no money with him at that point in time, her husband i.e., the appellant paid the money towards medical expenses incurred, which was about Rs.30,000/-. At this stage it is pertinent to note that though the appellant had taken such defense of having spent considerable amount on the medical expenses, no medical report or proof of payment was produced in support of the same.

17. The appellant examined his brother as DW-2 and examined himself as DW-3. In his statement, he stated that on 01.12.2017, while going to drop his wife, children and parents-in-law, he left home at about 9.00 AM and came back at about 4.30 PM. At this point, interestingly, he came with

another story that the father of the child victim demanded Rs.5-6 lakhs for not implicating him in the present case. The said fact was not even suggested to any of the witnesses.

18. Indeed, it is trite law that the testimony of the child victim requires deeper scrutiny, the children being prone to tutoring. The testimony is to be carefully evaluated in the light of attending circumstances to see if the same inspires confidence. The Court is required to see as to whether the child victim is wholly reliable, wholly unreliable or partly reliable. The Supreme Court in *Dattu Ramrao Sakhare v. State of Maharashtra*[1], observed as under:

> *"5. ...A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."*

In the present case, the child victim in her statement recorded during the investigation, as well as at the time of her deposition, categorically stated about the present appellant, who was, indisputably, already known to her. Though the testimony sought to be doubted for not stating the timelines of the incident and its reporting as stated by the other persons, it is not to be

[1] (1997) 5 SCC 341

forgotten that the child victim, 13 years of age, was first examined on 25.09.2018 after a gap of around one year. Minor variations or inconsistencies as alleged, as to the reason for child victim to go to the house of her grandmother are immaterial and do not cast a doubt on the relevant facts stated by her.

19. At this stage, it is worth noting that the appellant has not contested the mode and manner of his arrest. The court also deems it apposite to refer to the DNA analysis of the handkerchief as well as clothes of the child victim that were seized during the medical examination. While the biological examination revealed that human semen was found on the underwear and *pajami*, saliva was also detected on the handkerchief. The exhibits were further subjected to DNA analysis in which a mixed DNA profile was generated from the blood sample of the child victim and the appellant, which was found to be accounted from the source of Ex.11b (*pajami*) and Ex.12 (handkerchief). In the above backdrop, non-detection of semen in the vaginal vulvular swab of the child victim would not prevail over other evident that has come on record.

20. As such, this court has no hesitation to observe that the testimony of the child victim also finds corroboration in the forensic analysis report. Though it is contended that investigation officer has failed to locate and cite the person who had seen the appellant taking the child victim, it is settled law that mere failure in investigation would not discredit the otherwise trustworthy testimony.

21. Section 29 of POCSO Act provides that Court shall presume that the accused has committed the offence for which he was charged with, until the contrary is proved. However, before this presumption can operate, the

prosecution has to prove the foundational facts. A three Judge Bench of the Supreme Court in *Sambhubhai Raisangbhai Padhiyar v. State of Gujarat*[2] has held that section 29 of the POCSO Act comes into play once the foundational facts are established. It holds as follows:-

> *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.*

22. Gainful reference in this regard may also be made to the decision of a Co-ordinate Bench of this Court in *Veerpal v. State*[3], 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."*

In the present case, the prosecution has been able to lay the foundation of the facts and thus brought into play Section 29 of the POCSO Act, the appellant has miserably failed to rebut the said presumption. The defence

[2] (2025) 2 SCC 399
[3] 2024 SCC OnLine Del 2686

taken by the appellant is untenable and rightly discredited by the Trial Court.

23. In view of the above, finding no merit in contentions, the appeal is dismissed.

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

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

MANOJ KUMAR OHRI
(JUDGE)

AUGUST 14, 2025/*pmc*