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

Judgment reserved on: 02.02.2023
Judgment pronounced on: 16.05.2023

\+ **CRL.A. 570/2020 & CRL.M.A. 3034/2022**

RAJU YADAV ..... Appellant
Through: Mr. Anwesh Madhukar, Adv. (DHCLSC) with Ms. Prachi Nirwan, Mr. Yaseen Siddiqui, Advs.
versus
STATE OF NCT OF DELHI ..... Respondent
Through: Ms. Manjeet Arya, APP
SI Mohit Singh, PS Punjabi Bagh

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\+ **CRL.A. 206/2022**

LAKHI VISHWAS ..... Appellant
Through: Mr. Akhil Dhaka, Adv. for Mr. Rajesh Mishra, Adv. (DHCLSC)
versus
STATE (GOVT. OF NCT DELHI) ..... Respondent
Through: Ms. Manjeet Arya, APP
SI Mohit Singh, PS Punjabi Bagh

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G E M E N T

: JASMEET SINGH (J)

1. These are appeals seeking setting aside of the judgement dated 31.01.2020 and order on sentence dated 27.06.2020 passed by the learned Special Judge (POCSO ACT)/ ASJ-01, (West), Tis Hazari Courts, Delhi, in case S.C. No. 55924/2016, FIR No. 224/2013, u/s 376/342/506/120B/109 IPC and section 4/6 of Protection of Children from Sexual Offences Act, 2012

(hereinafter referred to as "POCSO Act"), registered at P.S. Punjabi Bagh, Delhi.

2. The appellants in CRL.A. 570/2020 and CRL.A. 206/2022 are Mr. Raju Yadav (hereinafter referred to as "appellant No.1") and Ms. Lakhi Vishwas (hereinafter referred to as "appellant No.2") respectively.

3. *Vide* judgement dated 31.01.2020, the appellant No.1 was found guilty of aggravated penetrative sexual assault u/s 6 of POCSO Act and appellant No.2 for abetting and aiding the offence of aggravated penetrative sexual assault by appellant No.1 u/s 16 of POCSO Act. Vide order on sentence dated 27.06.2020, the appellant No.1 and appellant No.2 were sentenced to undergo rigorous imprisonment for 10 years along with fine of Rs.10,000/- and in default of payment of fine, a further period of 1 month simple imprisonment each.

4. Brief facts of the case are-

i. Appellant No.2 is the maternal aunt of the prosecutrix. It is alleged that on 25.05.2013,the appellant No.2 took the prosecutrix (aged about 13 years) to her place of employment and during that night, when the prosecutrix was sleeping with appellant No.2 in the room, appellant No.1 (house guard) entered the room and committed rape upon the prosecutrix while the appellant No.2 bolted the room from inside. Both the appellants threatened the prosecutrix of dire consequences if she raised any alarm. It is further alleged that appellant No.1 repeated the same act upon the prosecutrix the next day, i.e. on 26.05.2013 and appellant No.2 again bolted the room from inside while appellant No.1 committed rape upon the prosecutrix.

ii. On 27.05.2013, at around 6 am, both the appellants dropped the prosecutrix at her place of employment at New Rajender Nagar. The prosecutrix narrated the entire incident to her employer Ms. Pushpa Rani

(also referred to as Pusha Nani by the prosecutrix) and thereafter, chargesheet was filed for offences u/s 376/342/506/120B/109 IPC and u/s 10/4/6 of POCSO Act against the appellants.

iii. Vide order dated 07.10.2013, charges for offence u/s 6 of POCSO Act was framed against appellant No.1 and charges for offence u/s 16 of POCSO Act was framed against appellant No.2.

5. The prosecution has examined sixteen witnesses in this regard, being the prosecutrix, public witnesses, expert witnesses and police officials.

6. Mr. Madhukar, learned counsel for appellant No.1 submits that the provisions of POCSO Act cannot be attracted in the present case as the age of the prosecutrix was not established to be under 18. He submits that:

i. Section 61 of the Evidence Act states that the contents of a document may be proved either by primary or secondary evidence but in the present case, the age of the prosecutrix is not proved through primary or secondary evidence.

ii. A bone ossification test was relied upon to prove the age of the prosecutrix. He relies upon various judgements of this Court and Supreme Court to state that a plus/minus difference of 2 years is prevalent in any bone ossification test, thus making the age of prosecutrix above the age of majority. He states that the age provided in the medical examination report has been ascertained to be between 15-17 years of age and keeping in view the range of the test, the age of the prosecutrix could have been anywhere in the range of 13-19 years at the time of incident. He states that the bone ossification test which the prosecution has relied upon is merely a photocopy of the said test which was conducted in another FIR and not the present FIR. He further states that the doctor of the said test has not been examined in the present case and hence the bone ossification test has

no evidentiary value or validity in this case as it does not fall within the ambit of section 65 of Evidence Act.

7. He states that no conviction can lie u/s 6 POCSO Act for the aforesaid reasons. He further states that in the alternative, the appellant No.1 can also not be convicted u/s 376D IPC as no charges have been framed under the said section and there is also no evidence to suggest the offence of 376D IPC.

8. He further states that the tear of the hymen cannot be a conclusive proof of penetrative sexual assault. He states that as per the MLC of the prosecutrix (EX. PW. 5/A), the tear of the hymen is an old tear (though subsequently crossed out) and there was also no edema, congestion or physical injuries on the genitalia of the prosecutrix or any other part of her body.

9. He submits that the semen found on the alleged underwear of the prosecutrix does not suggest the offence of rape.

i. The semen of the appellant No.1 was not found on any of the swabs collected and was only found on the underwear of the prosecutrix, thereby meaning that no semen was found on her body.

ii. The underwear which allegedly had the semen of appellant No.1 as per the FSL report was not recovered by the investigating agency but in fact was brought by the prosecutrix herself as stated in the MLC report. Upon collecting the said underwear, no observation or comment was made by the examining doctor as to the details of the underwear in terms of colours, white spots, etc.

iii. The allegation that the semen which was found on the underwear was that of appellant No.1 has not been put to him in his statement under section 313 and thus, the same cannot be used against him.

10. He has placed reliance upon "***Sharad Birdhichand Sarda v. State of Maharashtra***" [(1984) 4 SCC 116] wherein the Supreme Court observed that:-

> *"143.. This has been consistently held by this Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Pradesh [1951 SCC 1060 : AIR 1953 SC 468 : 1953 Cri LJ 1933] this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 of the old Code (corresponding to Section 313 of the Criminal Procedure Code, 1973), the same cannot be used against him.*
>
> *145. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code, 1973 have to be completely excluded from consideration."*

11. He further relies upon a judgement of this Court titled as "***Mohd. Azizul v. State***" [2022 SCC OnLine Del 2425] and more particularly para 15 which states that:-

> *"15. He further relies on the following judgments:*
>
> *7.1 Firstly, on the judgment of Altaf Ahmed v. Rahul @ State [CRL. A. 474/2020, Delhi High Court, dated 03.12.2020] to state that before the presumption under Section 29 of the POCSO Act can come into, the prosecution has to establish the foundational facts by leading evidence. The relevant para is as under:*
>
> *"24. So far as the contention by learned APP for the State with respect to presumption under Section 29 of the POCSO Act is*

concerned, it is no doubt true that in a trial under POCSO Act, the accused is liable to rebut the aforesaid presumptions against him. However, at the same time, for the said presumptions to come into play, the prosecution first has to establish the foundational facts by leading evidence. The presumption is rebuttable by either discrediting the witnesses through cross-examination or by leading defence evidence."

7.2 Secondly, on the judgment of Abhay Singh v. State [CRL. A. 968/2015, Delhi High Court dated 26.07.2017] wherein it was observed:

"36. Since the report of the chemical examiner Ex.14/F shows the presence of semen on the clothes and vaginal swab but the medical evidence as recorded in the MLC Ex.PW-8/A does not show that the private part of the victim had any mark of violence. Had there been penetration by a fully grown-up person like her father, even the slight penetration would have caused some injury in its attempt to enter the child's vagina.""

12. He further submits that a lawyer cannot give away the right of an accused. He states that during the examination-in-chief of the prosecutrix, the underwear of the prosecutrix was not produced before the court and hence, she could not identify the same. However, the defence counsel submitted that the identity of the underwear and consequentially the presence of semen on the underwear was not disputed thereby foreclosing the right of the accused to contest the identity of the underwear. He has relied upon "***Pawan Kumar v. State***" [2019 SCC OnLine Del 10452] wherein it was observed:-

"24. The question whether a suggestion given by the counsel on behalf of the accused can be considered as an admission and bind the accused under Section 18 of Indian Evidence Act came before

the Supreme Court in Koli Trikam Jivraj (supra), where it was held as under:—

"18. Therefore, the accused is entitled to the benefit of the plea set up by the lawyer but it cannot be said that the plea or defence which his lawyer puts forward must bind the accused. The reason is that in a criminal case a lawyer appears to defend the accused and has no implied authority to make admissions against his client during the progress of the litigation either for the purpose of dispensing with proof at the trial or incidentally as to any facts of the case. See Phipson's Manual of Evidence, Eighth Edition Page 134. It is, therefore, evident that the role that a defence lawyer plays in a criminal trial is that of assisting the accused in defending his case. The lawyer has no implied authority to admit the guilt or facts incriminating the accused. The argument of Mr. Nanavati that suggestion put by the lawyer of the accused in the cross-examinations of the prosecution witnesses amounts to an admission under Section 18 of the Indian Evidence Act cannot be accepted.""

13. He has also relied upon "***Himalayan Coop. Group Housing Society v. Balwan Singh***"[(2015) 7 SCC 373] and more particularly paras 22, 26 and 32 which read as under:-

"22. Apart from the above, in our view lawyers are perceived to be their client's agents. The law of agency may not strictly apply to the client-lawyer's relationship as lawyers or agents, lawyers have certain authority and certain duties. Because lawyers are also fiduciaries, their duties will sometimes be more demanding than those imposed on other agents. The authority-agency status affords the lawyers to act for the client on the subject-matter of the retainer. One of the most basic principles of the lawyer-client relationship is that lawyers owe fiduciary duties to their clients. As part of those duties, lawyers assume all the traditional duties that agents owe to their principals and, thus, have to respect the client's autonomy to make decisions at a minimum, as to the objectives of the representation. Thus, according to generally accepted notions

of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. The law is now well settled that a lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise/settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be. If the decision in question falls within those that clearly belong to the client, the lawyer's conduct in failing to consult the client or in making the decision for the client, is more likely to constitute ineffective assistance of counsel.

26. While Rule 15 mandates that the advocate must uphold the interest of his clients by fair and honourable means without regard to any unpleasant consequences to himself or any other. Rule 19 prescribes that an advocate shall only act on the instructions of his client or his authorised agent. Further, the BCI Rules in Chapter I of the said Section II provide that the Senior Advocates in the matter of their practice of the profession of law mentioned in Section 30 of the 1961 Act would be subject to certain restrictions. One of such restrictions contained in clause (cc) reads as under:

"(cc) A Senior Advocate shall, however, be free to make concessions or give undertaking in the course of arguments on behalf of his clients on instructions from the junior advocate."

32. Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or

statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add that in some cases, lawyers can make decisions without consulting the client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights."

14. In addition, it is submitted by learned counsel for appellant No.1 that there are inconsistencies, improvements and contradictions in the statements of the prosecutrix. He submits that as per the statement of the prosecutrix in the FIR, she has said that she had tried to raise an alarm but could not do so since the appellant No.2 threatened her. Subsequently, in her 164 statement she has stated that she was unable to raise an alarm as the appellant No.1 had tied a piece of cloth around her mouth so that she does not make any noise. He further submits that these two statements were further contradicted during her examination-in-chief. In her statement made during the trial, the prosecutrix has stated that it was appellant No.2 who had threatened the prosecutrix not to make any noise, while in her statement made on 26.05.2013, she has stated that both the appellants threatened her. It is stated that as per testimony of PW-2 (Mr. Satpal Chawla), it is stated that the prosecutrix was seen in the evening of Sunday and she appeared to be normal.

15. It is further submitted that the FSL report (EX PW 16/B) is inconclusive since the report states that the DNA found on the underwear of the prosecutrix is similar but not exact to that of the blood sample of the

appellant No.1. He submits that since DNA is 99% similar in all human beings, the mere fact that the report states that the DNA found is similar to that of the appellant cannot be the basis of conviction u/s 376 IPC or 6 of POCSO Act. Reliance is placed upon a judgement of Supreme Court "***Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik***" [(2014) 2 SCC 576], and more particularly para 13 which reads as:-

> *"13…DNA consists of four nitrogenous bases — adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognised by this Court in Kamti Devi that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl child."*

16. It is stated that the judgement above clearly shows that the DNA test will be genuine and scientifically accurate since the chances of complete similarity are 1 in 30-300 billion, and thus leaves no room for error. The fact that the DNA test shows that the DNA is similar but not the same as that of the appellant No.1, points towards the innocence of the appellant No.1.
17. Mr. Madhukar states that there is also a delay of 2 days in registration of the FIR and the present FIR is only a retaliation to the objection of the appellants towards the prosecutrix's affair with a boy named Raju who was working at the prosecutrix's employers house.
18. Learned counsel for the appellant No.2 submits that the version of the prosecutrix is unreliable as there are material improvements in her 164

statement as well as in her statement recorded on oath before the learned Trial Court at the time of evidence.

19. He states that the learned Trial Court has failed to establish any "motive" as defined under section 8 of Evidence Act since it is the most crucial ingredient of any criminal act. He further states that the prosecution has not been able to establish as to why the appellant No.2, being the maternal aunt of the prosecutrix, would support someone in commission of rape upon her.

20. It is submitted by learned counsel for appellant No.2 that the boy named Raju, who was aged about 16-17 years at the time of the alleged incident, was not made a witness by the police even when the FIR was registered from the same address. It is further submitted that nothing material can be gathered through the testimony of PW-2 (Mr. Satpal Chawla) and PW-3 (Ms. Pushpa Rani) which would prove that the alleged incident took place with the prosecutrix.

21. He further states that there are several judgements of this Court as well as the Supreme Court stating that if there are two views, one pointing towards the guilt of the accused and another towards his innocence, then the view which is favourable to the accused must be adopted.

22. Ms. Arya, learned APP submits that the prosecutrix as well as the prosecution witnesses have duly supported the case of the prosecution and all the prosecution witnesses have also identified the appellants. She states that the finding of DNA being similar is enough to return a finding of conviction.

23. It is submitted by the learned APP that in the present case, the lawyer did not give up the right of the accused, but the accused himself gave up his right. She further submits that even the medical and FSL reports also

support the prosecution's case and therefore, the prosecution has proved its case beyond a reasonable doubt.

ANALYSIS

24. I have heard learned counsel for the parties.

25. Under section 29 of the POCSO Act, there is a presumption of guilt against the accused. The prosecution is only required to lay the foundational facts which disclose the commission of offence by the accused persons. Once the same has been done, it is the accused who has to rebut the presumption of guilt.

26. **Bone ossification test**

i. In the present case, there was no birth certificate/school certificate of the prosecutrix and the prosecution relied upon a bone ossification test of the prosecutrix dated 14.06.2013 done in another case, i.e., FIR No. 100/13 registered u/s 370 IPC and 3/4 of Child Labour Act registered at PS Rajinder Nagar, to prove the age of the prosecutrix.

ii. The appellants have objected to the reliance placed upon the said bone ossification test, as the same was conducted in another FIR and not for the purpose of determining the age of the prosecutrix in the present case. I am unable to agree with the objection raised by the appellants as the testimony of PW-13 (Inspector Saminder Singh), proves that the bone ossification test has not been disputed by the appellant, their counsels and the *amicus curiae*. The testimony of PW-13 reads as under: -

> ***"PW 13- 142816, Anti Corruption Branch, CBI, Delhi.***
> *ON S.A.*
>
> *1. On 28.05.2013 I was posted as S1 at PS Rajinder Nagar. On that day further investigation of this case i.e. FIR no. 100/13 u/s 370 IPC and 3/14 Child Labour Act was assigned to me.* ***In that case, I got***

conducted the ossification test of the prosecutrix (who is also a victim in this case) from DDU hospital on 14.06.2013. *I collected the ossification test report of the prosecutrix in which her age was opined as 15-17 years.*

*2. IO of the present case requested me to hand over the copy of ossification test of the prosecutrix. I gave the copy of ossification test of the prosecutrix to IO /SI Vipnesh****. (The ossification report of the prosecutrix is not disputed by the accused as well as their Legal Aid Counsel and Amicus Curiae).Copy of the ossification test report of the prosecutrix is exhibited as Ex.PW13/A."***

iii. Once there was no objection to the bone ossification test done in FIR No. 100/13 being proved and there was no dispute to its veracity by the appellants as well as their legal aid counsel/ *amicus curiae*, the contents of the bone ossification test have been deemed to be accepted by the appellants.

iv. In addition, I am also of the view that once there is a bone ossification test already on the Court record (even though in another case) which is not disputed by the appellants as well as the *amicus*, the prosecutrix cannot be required to undergo another bone ossification test. The same if permitted, would amount to re-victimization and undergoing the trauma once again by the child survivor/prosecutrix.

27. **Age of the prosecutrix**

i. The second objection raised by the appellants is with regard to age of the prosecutrix. Various judicial pronouncements grant a leeway of 2 years on either side, while interpreting a bone ossification test for determination of age. As per the counsel of the appellants, since the bone ossification test conducted on the prosecutrix opines her age between 15-17 years, then after taking into consideration the margin of error of 2 years, the age of the prosecutrix should be considered 19 years on the date of the offence

and hence, the appellants should not have been convicted under the POCSO Act.

ii. The objective of POCSO Act reads as under: -

> *"The Protection of Children from Sexual Offences (POCSO) Act, 2012 was formulated to effectively address the heinous crimes of sexual abuse and sexual exploitation of children. This Act of 2012 was introduced to provide for the protection of children from the offences of sexual assault, sexual harassment etc. This act also provides for safeguarding the interests of the child at every stage of the judicial process by incorporating child friendly mechanisms for reporting, recording of evidence, investigation and speedy trial of offences through designated Special Courts.*
>
> *Primarily the object of the Act were to protect the children from various types of sexual offences and for this purpose this Act provides for the establishment of Special Courts for trial of offences under the Act, keeping the best interest of the child as of paramount importance at every stage of the judicial process."*

iii. The Supreme Court in "***Jarnail Singh v. State of Haryana"[(2013) 7 SCC 263]*** observed that:-

> *"22. On the issue of determination of age of a minor, one only needs to make a reference to Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as "the 2007 Rules"). The aforestated 2007 Rules have been framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000. Rule 12 referred to hereinabove reads as under:*
>
> *"**12.Procedure to be followed in determination of age**.—(1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*
>
> *(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on*

the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.

23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6."

iv. The Supreme Court in ***Jarnail Singh (supra)*** held that the procedure for determining the issue of minority laid down under Rule 12 of the Rules, 2007, is similar for both the victim and the juvenile. However, in ***Jarnail Singh,*** the Supreme Court was exclusively interpreting Rule 12 of the Rules, 2007, framed u/s 68(1) of the erstwhile J.J. ACT, 2000, which is similar to section 94 of the new J.J. Act, 2015, but not identical, as the newly added Section 94 which became effective from 01.01.2016 has done away with the benefit extended to the child or juvenile by considering his/her age on the lower side within the margin of one year.

v. Without prejudice to the above, the Supreme Court in ***Jarnail Singh*** has only leaned towards the benefit of the lower age side to both the child in

conflict with law and the minor victim under the POCSO Act. Hence, I am of the view that for determining the age of a child victim under the POCSO Act, where the bone ossification opines her age between 15-17 years, the inclination of the Court should be towards considering the lower side on the margin of error. The same is also in consonance with the objectives of POCSO Act. It cannot be the intention of POCSO Act to treat a victim who is a borderline minor, as a major in case the victim does not have a birth certificate/school certificate and has undergone a bone ossification test. Such an interpretation would not be in furtherance of POCSO Act but rather in contradiction and derogation to the objective and purpose of POCSO Act.

vi. In addition, the other evidences such as the testimonies of PW-2 (Mr. Satpal Chawla) and PW-3 (Ms. Pushpa Rani) also point towards the lower age of the prosecutrix. The testimonies of PW-2 and PW-3 read as under:-

> *"**PW-2 Satpal Chawla** s/o late Shri Panna Lal Chawla, Age 67 years r/o 9/14, East Punjabi Bagh, Delhi*
> *.....On 25.5.13, it was Saturday or Sunday, accused Lakhi brought **a girl aged about 13/14 years** and stated to be the daughter of her sister and told that she wants to keep that girl for 1/2 days with her.....*"
>
> *"**PW-3 Pushpa Rani** w/o Inder Kishan Malik aged 85 years r/o 137, Double Storey, New Rajender Nagar, Delhi.*
> *.....I was sitting at my daughter's house when she brought XX with her and she introduced XX as daughter of her sister to me. She told me her **age to be 14/15 years**.....*"

vii. Hence, the argument of learned counsel for the appellants that since the bone ossification test shows the age of the prosecutrix to be between 15 to 17 years, then the prosecturix should be treated as more than 18 cannot be accepted.

28. **Hymen tear**

i. Section 375 of IPC states that:-

"375. Rape.—A man is said to commit "rape" if he—
(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
...."

ii. The testimony of PW 5 (Dr. Aditi Aggawal) who conducted the MLC of the prosecutrix(Ex.PW5/A) reads as under: -

"*PW 5 (Dr. Aditi Aggawal) Senior Resident, Obs. & Gynae, SGM hospital Mangol Puri, Delhi*

....I examined her and found that ***her hymen was torn completely, however, no congestion was present****. I prepared her* ***MLC Ex.PW5/A*** *which is in my handwriting and bears my signatures at point A..."*

iii. In offences u/s 375 of IPC, even the slightest form of penetration is sufficient to constitute the offence of penetrative assault. It is also not necessary that there has to be some injury on the genitalia or any other part of the prosecutrix's body. The Supreme Court in "***Satyapal v. State of Haryana***"[(2009) 6 SCC 635] has observed that:-

"*18. In Modi's Medical Jurisprudence, 23rd Edn., at pp. 897 and 928, it is stated:*
"To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda, with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains."

iv. Hence, the contention of learned counsel of appellant No.1 that the hymen is an old tear and there was also no edema, congestion or physical injuries on the genitalia of the prosecutrix or any other part of her body is therefore rejected.

v. Moreover, considering the entire evidence on record, namely the statement of the prosecutrix, the MLC confirming her hymen tear, the FSL report concluding the presence of semen on the underwear of the prosecutrix which matches with that of the appellant No.1, I am also of the view that mere absence of injuries on the vital parts/organs of the prosecutrix is not enough to refute the otherwise strong factual matrix of the case establishing the offences under Section 6 and 16 of the POCSO Act.

29. **Right of accused and identity of the underwear**

i. It was argued by learned counsel for the appellants that the *amicus* had no right to give up the rights of the accused. The factum of not objecting to the identity of underwear was a valuable right accrued to the appellants which could not be given away by the *amicus.*The counsel for the appellant No.1 has relied upon the judgement of ***Pawan Kumar (supra)*** to support his arguments. However, in the present case, this judgement is not applicable as it was not the *amicus* who gave up right, but the appellants themselves as the same was done in their presence. Hence, the only conclusion that can be drawn is that right was given up in concurrence with the appellants and not the *amicus* alone. In this regard, the order dated 15.01.2014 passed by the Trial Court reads as under: -

"15.01.2014

Ld. APP for the state.
Both the accused in J/C with amicus curiae Ms. Sunita Gupta.
……

Statement of the prosecutrix (PW 1) recorded on 15.01.2014 in the presence of the appellants with their *amicus*, reads as under: -

"……The doctor has seized my undergarment during my examination. I can identify that undergarment. Ld. APP submitted that the case property has not so far been received from FSL. ***Ld. defence counsel submitted that she did not dispute the identity of the undergarment."***

ii. A bare perusal of the above shows that the right was given up in presence of the appellants and it cannot be said that the same was given away without their consent.

30. **Emission of semen**

The semen of appellant No.1found on the underwear of the prosecutrix is sufficient evidence to prove the guilt of the accused in commission of the offence. In addition, the conclusion arrived in the FSL report reads that *"DNA Profiling (STR Analysis) performed on the exhibits is sufficient to conclude that the DNA profiles generated from the source of exhibit '2' (Blood sample) of* ***accused are similar with DNA profiles*** *generated from the source of exhibit '1c' (Underwear) of the prosecutrix."* There is also no reason/explanation as to how semen of the appellant No. 1 was found on the prosecutrix's underwear.

31. **Contradictions/inconsistencies in the statement of the prosecutrix**

i. The submission made by learned counsel for the appellants that there are contradictions in the statement of the prosecutrix, are of no help to the

appellants. The Supreme Court in "***Appabhai v. State of Gujarat***" [1988 Supp SCC 241] observed that-

> *"13….The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy.*
>
> *…"*

ii. In the case at hand, the alleged discrepancies which have been pointed out regarding raising of alarm and threatening the prosecutrix are of a minor character and do not call into question the veracity of the prosecution's story. The basic version regarding the manner and commission of offence is constant. The contention of the counsel for appellants cannot be accepted that there are contradictions, improvements and inconsistencies, such as, *firstly*, as per the first statement of the prosecutrix later on incorporated in the FIR, she could not raise alarm as the appellant No.2 had threatened her, whereas in her statement u/s 164, she stated that the appellant had tied a piece of cloth around her mouth so she could not make any noise. *Secondly*, the prosecutrix diverted from her earlier statements that the appellants had threatened her, whereas as per PW-3,

the prosecutrix had given the version that the appellant No.2 had locked her in the room. These contradictions are of a minor character which do not shake the quality of the statement of the prosecutrix.

iii. Moreover, the Supreme Court in "***State of Punjab v. Gurmit Singh"*** [(1996) 2 SCC 384], the Court observed as under:-

> *"21…A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity.* ***The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.*** *If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice.* ***The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.****"*

iv. I am in agreement with the view taken by the learned ASJ in the impugned judgment that there is no reason to disbelieve the testimony of the prosecutrix as this conclusion was arrived at after considering all the evidences on record and testimonies of the witnesses. In this regard, relevant portion of the impugned judgment is as under: -

> *"35. From the above discussion, it is clear that the guilt of the accused can be proved by the sole testimony of the prosecutrix. In the present case, Ms. 'X' has deposed against the accused persons. There are no contradictions or any other reasons to disbelieve her testimony. Hence, it is duly proved that the accused Raju Yadav has committed penetrative sexual assault repeatedly upon Ms. 'X'."*

32. **DNA**

i. DNA tests are widely used and accepted for its accuracy. It has been argued by learned counsel for appellant No.1 that the DNA which was found on the underwear of the prosecutrix was "similar" and not "identical" to that of appellant No.1. It has been held by the Supreme Court in "***Pantangi Balarama Venkata Ganesh v. State of A.P.,***" [(2009) 14 SCC 607]that the use of the word 'similar' and not 'identical' in the report by the DNA expert is not material, when there was other evidence available on record as well. The relevant portion is reproduced as under: -

> *"44. We are not oblivious of the fact that the experts used the term **"similar"** and not **"identical".** For the purpose of this case it may not be of much consequence as this Court has not taken into consideration the evidence of DNA experts alone for the purpose of recording a judgment of conviction. It has been considered along with the other evidence. The prosecution case has been considered as a whole. Cumulative effect of the evidences adduced before the learned trial Judge have been taken into consideration for the purpose of arriving at a finding of guilt against the appellant."*

ii. Even in the present case, the Sessions Court has not relied upon the DNA exclusively but has taken into consideration the cumulative evidence and testimonies of all the witnesses, to arrive at the guilt of the appellants. According to me, the impugned judgment of the Sessions Court is based on a combined reading of facts and testimonies of the witnesses and therefore, cannot be faulted.

33. **Delay in lodging the FIR**

i. It is a settled law that in cases like rape, the delay in lodging of FIR cannot be a ground to disbelieve the version of the victim. In ***Gurmit Singh (supra),*** the Supreme Court observed that:-

> *"8…The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons*

particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged."

ii. The prosecutrix was dropped off at her employer's house on 27.05.2013 and the complaint was made on 28.05.2013. The delay in the present case is minima land the contention of the learned counsel for the appellants that there is delay in filing the FIR thus cannot be given weightage.

34. **Motive of appellant No.2**

It is submitted by learned counsel for appellant No.2 that no motive was established as to why appellant No.2, being the maternal aunt of the prosecutrix, would support appellant No.1 in committing rape upon the prosecutrix. Similarly, no motive is also established as to why the prosecutrix would falsely implicate appellant No.2 in the present case. The statement of the prosecutrix is of sterling quality. The combined evidence of the prosecution lays down the foundational facts which disclose the commission of offence and this Court finds no reason to disbelieve or discredit the statement of the prosecutrix.

35. **Objection of the appellants towards prosecutrix's relation with Raju and Raju not made a witness**

The prosecutrix has deposed that Raju was employed at the house of Pushpa Rani prior to her employment. Even testimony of PW-3 (Pushpa Rani) corroborates the testimony of prosecutrix and reads as under: -

*"**No person by the name of Raju ever worked with me.** On 25.5.13, accused Lakhi visited my house at about 4 or 5 p.m. However, I do not remember the exact time. On27.5.13, prosecutrix returned in the early morning at about 7 a.m. **It is wrong to say that one boy namely Raju***

aged about 15/16 years was working with me and prosecutrix developed physical relations with her and Raju was removed by me from the services."

Hence, the contention of the appellants that Raju was not made a witness and they were falsely implicated in the case because they raised an objection towards the prosecutrix's relationship with one Raju, who was employed at the prosecutrix's place of employment cannot be accepted.

CONCLUSION

36. The judgement of the learned Trial Court is well reasoned. The Trial Court has correctly observed that the fact that both the appellants were employed at the same place at the time of incident and the prosecutrix was also residing at their place from 25.05.2013 till 27.05.2013which proves that the offence has taken place and the same is also corroborated by the testimony of PW-3 (Ms. Pushpa Rani). In addition, it has also been correctly observed that the DNA profiles generated from the exhibits were sufficient to prove the guilt of appellant No.1 in commission of the offence.

37. The testimony of PW-5 (Dr. Aditi Aggarwal) has explained that congestion over the area of the body is usually present in injuries which are less than 24 hours old. The fact that the absence of congestion in the present case is possible due to lapse of time has also been rightly appreciated by the learned Trail Court.

38. The learned Trial Court has also rightly relied upon the judgements to state that the testimony of the victim alone is sufficient to prove the guilt of the accused and minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

39. There is also sufficient evidence against the appellant No.2 in abetting the offence committed by appellant No.1, being her presence in the room at the time of commission of offence and the testimony of the prosecutrix. The role of appellant No.2 in commission of the offence has also been correctly examined by the learned Trial Court.

40. It is a settled position of law that the statement of prosecutrix can be the sole basis for conviction unless there are cogent reasons for the Court to be hesitant in believing the statement at its face value or to seek corroboration. The Supreme Court in "***State of H.P. v. Sanjay Kumar***"[(2017) 2 SCC 51] held that:-

> *"30…We have already discussed above the manner in which the testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases.*
>
> *31…By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one*

who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime."

41. In the present case, the testimony of the prosecutrix is of sterling quality and inspires the confidence of this Court. This Court finds no reason to discredit or disbelief the statement of the prosecutrix. In addition, the statement of the prosecutrix has also been duly corroborated. The intention of the prosecutrix in falsely implicating the appellants can also not be made out.
42. The appellants have not been able to rebut the presumption of guilt which operates against them under section 29 of POCSO Act. The prosecution has successfully proved the guilt of the appellants in committing the offence beyond a reasonable doubt.
43. In this view of the matter, I find no reason to interfere with the judgement dated 31.01.2020 and order on sentence dated 27.06.2020 passed by the learned Special Judge (POCSO ACT)/ ASJ-01, (West), Tis Hazari Courts, Delhi, in case S.C. No. 55924/2016, FIR No. 224/2013, u/s 376/342/506/120B/109 IPC and section 4/6 of POCSO Act, registered at P.S. Punjabi Bagh, Delhi.
44. The appeals are accordingly dismissed.
45. Copy be sent to DSLSA Member Secretary to ensure that compensation has been paid to the prosecutrix.

JASMEET SINGH, J

MAY 16, 2023 / st