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

% Reserved on : 24.07.2024
Pronounced on : 26.08.2025

\+ **CRL.A. 664/2024, CRL. M(B) 1255/2024**

X .....Appellant
Through: Ms. Manika Tripathy, Advocate (DHCLSC) with Mr. Gautam Yadav, Advocate

versus

STATE (NCTD) AND ANR .....Respondents
Through: Mr. Pradeep Gahalot, APP for State with WSI Soni Lal PS Nabi Karim, Delhi
Mr. Archit Upadhyay, Advocate (DHCLSC) for respondent No.2

**CORAM:**
**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**JUDGMENT**

**CRL. M(B) 1255/2024**

1. With the consent of parties, the appeal itself is taken up for hearing.

2. In view of the above, the present application becomes infructuous and is disposed of as such.

**CRL.A. 664/2024**

1. By way of the present appeal, the appellant (father of child victim) seeks to assail the judgement of conviction dated 25.09.2023 in Session Case No.816/2017, vide which he has been convicted Sections 376(2)(f) & (n)/377 of IPC and Section 6 of POCSO Act.

Vide order on sentence dated 01.03.2024, he was directed to undergo rigorous imprisonment for a period of 10 years for the offence punishable under Section 6 of POCSO Act alongwith payment of fine of Rs.1,000/-, in default whereof he was directed to further undergo simple imprisonment for a period of 1 month. The benefit of Section 428 Cr.P.C. was provided to the appellant.

2. Briefly, the facts in a nutshell are that on 22.09.2017, the prosecutrix 'A' aged about 9 years, accompanied by her class teacher 'M' appeared in the Police Station and made following statements against her own father: -

*"आपका नाम क्या है? - 'A'*
*आपकी मम्मी का क्या नाम है? - RK*
*आपकी उम्र क्या है? - 9 साल*
*आप कौन सी क्लास में पढ़ती हो? तीसरी कक्षा में*
*आप कौन से स्कूल में पढ़ती हो? AV School.....*
*आप कितने भाई बहन हो? हम तीन बहन व् दो भाई हैं। मैं सबसे बड़ी हु।*
*तुम्हारा घर कहा पर है? हमारा गाँव बिहार में है। दिल्ली में मैं और मेरी छोटी बहन पापा के साथ किराये के मकान में रहते हैं।*
*तुम्हारी मम्मी कहा पर रहती हैं? मेरे पापा ने मेरी मम्मी को गाँव में एक महीने पहले भेज दिया था।*
*आपके साथ कुछ गलत हुआ है? हाँ मेरे साथ गलत काम हुआ है।*
*एक महीने पहले मेरी मम्मी को पापा ने गाँव में भेज दिया और मम्मी के जाने के बाद बकरा ईद से अगले दिन 3-9-17 को में जमीन पर सो रही थी तो रात को पापा 12 बजे के करीब मेरे पास आंकर मेरे ऊपर लेट गए मेरी कच्छी निकल दी फिर पापा ने मेरे पेशाब वाली जगह अपनी सुसु डाल कर ऊपर नीचे करने लगे तब मैं रोने लगी तो पापा ने मेरा मुह बंद कर दिया उस दिन मुझे खून भी आया था मैंने जमीन से खून कच्छी से पोछ कर कच्छी को कूड़े में फेक दिया था उस दिन के बाद पापा मेरे लेटिंग वाले रस्ते से रोज गलत काम करते थे अपनी सुसु डाल कर कल रात को भी पापा ने मेरे साथ लेट्रिंग वाले रस्ते से गलत काम किया था आज मैंने अपनी क्लास टीचर 'M' मैडम को सारी बात बताई 'M' मैडम मुझे लेकर थाने में आई मेरे पापा पर कानूनी कार्यवाही की जाये"*

3. The child victim was medically examined at Lady Harding Hospital and her statement was recorded under Section 164 Cr.P.C. before the

learned MM (Ex.PW-2/B) in which she stated as under:-

> *"हमारे पापा हमारे साथ रात को गन्दी गन्दी हरकत करते हैं। जब हम कपडे पहन कर सोते हैं रात को तो कपडे निकाल देते हैं और हमारे ऊपर चढ़ जाते हैं। ऊपर नीचे करते हैं। पापा ने पहली पहली बार आगे से किया था। पापा हमारी पैंटी भी उतार देते हैं और अपनी भी पैंटी उतार देते हैं और हमारे ऊपर चढ़ जाते हैं। पहली पहली बार किया था तो हमे खून निकला था। पापा अब पीछे से करते हैं।*
> *Q: क्या करते हैं पापा?*
> *A: हमारे ऊपर चढ़ के ऊपर नीचे करते हैं हमारे पापा हमारे मम्मी को डंडे से मारते हैं। हमारी दादी भी हमे और हमारी मम्मी को मारती हैं। हमें मम्मी के पास रहना है।"*

4. On completion of investigation, charge under Sections 376/377/506 IPC and Section 6 of POCSO Act was framed against the appellant vide order dated 01.12.2017, to which he pleaded not guilty and claimed trial. During trial, a total of 15 prosecution witnesses were examined. The Principal of the School, where the child victim was studying, who proved the age of the victim, was examined as PW-1. The child victim was examined as PW-2. The mother of the child victim, RK was examined as PW-3. The class teacher 'M', who had accompanied the child victim to the Police Station, was examined as PW-5. The MLC of the child victim was proved by Dr. *Manvi*, who was examined as PW-6. The FSL Report was proved through Ms. Sunita Gupta, Senior Scientific Officer (Biology) FSL, Rohini, Delhi, who was examined as PW-14. W/ASI Babita was examined as PW-15.

5. Learned counsel for the appellant while assailing the impugned judgment has raised threefold contention. *Firstly*, the child victim and her mother have turned hostile and did not support the prosecution's case. *Secondly*, the appellant is falsely implicated by the child victim on the instigation of her class teacher 'M' who bears a grudge against the appellant as there were prior quarrels between them, as his daughters used to get

Rs.2,000/- each from NGO, however, the said money was intentionally siphoned off by M. *Thirdly*, the prosecution's reliance on the FSL Report on the underwear of the child victim falls flat as the child victim did not identify the said underwear in her testimony. *Lastly*, it is contended that though the samples were collected on 28.09.2017, there was delay in sending the same to FSL.

6. *Per contra*, learned APP for the State, duly assisted by learned counsel for the child victim, has defended the impugned judgment and refuted the contentions. It is contended that when the testimony of the child victim was recorded, she was residing with her mother, who had taken her custody from CWC (Central and Central Delhi) on 09.10.2017 and therefore, on account of being tutored by her mother, the child victim resiled from her earlier statement recorded during the investigation. Learned APP has referred to the MLC and FSL Report to submit that the same conclusively proved that the appellant has been rightly convicted for the offence.

7. Concededly, the age of the child victim is not in dispute. The child victim at the relevant point of time was about 9 years of age and as such was a minor. Even otherwise, the age was proved through the Principal of the School (PW-1) where the child victim was admitted. The witness was not cross-examined despite the opportunity. Further, in the testimony of the mother of the child victim, RK (PW-3) has mentioned the age of the child victim to be 9 years.

The testimony of the mother of the child victim, would further reveal that the appellant is the biological father of the child victim. The witness deposed that on the occasion of last *Eid*, she, along with her husband and

children, went to her native village for her delivery as she was pregnant at that time. While she stayed back, her husband, i.e., the appellant, as well as both daughters, including the child victim, returned to Delhi. When the appellant was taken in custody, the witness reached Delhi and obtained the custody of the child victim from CWC, Mayur Vihar. It has come on record that the custody of the child victim was taken on 09.10.2017. The witness further deposed that the child victim told her that the appellant had not committed any wrong act with her, and the case was instituted on the instigation of the class teacher. As the witness had resiled from her statement, she was cross-examined by learned APP where she denied the suggestion that the child victim had told her that her father used to commit *'galat kaam'* (sex) with her every night. She was duly confronted with her earlier statement (Ex. PW3/P-1) where she had stated so.

8. The child victim was examined as PW-2. Before recording the testimony, the Trial Court recorded its satisfaction as to the competence of the child victim to depose. In her statement, the child victim resiled from her previous statement and stated that the appellant did not commit any wrong act with her. She stated that they used to receive a financial grant from school and in relation to the same quarrels had taken place between her class teacher 'M' and the appellant. She further stated that the statement was made only on the asking of her class teacher, 'M'. During her examination, though the child victim admitted that her underwear was seized in the hospital at the time of her medical examination, however she did not identify the same when it was shown, stating that the same did not belong to her. On being cross-examined by the learned APP, she stated that she was no longer studying in the same school. She further stated that after her father was put

behind bars, she wanted to get him out of jail. She said the quarrel between her father and class teacher occurred as the financial grant from school was transferred in the name of another child with the similar name. From the above, it is apparent that the child victim had completely resiled from her earlier statements and did not support the prosecution case.

9. The other relevant witness i.e. class teacher 'M' of the school was examined as PW-5. She deposed that on account of instructions received from the department, there was a drive to educate the children about good and bad touch. In this regard, a video was also shown to the school children prior to October, 2017. On the said day, one of the students of her class i.e., the child victim came to her and said *'mere papa mere sath bahot galat kaam karte hain'*. On further asking the child victim stated that *'mere papa raat main mere sarey kapde utar dete hain, main chupchap soyi rehti hun kyonki mujhe darr lagta hai'*. On being disclosed such information, the witness took the child to staff room where again the child victim reiterated the statement and also said that besides above, the appellant had committed the said act via 'vagina' as well as 'anus.' During her cross-examination, the witness stated that the school used to receive funds from the Government for maintenance of the wards. Initially, the said amounts used to be disbursed in cash, however, later; the same were directly transferred to the bank accounts of students. Though she admitted that father of the child victim used to come to collect the amount, however, denied the suggestion that there was any quarrel with the father of the child victim relating to payment of cash amount. A suggestion was given that one such quarrel had taken place in the month of June/July, 2017 to which she replied that school remained closed during those months on account of summer vacations.

10. Coming next to the medical and forensic evidence, it is noted that on registration of the FIR (Ex.PW-4/A) on 22.09.2017, the child victim was examined on the same day. The MLC has been placed on record as Ex.PW-6/A. The MLC records that on local examination following observations were made:-

> *"L/E*
> *Redness of vaginal mucusa (1-2 days)*
> *Hymen torned 1x1 cm hole posteriorly*
> *PR*
> *strength of anal sphincter decreased minimally 4/5."*

11. After medical examination, the doctor concerned, handed over sealed *pulanda* containing sexual assault evidence collection kit as well as the underwear of the child victim which was seized vide seizure memo Ex.PW12/A. As per the testimony of the I.O. W/ASI Babita (PW-15), the samples were deposited by her in *malkhana* and thereafter sent to FSL. Although the contention is raised as to delay in sending the samples, there is no suggestion put to the I.O. if the samples were ever tampered.

10. The prosecution examined *Sunita Gupta*, Sr. Scientific Officer (Biology), FSL, Rohini as PW-14, who proved the FSL Report. She deposed that as per DNA (STR) analysis, performed on exhibits '1n' i.e., rectal swab and smear of the child victim, '2' i.e., the underwear of the child victim and '3B' i.e., the blood sample of appellant, the profiles generated from the said exhibits were found to be similar. In other words, the DNA profile generated from the source exhibits i.e., rectal swab and smear of the child victim as well as her underwear, matched with the DNA profile generated from the blood sample of the appellant.

12. At this stage, another contention is raised on behalf of the appellant

that at the time of her medical examination, the child victim had stated that she had taken a bath and also changed her clothes. On this strength, it is contended that the underwear seized after medical examination is not the same underwear that was worn by the child victim when the offence was allegedly committed a day earlier. I deal with this aspect later in the judgement.

13. Indeed, the oral testimonies of the prosecution witnesses i.e., the child victim and her mother, do not support the prosecution's case as they have turned hostile. The medical and forensic evidence, however, points to the appellant's involvement in the offence. It is trite law that the evidence of prosecution witnesses who turn hostile cannot be washed off or rejected *in toto*. The evidence merits closer scrutiny and the portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. After employing caution and separating the truth from the exaggeration, lies and improvements, the Court can come to the conclusion that the residuary evidence is sufficient to secure a conviction. Whether the testimony of the hostile witness can be relied upon stands answered by the Supreme Court in *Selvamani v. State Rep. by the Inspector of Police* reported as **2024 SCC OnLine SC 837**, wherein it has been held as under:-

> *"10. This Court, in the case of C. Muniappan and Others v. State of Tamil Nadu10, has observed thus:*
>
> *"81. It is settled legal proposition that :(Khujji case, SCC p. 635, para 6) '6. ... the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.'*
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> *82. In State of U.P. v. Ramesh Prasad Misra, (1996) 10 SCC 360] this*

*Court held that (at SCC p. 363, para 7) evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in BaluSonba Shinde v. State of Maharashtra, (2002) 7 SCC 543], Gagan Kanojia v. State of Punjab, (2006) 13 (2010) 9 SCC 567 : 2010 INSC 553SCC 516], Radha Mohan Singh v. State of U.P.,(2006) 2 SCC 450], Sarvesh Narain Shukla v.Daroga Singh, (2007) 13 SCC 360] and Subbu Singh v. State, (2009) 6 SCC 462.*

*83. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.*
*xxx*

*85. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. Vide Sohrab v. State of M.P., (1972) 3 SCC 751, State of U.P. v. M.K. Anthony, (1985) 1 SCC 505, BharwadaBhoginbhaiHirjibhai v. State of Gujarat, (1983) 3 SCC 217, State of Rajasthan v. Om Prakash, (2007) 12 SCC 381, Prithu v. State of H.P., (2009) 11 SCC 588, State of U.P. v. Santosh Kumar (2009) 9 SCC 626 and State v. Saravanan, (2008) 17 SCC 587"*

Thus, the evidence of a hostile witness cannot be written off and the same has to be considered with due care and circumspection. The evidence of 'hostile witness' which finds corroboration from the facts of the case and other reliable evidence can be relied upon. Though the child victim and her mother have turned hostile, it cannot be lost sight of that the appellant/accused is the father of the child victim. It would be prudent to

look at other materials placed on record to check whether the conviction of the appellant was merited.

14. The class teacher of the child victim (PW5) has given a categorical deposition as to the child witness telling her that her father had committed '*galat kaam'* with her, which upon asking, the child victim had stated that he put his private part in her private part. The child victim further informed her that the act was also committed via anus. Her testimony is sought to be discredited on behalf of appellant by contending that she deposed falsely to implicate the appellant on account of some dispute with him regarding financial aid. In her cross examination, she refuted the suggestion that any dispute had arisen between her and the appellant over payment of cash amount. She further stated that no quarrel could have taken place in June/July 2017, as the school was closed for summer vacations. Moreover, even though the principal of the school was also examined as PW1, no suggestion was given to her in relation to this alleged financial dispute. The appellant has failed to shake the veracity of the statement of PW5.

15. Further, the prosecution case also finds support in the FSL report (Ex. PW14/A). A perusal of the same would show that the DNA profile generated from the source exhibits i.e., rectal swab and smear of the child victim as well as her underwear, matched with the DNA profile generated from the blood sample of the appellant. It was contended that the report could not be relied upon as the child victim had failed to identify the underwear in her testimony. It was also contended that the MLC records that she took bath and changed her clothes. However, nowhere does the MLC state that all the clothes including the underwear were changed on the day of the medical examination. In fact, the allegations are that the incident had

taken place a day prior as well. The seizure of the underwear was proved by PW15 W/ASI Babita vide seizure memo Ex. PW12/A. Even if the underwear is to be disregarded, the appellant has still been unable to explain the DNA Match with the rectal swab and smear of the victim. In so far as delay in sending the samples is concerned, no allegation as to tampering was made. PW13 and PW9 has specifically deposed that no tampering had taken place and as per the FSL Report, the samples were received in a sealed condition. In such a scenario, delay, if any, does not assume any importance.

16. In the MLC (Ex. PW6/A) prepared on the same date as the complaint, in the brief history it is stated that one night the appellant removed the clothes and underwear of the child victim and '*inserted something long and rounded thing from his body, most probably penis'* and did intercourse. The child victim was bleeding and the appellant cleaned it with her underwear and threw it. Thereafter, the same act was committed daily at night and rape was committed on the anus and mouth of the child victim as well. The MLC also noted that as per patient history, she suffered the same incident the day before the MLC was prepared. Thus, the MLC was prepared within 24 hours of the complaint and the last stated occurrence of the incident. Coming to injuries, the MLC records redness of vaginal mucosa (1-2 day), a torn hymen with a 1x1 cm hole, as well as a decreased strength of the anal sphincter.

17. 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[1] 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. "*

18. Gainful reference in this regard may also be made to the decision of a Co-ordinate Bench of this Court in Veerpal v. State[2], 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."*

19. In view of the version recorded in the initial complaint and statement under Section 164 CrPC being corroborated by the MLC and the FSL report, and the unwavering testimony of PW5, the child victim turning hostile has not dented the prosecution case. The prosecution has been able to lay the foundation of the facts and under and thus brought into play Section 29 of the POCSO Act, and that presumption the appellant has miserably failed to rebut. He has been unable to shake the credibility of any of the witnesses

[1] (2025) 2 SCC 399
[2] 2024 SCC OnLine Del 2686

who supported the prosecution case by thorough examination or pointed any fatal gaps in the prosecution case or explained the findings in the MLC or FSL report. The defence taken by the appellant is untenable and rightly discredited by the Trial Court.

20. This Court, has thoroughly examined the records and finds no reason to differ with the conclusion arrived at by the trial court. Consequently, the appeal is dismissed and the impugned judgment convicting the appellant as well as the order on sentence are upheld.

21. Accordingly, the present appeal is dismissed.

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

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

**MANOJ KUMAR OHRI**
**(JUDGE)**

**AUGUST 26, 2025**
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