

HIGH COURT OF DELHI**Bench: Hon'ble Mr. Justice Amit Bansal****Date of Decision: 06 November, 2023**

CRL.A. 160/2021 & CRL.M.(BAIL) 121/2023 (suspension of sentence)

SHANTANU**..... Appellant****versus****THE STATE****..... Respondent****Legislation:**

Section 376 of the Indian Penal Code, 1860 (IPC),
Sections 3(c), 6, 7, 8, 9(m), 10, and 42 of the Protection of Children from
Sexual Offences Act, 2012 (POCSO Act),
Sections 161, 164, 313 of the Code of Criminal Procedure, 1973 (CrPC)

Subject: Appeal against conviction under Section 376 of IPC and Section 6
of the POCSO Act, challenging the judgment of the Trial Court which
sentenced the appellant to ten years of rigorous imprisonment and a fine for
the alleged sexual assault of a minor.

Headnotes:

Criminal Appeal – Conviction under POCSO Act – Appeal against conviction
for offences under Section 376 IPC and Section 6 of the POCSO Act –
Appellant sentenced to ten years rigorous imprisonment and fine by Trial
Court – Alleged inconsistencies and material improvements in the victim's
testimony – Appellant's conviction under Section 6 POCSO Act not proved
beyond reasonable doubt, modified to Section 10 of the POCSO Act. [Paras
1-6, 16-34]

Evidence Analysis – Victim's Testimony – Various statements of child victim
examined – Discrepancies noted in the description of the alleged assault –
MLC and Section 161 CrPC statement mentioned touch through clothes, later
statements and Trial Court deposition included finger insertion and threats –
Trial Court's inference of insertion not concurred due to lack of medical
corroboration and inconsistencies. [Paras 9-21]

Investigation Lapses – Unexamined Witnesses – Presence of other children
during the incident not probed – Serious lapse in investigation highlighted,
affecting the credibility of the prosecution's case. [Para 22]

Medical Evidence – Lack of Corroboration – Medical evidence did not
corroborate the victim's later statements of being cut by the appellant's
fingernails – No forensic examination conducted on accused's nails. [Paras
21, 23]

Hearsay Evidence – Testimonies of victim's parents – Both based on what the
child victim reported, hence considered hearsay and not given substantial
weight. [Para 24]

Legal Interpretation – Penetrative Sexual Assault – Analysis of POCSO Act provisions – Manipulation required for penetration not established – Simple touch does not amount to manipulation, separate offence under the Act. [Paras 26-29]

Delay in Filing FIR – Explained by victim's mother – Delay not considered a sole factor for discrediting prosecution's case. [Para 30]

Final Decision – Conviction Modified – Based on evidence and legal interpretation, appellant's conviction under Section 6 of the POCSO Act set aside, found guilty under Section 10 of the POCSO Act – Sentenced to five years rigorous imprisonment with retained fine. [Paras 31-34]

Referred Cases:

- State of Himachal Pradesh v. Manga Singh, (2019) 16 SCC 759
- Satinder Singh v. State (Govt. of NCT of Delhi), 2007 (1) JCC 639
- Bijender Singh v. State of Haryana, 2013 [2] JCC 845

Advocates:

For the Appellant: Mr. Rajive Maini, Ms. Shriya Maini, AOR with Ms. Aparna Kaushik and Ms. Neeshu Chandpuniya, Advocates

For the Respondent: Mr. Ritesh Kumar Bahri, APP for State

JUDGMENT

CRL.A. 160/2021

1. The present appeal has been filed for setting aside the judgment of conviction and the order on sentence, both dated 28th October, 2020, passed by the learned Additional Sessions Judge (POCSO Act), Central District, Tis Hazari Courts, New Delhi.
2. *Vide* judgment of conviction, the appellant was convicted for the offences punishable under Section 376 of the Indian Penal Code, 1860 (IPC) and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). *Vide* order on sentence, the appellant was sentenced to rigorous imprisonment for a period of ten years for the conviction under Section 6 of the POCSO Act and to pay a fine of Rs.5,000/-. No sentence was awarded to the appellant under Section 376 of the IPC in view of Section 42 of the POCSO Act.
3. The brief facts of the case as set up by the prosecution are as follows:
 - 3.1. On 8th August, 2016, a PCR call was received by the police from the father of the victim, regarding sexual assault on his daughter, who was aged six years at the time of the incident. Information was recorded and the police arrived at the residence of the victim.
 - 3.2. The victim narrated to the police that on 5th August, 2016, when she had gone for tuition, the appellant, who is the brother of her tuition teacher, touched her anus with his finger, and it caused her severe pain. The victim

informed her mother about the incident at the tuition and the resulting pain.

3.3. The victim along with her parents and a police official went to the Aruna Asaf Ali Hospital, where her medical examination was conducted and the MLC (Exhibit PW-2/B) was prepared.

3.4. Thereafter, the police recorded the statement of the victim and prepared a *Rukka* on 8th August, 2016 for registration of the FIR. Based on the information provided in the *Rukka*, the FIR No.171/2016 under Section 376 of the IPC and Section 6 of the POCSO Act was registered at Police Station Lahori Gate on 9th August, 2016.

3.5. On the same date, the statement of the victim under Section 164 of the Code of Criminal Procedure, 1973 (CrPC) was recorded before the learned Metropolitan Magistrate, Tis Hazari Courts, New Delhi.

3.6. The appellant was arrested on 9th August, 2016 and subsequently, after investigation, the chargesheet was filed.

4. During trial, sixteen witnesses were examined by the prosecution, including the victim (PW-2), father of the victim (PW-6), mother of the victim (PW-7), Dr. Surinder Kumar (PW-4), Dr. Sandeep Kumar (PW-11), Dr. M. Rao (PW-10), Dr. Kuldeep (PW-8), Constable Mukesh Kumar (PW-9), Police Sub Inspector Akanksha (PW-12), Duty Officer Subhash (PW-3), Duty Officer ASI Panwati (PW-1), Physical Education teacher of the victim (PW-5) and Sub Inspector Seema (PW-13). Statement of the appellant denying evidence and claiming innocence was recorded under Section 313 of the CrPC. The sister of the appellant, Ankita, who was the tuition teacher of the victim, deposed as DW-1.
5. The Sessions Court after examining the witnesses, analysing the evidence and hearing the arguments convicted the appellant for the offences under Section 376 of the IPC and Section 6 of the POCSO Act.
6. Counsel appearing on behalf of the appellant has made the following submissions:
 - i. There are material contradictions and improvements in the statements of the victim. Whereas, the victim in her statements in the MLC as well as under Section 161 of the CrPC stated that the appellant touched her anal region from above her pants, however, in her statement under Section 164 of the CrPC, the victim stated that the appellant inserted his finger and caught her by the neck and threatened her. During her deposition before the Trial Court, the victim stated that the appellant had cut her anal region with his fingernails.

- ii. The Trial Court has convicted the appellant based solely on the inconsistent testimony of the victim and the same has not been corroborated by any independent witnesses or medical evidence.
 - iii. There are serious lapses in the investigation carried out in the case. The victim during her cross-examination stated that there were other children present at the time of the incident. However, they were not examined during trial.
 - iv. There has been an unexplained delay of three days in filing the FIR. The alleged incident occurred on 5th August, 2016 and the FIR in the present case was filed on 9th August, 2016.
 - v. Since there were inconsistencies in the statement of the victim with regard to touch and insertion as well as lack of external injuries, the present case would, at best, fall under Sections 8/10 of the POCSO Act, and not under Section 6 of the POCSO Act.
7. *Per contra*, the learned APP appearing on behalf of the State has made the following observations:
- i. The victim in her various statements has supported the case of the prosecution and there are no inconsistencies in her statements. The victim, in all her statements has consistently maintained that the appellant touched her anal region and she felt pain.
 - ii. A conviction under Section 376 of the IPC/Section 6 of the POCSO Act can be made on the sole testimony of the prosecutrix if the said testimony is reliable and trustworthy and no corroboration is required for the conviction to sustain. In this regard, reliance has been placed on the judgment of the Supreme Court in ***State of Himachal Pradesh v. Manga Singh***, (2019) 16 SCC 759.
 - iii. The Trial Court has rightly inferred that the appellant inserted his finger in the anal region of the victim, which caused her severe pain.
 - iv. In terms of Section 3(c) of the POCSO Act, penetrative sexual assault can occur if there is “manipulation” of any body part of the child.
 - v. The delay in filing of the FIR has been sufficiently explained by the mother of the victim during the course of the trial. In this regard, reliance has been placed on the judgment of a Coordinate Bench of this Court in ***Satinder Singh v. State (Govt. of NCT of Delhi)***, 2007 (1) JCC 639, where the Court accepted the delay of two months in filing of the FIR as having been well explained.
8. I have heard the counsels for the parties and perused the material on record.
 9. Since the case of the prosecution is primarily based on the testimony of the victim (PW-2), I shall proceed to analyse the same.

10. In the statement of the victim recorded during the MLC on 8th August, 2016, the victim had stated that the appellant touched her anal region through her clothes without exposing. The relevant extracts of the MLC are set out below:-
“...a known person named Shantanu (brother of tuition teacher) touched her anal region with his finger through her clothes (not after exposing)... When she came home, she told her mother she was having pain while sitting and passing motion”
11. In the statement of the victim recorded under Section 161 of the CrPC (Exhibit PW-2/A) on 8th August, 2016, the victim stated that the appellant touched the victim with his finger from above her pants, which caused her a lot of pain.
12. The victim in her statement under Section 164 of the CrPC (Exhibit PW-2/D) recorded on the next day, i.e. 9th August, 2016, stated that the appellant touched and inserted his finger in her anal region. She also stated that the appellant held her by the neck and threatened her not to tell about the incident to the tuition teacher.
13. In her deposition before the Trial Court, the victim stated that there were two other children present at the time of the incident, whose faces were turned by the appellant before committing the offence. On being questioned about the reason for the pain, the victim stated that the appellant had cut her anal region with his finger nails.
14. The victim was then cross examined by the learned APP. The relevant extracts from the cross examination of the victim by the learned APP are set out below:-
Question: I put it to you that Shantanu bhaiya caught your neck and threatened you not to disclose anyone and ran away and you had stated the same in your statement under section 164 CrPC?
Answer: No, it is incorrect.
(At this stage, witness is confronted with Ex. PW2/D from the portion A to A, wherein it is so recorded.)
Question: I put it to you that Shantanu bhaiya had said to you not to disclose the incident to Ankita didi and you had stated the same in your statement under section 164 CrPC?
Answer: No, it is incorrect.”
(At this stage, witness is confronted with Ex. PW2/D from the portion B to B, wherein it is so recorded.)
15. In her cross examination by the defence counsel, the victim was confronted with her statement under Section 161 of the CrPC.
16. An analysis of the various statements made by the victim at various points of time as narrated above would show that there have been material improvements in the statements made by the victim.

17. In her statement during the MLC as well as her statement recorded under Section 161 of the CrPC, the victim has consistently stated that the appellant touched her anal region with his finger through her clothes. However, in her statement under Section 164 of the CrPC, she has stated that the appellant inserted his whole finger inside her anal region and also held her throat and threatened her.

18. In her deposition before the Trial Court, the victim for the first time stated that the appellant had slid his hand through her clothes. It was also stated for the first time that the appellant had cut her anal region with his finger nails. Clearly, this amounts to a material improvement. There was no mention about the appellant cutting her anal region with his finger nails in her earlier statements. In her earlier statements, the victim had stated that the appellant touched her anal region through her clothes.

19. It is relevant to note that the victim, during her cross-examination by the learned APP, was confronted with her statement under Section 164 of the CrPC where she had stated about the appellant threatening her and asking her not to disclose the incident to the tuition teacher. The victim denied having received any threats.

20. In her cross-examination by the defence counsel, the victim was once again confronted with her statement under Section 161 of the CrPC to show the inconsistencies between her deposition in the Trial Court and previous statements.

21. It cannot be disregarded that the victim at time of incident was a child of six years and therefore, some leeway has to be provided for minor inconsistencies in her statement. However, from the analysis above, it cannot be stated that the contradictions in the statements of the victim are minor or immaterial. If her anal region was indeed cut by the appellant with his finger nails, it would have caused a lot of pain and she would have disclosed the same in her earlier statements under Section 161 of the CrPC and Section 164 of the CrPC. Additionally, if the appellant had used his nails, it would have reflected in the MLC. As per the MLC, there was no redness or external mark of injury over the body of the victim. It is also an admitted position that there was no forensic examination done in respect of the accused/appellant using his nails to cut the anal region of the victim. Therefore, I cannot concur with the finding of the Trial Court that an inference of insertion can be made from the fact that the victim suffered pain.

22. From the testimony of the victim, it also appears that there were two other children present at the time of the incident. The prosecution did not

make any attempt to question the aforesaid two children. This clearly amounts to a serious lapse in the investigation.

23. It is also a matter of record that there is no independent witness or a medical evidence supporting the case of the prosecution. There is no dispute with the proposition that a conviction can be made only on the basis of the testimony of the prosecutrix without any independent corroboration. However, in such case, the testimony of the prosecutrix has to be of a sterling quality. As noted above, in the present case, there have been contradictions and material improvements in the testimony of the prosecutrix.

24. As regards the testimony of the father (PW-6) of the victim, it has been stated that he had been deposing on the basis of the information given to him by his wife/mother (PW-7) of the victim. The testimony of the mother is also based on what the child victim had told her. Both of the testimonies are in the nature of hearsay and thus, not much weight can be attached to the same.

25. DW-1, being the sister of the appellant, in her deposition has stated that there were disputes between the mother of the victim and her with regard to giving tuition to the victim separately. This aspect was also put to the victim in her cross-examination, though the victim has denied any enmity between her mother and DW-1.

26. With regard to the submission of the learned APP that 'penetrative sexual assault' includes manipulation, reference may be made to Section 3(c) of the POCSO Act which is set out below:-

"3. Penetrative sexual assault.—A person is said to commit "penetrative sexual assault" if—

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person;"

27. Reference may also be made to Section 7 read with Sections 9(m) and 10 of the POCSO Act (unamended), as applicable on the date of the offence.

The same is set out below:-

"7. Sexual assault.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

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xxx

xxx

9. *Aggravated sexual assault.—*

(m) whoever commits sexual assault on a child below twelve years;

10. Punishment for aggravated sexual assault.—Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.”

28. A perusal of Section 3(c) of the POCSO Act shows that for an act to be a penetrative sexual assault, the accused has to manipulate any part of the body of the child so as to cause penetration. There is nothing in the present case to show that there was any manipulation on any part of the body of the victim so as to cause penetration.

29. A simple act of touch cannot be considered to be manipulation under Section 3(c) of the Act. It is relevant to note that under Section 7 of the POCSO Act, ‘touch’ is a separate offence. If the submission raised by the learned APP that a touch would amount to manipulation is accepted, then Section 7 of the Act would be rendered redundant.

30. As regards the delay in filing of the FIR, in my considered view, the delay of three days has been duly explained by the mother of the victim (PW7) in her deposition. In any event, delay alone, by itself cannot be the basis for disbelieving the case set up by the prosecution.

31. Merely because there have been inconsistencies in the statement of the child victim, it cannot be said that her testimony is completely unreliable and should be disregarded in its entirety. It is to be noted that the child victim has consistently stated in her testimony as well as various previous statements that she was touched in the anal region by the appellant and the touch caused her pain. In this regard, the learned APP has correctly placed reliance on the judgment of the Supreme Court in ***Bijender Singh v. State of Haryana***, 2013 [2] JCC 845.

32. In view of the above discussion, I am of the opinion that the offence under Section 6 of the POCSO Act has not been proved against the appellant beyond all reasonable doubt. But the offence under Section 10 of the POCSO Act is proved beyond all reasonable doubt against the appellant.

33. Therefore, the appeal is partially allowed and the impugned judgment is modified to the extent that instead of Section 6 of the POCSO Act, the appellant stands convicted under Section 10 of the POCSO Act.

34. The appellant is sentenced to undergo rigorous imprisonment of five years for the offence under Section 10 of the POCSO Act. The fine of Rs.5,000/- awarded by the Trial Court is retained.

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