IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRA-D-1903-DB-2014 (O&M)
Reserved on: 21.12.2021
Date of decision: 04.02.2022

Sanjay

.....Appellant

Versus

State of Haryana

.....Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA

Present: Ms. Tanu Bedi, Advocate,
for the appellant.

Mr. Ankur Mittal, Addl. A.G., Haryana
and Mr. Saurabh Mago, AAG, Haryana.

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Ashok Kumar Verma, J.

1. This appeal has been filed against the judgment of conviction dated 27.10.2014 and order on quantum of sentence dated 28.10.2014 passed by the Additional Sessions Judge, Faridabad, whereby accused-appellant (Sanjay) has been convicted and sentenced as under:-

Offence under Section	Period of sentence	Fine imposed	In default of payment of fine
342 IPC	Simple imprisonment for one year	Rs.1000/-	Simple imprisonment for one month
376 IPC	Imprisonment for life	Rs.50,000/-	Rigorous imprisonment for two years
4 of POCSO Act	Imprisonment for life	Rs.50,000/-	Rigorous imprisonment for two years

2. Brief facts, as culled out from the paper-book, are that on 11.05.2014, complainant-Neetu Devi along with her husband-Bushan Singh and daughter-victim came to the police station and got recorded her

statement to the effect that on 10.05.2014, her daughter, aged about 04 years, had gone to the shop of Sanjay for purchasing curd. When for a long time she did not return, complainant had gone to see her, whereupon she found that her daughter was coming from the shop of Sanjay. She inquired from her daughter, where she was, then her daughter told her that uncle, wearing red T-shirt, had taken her inside the room and tried to commit rape upon her after removing her pant. Thereafter, she revealed that at that time, Sanjay was being called by some person from outside, who after leaving her inside, came outside for attending that person. She tied her trouser and came out. Thereafter, Neetu Devi asked Sanjay about the incident, whereupon he (Sanjay) got frightened, closed his shop and fled away. She narrated this fact to her husband.

3. On the basis of statement/complaint made by complainant Neetu Devi, FIR No.166 dated 11.05.2014, under Sections 376, 511, 342 IPC and Section 4 of Protection of Children from Sexual Offences (POCSO) Act, was registered at Police Station, Chhainsa, Faridabad. During investigation, accused-appellant was arrested, who suffered a disclosure statement Ex.PF. victim was medico-legally examined and her ossification test was got conducted. Rough site plan was got prepared. On completion of investigation, report under Section 173 Cr.P.C. was prepared and presented in the Court of Illaqa Magistrate. Vide order dated 15.07.2014, Illaqa Magistrate committed the case to the Court of Sessions. Copies of challan and other documents were supplied to the accused-appellant free of costs, as envisaged under Section 207 Cr.P.C.

4. Thereafter, finding a prima facie case, charge under Sections 342 and 376 IPC and Section 4 of POCSO Act was framed against the accused-

appellant, to which, he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined Anoj Kumar, Draftsman (PW-1), Dr. Manjari Gupta, Medical Officer, B.K. Hospital, Faridabad (PW-2), Dr. Ravi Shankar (PW-3), Dr. Manoj Bajaj (PW-4), Constable Amit Kumar (PW-5), EASI Lalit Kumar (PW-6), Constable Rohtash (PW-7), Constable Surender (PW-8), victim (PW-9), Neetu, mother of victim (PW-10), Dr. Narender (PW-11), PSI Indu Bala (PW-12) and HC Rajesh Kumar (PW-13).

6. On conclusion of the prosecution evidence, statement of the accused under Section 313 Cr.P.C. was recorded, wherein entire incriminating evidence was put to him. However, he denied the same and pleaded false implication in the case. In defence, accused-appellant examined Bushan Singh (DW-1) and Meena Kesari as DW-2.

7. Trial Court, after going through the evidence led by the prosecution, convicted and sentence accused-appellant as stated above. Reference was made to the deposition of Dr. Manjari Gupta, Medical Officer (PW-2), who conducted the medical examination of the victim and opined that possibility of sexual assault could not be ruled out. In the MLR, date of birth of the victim is mentioned as 17.11.2009. As per deposition of Dr. Ravi Shankar (PW-3), who has done ossification test of the victim, her age was between 4-5 years with margin error of six months on either side. The victim was examined as PW-9 and she specifically deposed, by seeing the accused-appellant, that he had put his *nunu* inside her *nunu* and did wrong act with her. As per the observation of the trial Court, she (victim) was competent witness having sufficient understanding of right and wrong and her reply was satisfactory to all the queries put to her. Her statement,

Ex.PH, under Section 164 Cr.P.C. was recorded on 12.05.2014, wherein she had specifically stated with regard to the allegations, as reflected in the complaint made by complainant-Neetu Devi. As per opinion given by Dr. Manjari Gupta (PW-2), possibility of sexual assault could not be ruled out. Dr. Manoj Bajaj (PW-4), who had medico-legally examined accused-appellant (Sanjay), had opined that there was nothing to suggest that he (Sanjay) was incapable to perform sexual intercourse. Accused-appellant had examined Bhushan Singh, father of the victim as (DW-1) and his neighbourer Meena Kesari as DW-2.

8. While convicting the accused, reference was made to the judgment passed in ***Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753,*** wherein Hon'ble the Supreme Court had discussed in detail the plight of the victim of sexual assault. It has been observed that the testimony of victim, in such cases, is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused, where her testimony inspires confidence and is found to be reliable. Further, reference was made to a judgment passed by Hon'ble the Supreme Court in ***Shyam Narain vs. The State of NCT of Delhi,*** **AIR 2013 SC 2209,** wherein the appellant was facing prosecution for committing a brutal rape of 08 years old child. Hon'ble the Supreme Court had dismissed the appeal for reduction of sentence from life to 10 years.

9. The FSL report, Ex.PX, showed that semen could not be on Ex.1. The trial Court observed that clothes, in the present case, were changed and hence, the same were not sent to FSL, Madhuban for examination. Finally, it

was observed that even if, mother of the victim had turned hostile, it would not wash away the guilt of the accused because the victim, while appearing as PW-9, specifically deposed with regard to the occurrence. Moreover, Dr. Manjari Gupta (PW-2), who conducted the medical examination of the victim, has specifically deposed that *possibility of sexual assault could not be ruled out*. On the basis of above evidence, the accused-appellant has been convicted and sentenced.

10. Ms. Tanu Bedi, learned counsel for the appellant, has vehemently argued that in the present case, when the victim appeared as PW-9 and made her statement in examination-in-chief, no opportunity was given by the trial Court to cross-examine the victim which resulted in defeat of indefeasible right of the accused/appellant. Hence, the testimony of the victim cannot be made basis for convicting the accused/appellant.

11. Learned counsel for the appellant while referring to Ex.PB, further submits that as per medical report no mark of external injury was seen all over the body. She has referred to the statement given by Neetu (PW-10), mother of the victim, wherein she has resiled and stated that no such act was committed by the accused when her daughter had gone to his shop. She did not identify the accused present in Court. At the same time, she admitted that she had reported the matter to the police. Hence, the initial version given by mother of the victim is liable to be rejected and it was her complaint, which was made basis for registration of the FIR Ex.PE. Apart from the version given by the mother of the victim, her father Bhushan Singh appeared as Defence Witness i.e.DW-1 and in his deposition, he had stated that there was political rivalry in their colony and some leaders had approached his wife to file some criminal case against Jagmohan and his

sons and tutored his wife and innocent minor daughter to make specific statement before the police and Court. He denied that her daughter ever told him anything about the present occurrence. He further stated that appellant/accused Sanjay has been falsely involved in the present case. Meena Kesari (DW-2), who was an independent witness, deposed that she was running a shop near the house of Jagmohan, father of Sanjay-appellant. On 10.05.2014, she did not see any minor girl entering or going out of the shop of Jagmohan and everything was normal. Learned counsel for the appellant thus submits that the prosecution has failed to prove its case beyond reasonable doubts. In support of her submissions, learned counsel for the appellant relies on **Ratansinh Dalsukhbhai Nayak vs. State of Gujarat, (2004) 1 SCC 64, Chhagan Dame vs. State of Gujarat, 1995 SCC (Crl.) 182, Bhagwan Singh and others vs. State of M.P., (2003) 3 SCC 21, Arbind Singh vs. State of Bihar, 1995 Supp. (4) SCC 416, Nirmal Kumar vs. State of U.P., 1993 Supp. (1) SCC 510.**

12. *Per contra* learned counsel for the State has argued that the evidence produced on record clearly establishes that the accused illegally confined minor victim and subjected her to sexual assault. Learned counsel for the State has referred to the statement made in examination-in-chief by the victim wherein she has duly identified the accused/appellant present in Court and clearly stated that the accused/appellant has subjected her to sexual assault. Learned counsel for the State vehemently argues that the solitary statement of the victim aged about 04 years is sufficient to award conviction and sentence to the accused/appellant and the Trial Court has rightly done so. So far as the non-cross-examination of the victim is concerned, learned counsel for the State submits that the accused/appellant

has slept over his right as he did not submit any questionnaire at the time of examination of victim (PW-9) or did not make any application for cross-examination or recall of the victim, nor raised any objection and any argument during the trial, for the reasons best known to him. Learned counsel for the State vehemently argues that as per medico legal report Ex.PB and the testimony of the doctor (PW-3), *the possibility of the sexual assault cannot be ruled out*. In support of above submissions, learned State counsel relies on ***Union of India Vs. T.R. Varma : AIR 1957 SC 882; AEG Carapiet Vs. A.Y. Derderian : AIR 1961 CAL 359; Sarwan Singh Vs. State of Punjab : 2003(1)SCC 240; Unnikrishnan R. Vs. Sub Inspector of Police, Kurathikadu Police Station and Others:Manu/KE/5388/2019, Jaidev Vs. State, Manu/DE/4319/2019; Binu K.V. Vs. State of Kerala, Manu/KE/1636/2017; Lokesh Vs. State : 2019(4) RCR (Criminal) 219; Attar Singh Vs. State of Maharashtra : 2013(11) SCC 719; Arjun and another Vs. State of Chhattisgarh : 2017(3) SCC 247; Rameshbhai Mohanbhai Koli and others Vs. State of Gujarat : 2011(11) SCC 111; Paramjeet Singh @ Pamma Vs. State of Uttrakhand : 2010(10) SCC 439*** and ***Hemudan Nanbha Gadhvi Vs. State of Gujarat : AIR 2019 (17) SCC 523.***

13. We have considered the rival submissions of the learned counsel for the parties and have scrutinized the record of the case.

14. Before proceeding further, it would be apposite to reproduce the statement of the victim made in examination-in-chief in full, as under:-

> "I have asked the prosecutrix some general questions about herself and her family in camera and I am fully satisfied that the witness is ready to depose freely and without any fear or pressure from any quarter. I shall now record her statement in camera.

Sd/-
(D.R. Chalia)
Additional Sessions Judge,
Faridabad. 7.8.2014.

Deposition sheet of witness examined on oath

FIR No.166 dated 11.5.2014
U/s 376, 511, 342 IPC and 4 of POCSO ACT
P.S. Chhainsa, Faridabad.

(Witness No.9 Information and deposition of (Victim.. daughter for prosecution) of Bushan Singh, age 4 years, resident of House No.F-2-290, Shiv Durga Vihar, Lakkarpur, Faridabad. ON SA (CAMERA PROCEEDINGS) Taken before me (D.R. Chalia), Addl. Sessions Judge, Faridabad, today i.e. 7.8.2014 who on oath saith:

A child witness has been produced in the court by Shri Rajeev Deepak, learned Public Prosecutor for the State. In order to ascertain her intelligence and competency to make the statement, this court has decided to prepare a memorandum of quaries and answers which runs as under:-

Q1. What is your name?
Ans. My name is (..Victim).
Q.2 How old are you?
Ans. Now I am 4 years old.
Q3 Do you go to school?
Ans. Yes, I am a student of Nursery Class.
Q.4 How many brothers and sisters are you?
Ans. We are three sisters only.
Q.5 What is your father's name?
Ans. My father name is Bushan Singh.
Q.6 What is your mother's name?
Ans. My mother name is Neetu Devi.
Q.7 What has happened with you. Do you identify the person present in the Court.

Ans. (Accused was taken out from the Wooden Jaali and witness had glimpse of accused and thereafter he was asked to back in the wooden Jalli). Witness has stated that accused has put his *nunu* inside my *nunu* and did wrong act with me.

COURT OBSERVATIONS:

Witness is a small kid with all innocence. To make the witness comfortable she was make comfortable by offering some coloured papers games and during that process only the question was put to her as to whether person who is present in the court is known to you or not. Initially, she very innocently waved her neck saying no and again after some time she has stated that he

has put his *nunun* inside my *nunun* and did wrong act with me.

Certified that I have questioned the child witness namely (Victim) daughter of Bhushan Singh in order to judge the capability to understand the nature of the questions and to answer the same. She is a competent witness and having sufficient understanding of right and wrong and some queries put to her in which she replied satisfactory.

RO&AC Sd/-
(D.R. Chalia)
Additional Sessions Judge,
Faridabad. 7.8.2014."

15. On the said date i.e. 7.8.2014, the trial court passed the following order:-

"Present: Shri Rajeev Deepak, PP for the State

Accused in custody represented by Shri Anand Gupta, Advocate

PWs Ct.Amit Kumar, EASI Lalit Kumar,Ct. Rohtash, Ct.Surender, (Victim) and Neetu are present and examined as PW5 to PW10. Learned PP tendered in evidence FSL report Ex.PX and given up Director, FSL Madhuban and Inspector- SHO Narender Kumar as being unnecessary, vide recording his statement separately to this effect. No other PW is present. Now case is adjourned to 22.8.2014 for remaining prosecution evidence.

sd/-D.R.Chalia
Addl.Sessions Judge,
Faridabad 7.8.2014"

16. Before recording the statement of the victim under Section 164 of the Cr.P.C. during investigation on 12.05.2014, the learned JMIC, Faridabad asserted her competence to testify, by posing her a few questions to which she responded. The said statement has been exhibited on record as Ex.PH. The original statement is in Hindi v*ernacular* and when translated into English reads as under:-

"Q.: Where are you residing?
Ans. I am residing far away.
Q.: In which school you are studying?
Ans. In the school of Khushi.
Q.: In which class you are studying?

Ans. In 1st B.
Q.: In whose company you had come?
Ans. Mother, father, elder mother and police aunty.
Q: Where you had come?
Ans: In police station.
Q: For what purpose you had come there?
Ans. For drinking frooty.
Stated that on day prior yesterday I had gone to take curd from the shop of beared person.
Q. Who was present there?
Ans. There was a big man of red colour clothes.
Q. What was there?
Ans. There was room in the shop and a bed.
Q. What was happened?
Ans. The man of red cloth said to play me game but he did not play game. He said that game is in your *Nunu.* Thereafter, he loosened my pant. I was wearing pink pant. Thereafter, he penetrated his *nunu* into my *nunu*.
Q.: Then what happened?
Ans. Nothing occurred then. Then he left me. Now I will go to village.
Q.: With whom you had gone at the shop of beared person?
Ans. I went alone.
Q.: Then what happened?
Ans. We went to the police station where uncle of red T-shirt felt sorry from me.
Q.: Why you had gone to the shop?
Ans. To take curd.
Q.: Whether you feel pain?
Ans. No. I did not feel pain.
Q.: Do you want to say anything?
Ans. No, now story closed.
Q.: She was again asked :
Whether she wants to say anything more?
Ans. No, I want to play game. I want to go with my mother.

Sd/-
Chavi Goel
JMIC, Faridabad
12.5.2014

R.T.I
(Victim)

This is to certify that (Victim) was competent to depose and there was no pressure on her. She has deposed voluntarily.

Sd/-
Chavi Goel
JMIC, Faridabad

12.5.2014"

17. Chapter VIII of the POCSO Act stipulates procedure and powers of Special Courts and recording of evidence. Section 33 lays down procedure and powers of a Special Court which reads as under:-

> "**33. Procedure and powers of Special Court.**
>
> (1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.
>
> (2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.
>
> (3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.
>
> (4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.
>
> (5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.
>
> (6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.
>
> (7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:
>
> Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child..."

18. Section 33 of POCSO Act has been enacted keeping in background the objects and reasons of the POCSO Act and as is evident from a reading of the provisions of the Section, the Legislature in its wisdom has provided a special procedure for recording the evidence of a child witness Section 33 (2) provides that the questions to be put to the child witness shall be first communicated to the Special Court, who then would put these questions to the witness and Section 33 (5) specifically

provides that the child is not to be called repeatedly to testify in Court. The mandate of law clearly is to ensure protection to a child witness from victimization and harassment by repeated appearances in Court.

19. In cases of sexual assault against children, the first, and most important, piece of evidence, is always the statement of the child victim herself/himself.

20. Evaluation of the evidence of child witnesses, especially where the child is the victim herself/himself, is always a tricky affair. Combating, and, at times, conflicting, considerations come into play in such cases. On the one hand, there exists a presumption that a child of tender years would not, ordinarily, lie. The applicability, or otherwise, of this presumption, would necessarily depend, to a large extent, on the age of the child. No dividing line can be drawn in such cases; however, one may reasonably presume that a child of the age of four, or thereabouts, would be of an age at which, to questions spontaneously put to the child, the answer would ordinarily be the truth. As against this, the Court is also required to be alive to the fact that children are impressionable individuals, especially when they are younger in age, and are, therefore, more easily tutored. The possibility of a small child, whose cognitive and intellectual faculties are yet not fully developed, being compelled to testify in a particular manner, cannot be easily gainsaid. Even so, the prevalent jurisprudential approach proscribes courts from readily treating the evidence of child witnesses as tutored and, ordinarily, where a child is subjected to sexual assault, her, or his, statement possesses considerable probative value.

21. Hon'ble Supreme Court had an occasion to examine the jurisprudential contours of appreciation of evidence of child witnesses, in its

judgment in ***Sanjay Kumar Valmiki v. State, 2018 SCC Online Del 9304***. The following passages, from the said judgment - which stands affirmed, by dismissal of SLP (Crl) No. 3050/2019 preferred, there against - may be reproduced :-

> "57. The child witness, like the child himself, has ever remained, criminologically speaking, a jurisprudential enigma. The judicial approach, to such evidence, has, at times, advocated wholesome acceptance of such evidence, subject to the usual precautions to be exercised while evaluating any other evidence; however, the more prevalent approach appears to prefer exercise of cautious consideration by the Court, while dealing with such evidence. The raison d'etre for advocating such an approach, as is apparent from the various authorities on the point, is that child witnesses are usually regarded as susceptible to tutoring; consequently, Courts have consistently held that, where the Trial Court is satisfied, on its own analysis and appreciation, that the child witness before it is unlikely to be tutored, and is deposing of his own will and volition, it cannot treat such witness, or the evidence of such witness, with any greater circumspection, than would be accorded to any other witness, or any other evidence. As has been often emphasised by courts in this context, no express, or even implied, embargo, on a child being a witness, is to be found in Section 118 of the Indian Evidence Act, which deals with the competency of persons to testify, and reads as under:
>
> **118. Who may testify. --**
> All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
> Explanation.-- A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

22. Statutorily, therefore, it is clear that there is no prohibition on children being witnesses, whether in civil or criminal cases, irrespective of the nature of the offence. The only circumstance in which the statute proscribes reliance on such evidence, is where the child is prevented from understanding the questions put to him, or from giving rational answers to such questions, by reason of his age. A duty is, therefore, cast, by the

statute, on the judge faced with the responsibility of taking a decision on whether to allow, or disallow, the testimony of the child witness, to arrive at an informed decision as to whether the said evidence is vitiated on account of the child having failed to understand the questions put to him, or to provide rational responses thereto. If the answer, to these two queries, is in the negative, there is no justification, whatsoever, for discarding, or even disregarding, the evidence of the child witness.

23. One of the cardinal principles to be borne in mind, while assessing the acceptability of the evidence of a child witness, is that due respect has to be accorded to the sensibility and sensitivity of the Trial Court, on the issue of reliability of the child, as a witness in the case, as such decision essentially turns on the observation, by the Trial Court itself, regarding the demeanour and maturity of the concerned child witness. An appellate court would interfere, on this issue, only where the records make it apparent that the Trial Court erred in regarding the child as a reliable witness. Where no such indication is present, the appellate court would be loath to disregard the evidence of the child witness, where the Trial Court has found it to be credible, convincing and reliable. [***Ref. Satish and another v. State of Haryana, (2018) 11 SCC 300***] .

24. The following guiding principles, governing the admissibility and reliability of the evidence of child witnesses, are readily discernible from the above cited judicial pronouncements of the Supreme Court:

(i) There is no absolute principle, to the effect that the evidence of child witnesses cannot inspire confidence, or be relied upon.

(ii) Section 118 of the Indian Evidence Act, 1872 discounts the competence, of persons of tender age, to testify, only where they are

prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of their age.

(iii) If, therefore, the child witness is found competent to depose to the facts, and is reliable, his evidence can be relied upon and can constitute the basis of conviction.

(iv) The Court has to ascertain, for this purpose, whether (a) the witness is able to understand the questions put to him and give rational answers thereto, (b) the demeanour of the witness is similar to that of any other competent witness, (c) the witness possesses sufficient intelligence and comprehension, to depose, (d) the witness was not tutored, (e) the witness is in a position to discern between the right and wrong, truth and untruth, and (f) the witness fully understands the implications of what he says, as well as the sanctity that would attach to the evidence being given by him.

(v) The presumption is that every witness is competent to depose, unless the court considers that he is prevented from doing so, for one of the reasons set out under Section 118 of the Indian Evidence Act, 1872. It is, therefore, desirable that judges and Magistrates should always record their positive opinion that the child understands the duty of speaking the truth, as, otherwise, the credibility of the witness would be seriously affected, and may become liable to rejection altogether.

(vi) Inasmuch as the Trial Court would have the child before it, and would be in a position to accurately assess the competence of the child to depose, the subjective decision of the Trial Court, in this regard, deserves to be accorded due respect. The appellate court would interfere, therewith, only where the record indicates, unambiguously, that the child was not

competent to depose as a witness, or that his deposition was tutored. Twin, and to an extent mutually conflicting, considerations, have to be borne in mind, while ascertaining the competency of a child witness to justify. On the one hand, the evidence of the child witness has to be assessed with caution and circumspection, given the fact that children, especially of tender years, are open to influence and could possibly be tutored. On the other hand, the evidence of a competent child witness commands credibility, as children, classically, are assumed to bear no ill-will and malice against anyone, and it is, therefore, much more likely that their evidence would be unbiased and uninfluenced by any extraneous considerations.

(vii) It is always prudent to search for corroborative evidence, where conviction is sought to be based, to a greater or lesser extent, on the evidence of a child witness. The availability of any such corroborative evidence would lend additional credibility to the testimony of the witness.

25. Now adverting to the evidence of the victim in the present case, we are unable to subscribe to the submission of the learned counsel for the appellant to the effect that the appellant has not been given opportunity to cross examine the victim which resulted in denial and defeat of indefeasible right of the accused/appellant which resulted in vitiating the entire story of the prosecution. There is no dispute with the proposition that accused has indefeasible right to cross examine the witnesses during the prosecution proceedings. However, in the present case, from a perusal of the record, it is evident that the examination-in-chief of the victim was conducted on 07.08.2014 i.e. when the examination-in-chief and cross-examination of the mother of the victim was conducted. On the said date i.e. 7.8.2014, as many as 6 PWs including the victim and her mother were examined and the

appellant's counsel had cross-examined the mother of the victim alongwith other PWs, but he did not bother to cross-examine the victim nor he showed his willingness to cross-examine the victim nor any questionnaire was submitted by the accused or his counsel to the Presiding Officer for the purpose of putting questions to the victim. A perusal of the order dated 7.8.2014 passed by the trial court reproduced above would show that after examining PW-5 to PW-10, the case was adjourned to 22.8.2014 for remaining prosecution evidence, but even thereafter, the appellant did not make any effort to recall of the victim for cross-examination. Furthermore even when the appellant moved an application dated 02.09.2014 under Section 311 of the Cr.P.C. for recalling the PW-10 Smt. Neetu, mother of the victim, for re-examination/further cross-examination. The said application was dismissed by the Trial Court vide order dated 06.09.2014 on the ground that Smt.Neetu, mother of the victim was thoroughly cross-examined by learned defence counsel as PW-10 on 07.08.2014. The accused/appellant had moved the aforesaid application for cross-examination of the mother of the victim only and not regarding the victim herself which itself shows that the appellant was not interested and he never intended to cross-examine the victim (PW-9) during the course of trial. It was well within the knowledge of the appellant right from the beginning that the victim has been declared a competent witness by the trial court and despite that, the appellant chose to remain silent and never showed his willingness to cross-examine the victim. Moreover, a bare reading of the impugned judgment dated 27.10.2014 passed by the Trial Court convicting the appellant shows that no such plea has been raised nor any argument has been advanced before the trial court regarding non-cross-examination of the

victim. From the sequence of events mentioned above, the only inference which can be drawn is that although the appellant was well aware of his right of cross-examination, but he deliberately did not intend to avail the same, may be under the belief that the mother of victim (PW-10) has turned hostile and father of the victim (DW-1), namely, Bushan Singh was examined as defence witness. Moreover, in the present case the victim has duly identified the accused/appellant during examination-in-chief and has stated that accused had put his *nunu* inside her *nunu* and did wrong act with her.

26. Furthermore, in the present case it is not disputed that the victim (Child witness) was not competent to depose to the facts and was not a reliable witness. Once a child witness, if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath, the evidence of a child witness can be considered under Section 118 of the Indian Evidence Act, 1872 provided that such witness is able to understand the answers thereof. These views of ours are fortified by the judgment of Honble Supreme Court in the case of ***Dattu Ramrao Sakhare Vs. State of Maharashtra : 1997 (5) SCC 341***.

27. We are not convinced with the arguments of the learned counsel for the appellant that no mark of external injury was found on the victim and as per FSL report Ex.PX *semen* could not be detected on Ex.-1 (Introitus Swab) and as such no offence under Section 4 of the POCSO Act is made out against the appellant. Merely semen could not be found, does not mean that offence under Section 4 of the POCSO Act has not been committed. Section 4 (2) of the POCSO Act clearly stipulates that whoever commits penetrative sexual assault on a child below sixteen years of age shall be

punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine. In the present case, the victim was medically examined. During medical examination ossification test was done wherein the victim was found to be 4/5 years old. PW-3 Doctor Ravi Shankar Gaur was duly examined by the prosecution. Medico Legal Report Ex.PW2/A shows the opinion of the doctor that *the possibility of sexual assault cannot be ruled out*. Statement of the victim recorded under Section 164 of the Cr.P.C. before the Illaqa Magistrate and the statement made before the trial court during examination-in-chief as also the statement of the mother of the victim made before the trial court during examination as PW-10 that red T-shirt uncle had put his nunu inside her nunu, the appellant has made the child-victim lie on the bed and thereafter pulled down his pant and thereafter put his nunu in her nunu, coupled with the aforesaid medical opinion of the doctor that *the possibility of sexual assault cannot be ruled out*, are consistent which are sufficient to prove the aforesaid offence against the appellant beyond reasonable doubts.

28. Now coming to the arguments of the learned counsel for the appellant that mother of the victim has turned hostile and did not identify the appellant/accused before the Trial Court and also the father of the victim appeared before the Trial Court as defence witness and these circumstances are enough to vitiate the entire story of the prosecution. We are not convinced with the aforesaid arguments of the learned counsel for the appellant. During the deposition before the Trial Court, Smt. Neetu, mother of the victim further deposed that on 10.5.2014, she had sent her

daughter aged about 4 years to bring curd from the shop of Sanjay. When her daughter did not return for a long time, then she went from her house for her search. She saw her daughter coming out from the shop running. Then she asked her daughter as to why she is running, then she told her that uncle who is in the red T-shirt has made her lie on the bed and thereafter pulled down his pant and thereafter put his nunu in her nunu. Then she took her daughter to the shop where accused was present and her daughter had stated that he has done this wrong act. They left from there and she told the entire incident to her husband. Thereafter the matter was reported to the police and the police recorded her statement Ex.PG which was duly signed by her. She, however, deposed that *accused present in the court is not that person.* Thereafter, she was declared as hostile and the learned PP for the State was allowed to cross-examine the witness.

29. When cross-examined by learned PP for the State, mother of the victim (PW10) stated that it was correct that she has mentioned in Ex.PG that when her daughter told about this bad act, she went to his shop alongwith her daughter and asked from accused Sanjay that why he had done this bad act with her daughter. On this he became perplexed. It was also correct that she has stated in Ex.PG that thereafter he had gone somewhere after closing his shop. It was correct that she has stated in her statement Ex.PG that Sanjay had committed bad act with her innocent daughter after taking her in a room and stern action be taken against him. It was correct that statement of her daughter was recorded before learned Illaqa Magistrate which is Ex.PH which is duly thumb marked by her.

30. When cross-examined by learned defence counsel, she again reiterated that she again reiterated that she had written in her statement

Ex.PG that her daughter told her that at the moment accused was trying to put his nunu inside her nunu then somebody called him from outside by calling Sanjay Sanjay and thereafter he came out from the room and he also pulled up his pant and came out subsequently. She further reiterated that she has got written in her statement to the police that in Ex.PG that red T-shirt uncle had put his nunu inside her nunu. She has also got written in Ex.PG that an attempt to make by accused to commit rape upon her daughter and had somebody not called him from outside, then Sanjay would have gone to any extent. She also stated that owner of the shop is of a person named muchhal who was having three sons. She further deposed that she had given money to her daughter to purchase curd, when she came back, she was not having curd. All these are sufficient to show that the mother of the victim was well aware of the identification of the accused/appellant Sanjay.

31. If the statement of above said witness, namely, Smt. Neetu Devi (PW10) (mother of the victim) is read as a whole, then it can be safely said that Smt. Neetu (PW10) has wholly supported the prosecution version. She has specifically stated about the whole incident and has stood by her earlier statement Ex.PG made to the police immediately after the incident. No doubt, she has stated that *accused present in the court was not that person,* but she has wholly supported the prosecution case in toto.

32. The fact that the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out

whether any weight should be attached to it. While explaining the evidentiary value of hostile witness, Hon'ble Supreme Court in **Radha Mohan Singh vs. State of UP, (2006) 2 SCC 450,** has observed as under:-

> ".....It is well settled that 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 witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof..."

This view was reiterated by the Hon'ble Supreme Court in **Rajendra vs. State of UP, (2009) 13 SCC 480** wherein it was observed that merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. A similar view was taken by the Supreme Court in **Govindappa vs. State of Karnataka, (2010) 6 SCC 533** that the deposition of a hostile witness can be relied upon at least upto the extent he supported the case of the prosecution. In **State of Gujarat v. Anirudhsing, (1997) 6 SCC 514,** the Supreme Court has observed as under:-

> "3.Every criminal trial is a voyage in quest of truth for public justice to punish the guilty and restore peace, stability and order in the society. Every citizen who has knowledge of the commission of cognizable offence has a duty to lay information before the police and cooperate with the investigating officer who is enjoined to collect the evidence and if necessary summon the witnesses to give evidence. He is further enjoined to adopt scientific and all fair means to unearth the real offender, lay the charge-sheet before the court competent to take cognizance of the offence. The charge-sheet needs to contain the facts constituting the offence/s charged. The accused is entitled to a fair trial. Every citizen who assists the investigation is further duty-bound to appear before the Court of Session or competent criminal court, tender his ocular evidence as a dutiful and truthful citizen to unfold the prosecution case as given in his statement. Any betrayal in that behalf is a step to destabilise social peace, order and progress."

33. The father of the victim, namely, Bushan Singh appeared as DW-

1 before the Trial Court and tried to falsify the case of the prosecution by saying that there is a political rivalry and some of them having relations with political parties approached her wife to file some criminal case against Jagmohan and his sons. Those leaders tutored his wife and minor daughter to make specific statement before the police and the Court. The father stated that the appellant has been falsely involved in the present case and he is totally innocent. However, in the cross-examination the father stated that on 12.05.2014 he alongwith victim, his wife and police officers have come to Court where statement under Section 164 of the Cr.P.C. of her daughter was got recorded. He also stated that Ex.PF, Ex.PF/1 and Ex.P1 bears his signature. Ex.PF is the confession of accused/appellant Sanjay, Ex.PF/1 is the memo of demarcation of the spot and Ex.P1 is the recovery memo of parcel. In all these exhibits the father of the victim had put his signature as a witness. From the conduct of the father of the victim, we are of the considered opinion that he has been won over by the appellant and as such his appearance as a defence witness before the Trial Court cannot be made the basis to falsify the story of the prosecution.

34. We have also gone through the judgments relied on by the learned counsel for the appellant which are on different footings and not under the POCSO Act and as such the same are not applicable to the peculiar facts and circumstances of the present case.

35. In view of the above discussions, we are of the considered opinion that the impugned judgment of the learned Addl. Sessions Judge does not call for any interference by this Court.

36. Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There

cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been steep rise in the child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility call for such protection. Children are the natural resource of our country and they are country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other mode of sexual abuse. These factors point towards a different approach required to be adopted.

37. For the aforementioned reasons, the appeal fails and is dismissed. Registry to return back the original records to the trial court.

(ASHOK KUMAR VERMA)
JUDGE

(RITU BAHRI)
JUDGE

04.02.2022
MFK

Whether speaking/reasoned : Yes
Whether reportable : Yes