

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

% Decided on: 19th May, 2022

+ **CRL.A. 114/2020**

MUKISH Appellant
Represented by: Ms.Inderjeet Sidhu, Advocate
(DHCLSC).

versus

STATE Respondent
Represented by: Mr.Tarang Srivastava, APP for
the State with SI Yogesh
Tanwar, PS Badarpur.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MS. JUSTICE MINI PUSHKARNA

MINI PUSHKARNA, J. (ORAL)

CRL.M.A. 9812/2022 (Exemption)

1. Exemption allowed subject to just exceptions.
2. Application is disposed of.

CRL.A. 114/2020

1. The present is an appeal under Section 374(2) read with Section 383 of Cr.P.C. challenging the Judgment dated 28th November, 2019 and order on point of sentence dated 29th November, 2019 passed by Sh. Gaurav Rao, learned Additional Sessions Judge-01 (POCSO), South-East District, Saket Courts, New Delhi.

2. The appellant was convicted for the offence punishable under Section 6 of The Protection of Children from Sexual Offences Act, 2012 (herein referred to as 'POCSO Act'), and awarded sentence of Imprisonment for life along with fine of Rs.10,000/- ; in default of payment of fine, the Trial Court has further awarded sentence of Simple Imprisonment for a period of one month, for the said offence.

3. In the present appeal the main challenge to the impugned judgment of the learned Trial Court is on the ground that the prosecution has not been successful in establishing the guilt of the appellant in respect of offence punishable under Section 6 of the POCSO Act. Learned counsel for the appellant has contended that the testimony of the prosecution witnesses did not inspire any confidence and no conviction or sentence can possibly be awarded on the basis of such evidence. She further argued that the witnesses, PW1 i.e. the mother of the victim, and PW3 i.e. father of the victim, had not supported the case of the prosecution and have deposed in favour of the appellant. Learned counsel for the appellant referred to the cross-examination dated 3rd May, 2016 of PW1 and cross-examination of PW3 to contend that the said witnesses who were the parents of the victim had turned hostile and had rather deposed in favour of the appellant. Further, even the victim was not examined, which was fatal to the prosecution case.

4. Learned counsel for the appellant further challenged the sentence awarded to the appellant vide order dated 29th November, 2019 passed by the learned Trial Court and prayed for leniency by

reducing the sentence awarded to the appellant. For this purpose, she relied upon three judgments viz. T.K.Gopal vs. State of Karnataka, AIR 2000 SC 1669; Nawabuddin vs. State of Utrakhand, 2022 (3) SCALE 16; Ramher vs. State (Govt. of NCT) of Delhi, 2014 (140) DRJ 344 (DB). It is submitted that there were mitigating circumstances in favour of the appellant for considering his case for reduction of sentence. She argued that the appellant had clean antecedents; was 35 years of age at the time of offence; he was married and his wife and six children were dependent on him, the appellant being the sole bread earner. She further argued that the jail conduct of the appellant was satisfactory and on path of the reformation. Thus, she prayed for reduction in the sentence awarded to the appellant.

5. Allegations against the appellant are that he committed aggravated penetrative sexual assault upon baby 'M' on 14th March, 2014, at about 10.00 PM at a house in Badarpur, New Delhi. Vide order dated 11th July, 2014, charge for offence punishable under Section 6 of the POCSO Act was framed against the accused Mukish, appellant herein. In all 15 witnesses were examined by the prosecution.

6. As per the deposition of PW1, mother of the victim, she along with her husband and two children, including her daughter, aged about four years, resided at the given address. On the day of the incident, they all had gone to sleep after taking dinner. At that time, her daughter 'M' was also sleeping with her. However, in the night Mukish had taken her daughter to sleep with him. At around 10.00

PM, she heard the cries of her daughter. She asked Mukish to send her daughter to her but he did not send her daughter to her. They got suspicious whereupon her husband had removed the blanket above the accused and they found that Mukish had removed the pant and nicker of her daughter and had also removed his pant and nicker. They took her daughter to her bed and found that she was bleeding from her vagina. She wiped off the private part of her daughter with a cloth. Thereafter, her husband rang up the police. In the meantime, Mukish ran away from there. Mother of Mukish also ran away. Subsequently, the police came and recorded her statement on which she put her thumb impression, Ex.PW1/A. The police thereafter took her, her husband, her daughter and son to the police station and subsequently, they were sent along with the police to hospital where the medical examination of her daughter was conducted. Thereafter, they returned to the police station in the night and the police recorded the statement of her husband and took their thumb impression and signatures of her husband. After sometime, the police apprehended Mukish and also seized one pillow, three blankets, one shirt, one bedsheet vide seizure memo Ex.PW1/B and Ex.PW1/B-A, bearing her right thumb impression on both the memos. The police also seized one pant and underwear of her daughter baby 'M' vide seizure memo Ex.PW1/C bearing her right thumb impression at point 'A'. During her cross-examination, she deposed that accused Mukish is related both to her and her husband. She stated that she had shown the spot to the police and the police prepared the site plan at her instance and the same is Ex.PW1/D. She stated that she had come to Saket court for getting her

statement as well as statement of her daughter, recorded. Due to tender age her daughter was unable to speak and as such, her statement was not recorded by the Magistrate; but her statement was recorded under Section 164 Cr.P.C. before the Magistrate, i.e. Ex.PW1/E. During course of her examination, she identified the case property i.e. one blanket of brown colour, one shirt, one pillow, one blanket of red and brown colour, another blanket of black, green and blue colour, blue colour pant and one underwear of cream colour having blue stripes, exhibited as Ex.P1 to P7.

7. PW3, father of the victim deposed that on 14th March, 2014, his maternal uncle (*Mama*) namely Mukish came to his house. Around 10.00-11.00 PM, while they were sleeping in the house, he heard noise of cry of his daughter 'M' aged about 4-5 years. His wife told him that blood was oozing out from the vagina of his daughter. He took her to Safdarjung Hospital. Thereafter, they came back from the hospital. He deposed that someone informed the police and the police came there and enquired. The accused Mukish was present in the court at the time of his deposition and PW3 correctly identified him.

8. Statement of PW-15, SI Sarita Rathi is crucial. The said witness was the Investigating Officer (IO) in the present case. During her examination dated 30th October, 2019, PW-15 categorically deposed that on 14th March, 2014, she was posted in Police Station Badarpur and was present in the Police Station. On that date at about 10:40/10:45 PM, duty officer entrusted her Call No.50A regarding incident of rape at a house in Badarpur. She along with Lady Const.

Sarita, HC Narender and Const. Pawan reached at the aforesaid spot where complainant wife, her husband along with her minor daughter aged about 4 years met them. After recording the statement of the complainant, she along with Lady Const. Sarita took the victim girl to AIIMS hospital for her medical examination. The victim girl 'M' was also accompanied by her mother. PW-15 got the victim girl medically examined, obtained MLC and other medical documents along with exhibits which were preserved by the doctor during medical examination. Thereafter, she along with the mother of the minor victim visited and inspected the spot. Crime team also reached the spot and inspected the scene of crime and photographer took the photographs of the scene of the crime. PW-15 has categorically deposed that she lifted brown colour blanket stained with white colour fluid, one shirt, one cushion and two other blankets from the scene of crime which were converted into *pullandah* and were taken into police possession vide Memo Ex.PW1/B and Ex.PW1/BA. She had also seized the pant of the victim girl from the spot, which was also converted into sealed *pullandah* and took the same in police possession vide Memo Ex.PW1/C.

9. Deposition of HC Narender Kumar, PW-4 is also relevant. He deposed that on 14th March, 2014, he was posted at PS Badarpur as Head Constable. On that day, one call regarding rape vide DD No.50A was assigned to SI Sarita. Thereafter, he alongwith Const. Pawan, Lady Const. Sarita reached at Tajpur Pahari, Badarpur, Delhi where 'B' complainant, the mother of the victim met them. The complainant

told the incident to SI Sarita which had occurred with her daughter. The IO/SI Sarita seized and took into possession one brown colour blanket which was lying on the floor of the room situated in the inner side. There was a white stain on the said blanket and it was encircled by the IO. Thereafter, it was kept in a white cloth parcel and it was sealed. Two other blankets, one pillow and one shirt were also seized by the IO from there. The same were kept in another cloth parcel and it was sealed.

10. Reference to deposition of PW-9, Lady Constable Sarita reveals that on 14th March, 2014, when she was posted at PS Badarpur, upon receipt of call, she along with SI Sarita Rathi, HC Narender and Const. Pawan reached at the house in Badarpur, where IO inspected the spot. IO prepared injury report of prosecutrix 'M' and handed over the same to PW-9. PW-9 along with parents of the prosecutrix and IO, took prosecutrix to AIIMS for her medical examination. After medical examination, doctor handed over to PW-9, two duly sealed envelopes with the seal of the hospital along with sample seal, which were handed over to the IO/SI Sarita Rathi in the hospital itself.

11. PW-2, Dr. Mohan Singh Meena, Junior Resident, Department of Forensic Medicine and Toxicology, AIIMS Hospital deposed that on 15th March, 2014, at about 1.30 PM, accused Mukish was brought to the department of Forensic Medicine by Const. Yash Raj. He medically examined the accused and prepared detailed MLC i.e. Ex.PW2/A. Upon examination, he opined that there was nothing found suggestive that the person examined was incapable of performing

sexual intercourse under normal circumstances. During the course of medical examination, he collected blood in gauze, penile swab, control swab, underwear which was preserved, sealed, signed and handed over to the police along with the sample seal.

12. Similarly, PW-5, Const. Pawan deposed that on 19th March, 2014, he was posted as Constable at Police Station, Badarpur and on the said date, as per the instructions of the IO, he collected 8 parcels duly sealed along with sample seal of CMO, AIIMS and Malkhana and deposited the same at FSL, Rohini vide RC No.42/2021. So long as the exhibits remained in his possession, same were not tampered with in any manner.

13. Reference to the deposition of PW-10, Sh. Naresh Kumar, Senior Scientific Officer, Biology, FSL, Rohini, New Delhi shows that the said witness deposed that he was working as Senior Scientific Officer, FSL, Rohini. On 19th March, 2014, seven sealed parcels were received in the present case in the office of FSL, Rohini, which were marked to him for examination and opinion. The seal on the parcels were compared with the specimen seals and the same were found intact. The said parcels were opened, exhibits were taken out which were marked Ex.1a, 1b, 1c, 2, 4, 5, 7, 8a, 8b, 8c, 8d and 9. On biological examination, human semen was detected on Ex.4 and Ex.7. The said Ex.4 and Ex.7 were taken for examination and after examination, DNA profile of Ex.5 (blood gauge of accused Mukish) was found matching with the DNA profile of Ex.7 (blanket). The detailed DNA report including allelic data was exhibited as

Ex.PW10/A. After the examination, the remnants of exhibits were sealed with his official seal i.e. 'FSL NK DELHI'.

14. Though learned counsel for the appellant has vehemently argued that PW-1 and PW-3 being the mother and father of the minor victim had turned hostile, however, the fact remains that there is clinching evidence on record which points to the guilt of the accused/appellant herein. During her cross-examination, though PW-1 deposed that her statement recorded earlier was given at the instance of the police officers. She stated that Mukish had not committed any offence with her child and that her daughter had received injuries by fall from iron pipe *charpai*, however, she did not retract from the statement that police had come to her residence on the date of the incident. Her deposition that she along with her husband and children, including daughter 'M' went to hospital along with police where medical examination of her daughter was conducted, remains unvaried. Similarly, though in her cross-examination, she stated that clothes were not seized in her presence, she did not retract from the statement regarding the identification of the seized clothes that belonged to the accused and her daughter and other seized items including blankets and pillow.

15. Similarly, PW-3, during his cross turned hostile and retracted from his earlier statement against the accused. However, during his cross-examination, he deposed that it was correct that he along with his wife and daughter went to hospital, where his daughter was examined by the doctor. He further deposed that it was correct that in

the hospital, he had signed 'Consent Form' for medical examination of his daughter, Ex.PW3/A bearing his signature at point 'A'. He further deposed during his cross-examination that he had also signed on the MLC of his daughter Ex.PW3/B. Thus, his statement to this extent remained steadfast and firm.

16. The law is very clear in this regard that evidence of hostile witness need not be totally rejected. It can be accepted to the extent his version is found to be dependable and is consistent with the case of prosecution or defense. Reference in this regard may be made to the decisions of the Hon'ble Supreme Court in Balu Sonba Shinde vs. State of Maharashtra, (2002) 7 SCC 543; Khujji @ Surendra Tiwari vs. State of Madhya Pradesh, (1991) 3 SCC 627; Jodhraj Singh vs. State of Rajasthan, (2007) 15 SCC 294 and Radha Mohan Singh @ Lal Saheb vs. State of U.P., (2006) 2 SCC 450.

17. The FSL result is on record as Ex.PW10/A, as was proved by Sh.Naresh Kumar, Senior Scientific Officer, FSL. The DNA profile of the human semen as was detected on the blanket that was seized from the spot, matched with the DNA profile of the blood of the accused. The photographs of the place of the incident/spot along with their negatives were duly proved by Const. Amit Singh/PW8, as Ex.PW8/A and Ex.PW8/B-1 to Ex.PW8/B-4. Further, SI Sarita Rathi, who was the IO in the present case, was examined as PW-15 and she duly corroborated the testimony of other prosecution witnesses.

18. The contention as raised by the learned counsel for the appellant that the victim child was not examined cannot be fatal to the

prosecution case, for the reason that the victim was too young, hardly 4 years old at the time of the incident. Being of such tender age she was not in a position to give any statement. The learned Trial Court has rightly held that the tender age of the victim coupled with her lack of maturity to understand as to what ghastly/ wrong act had been committed with her, was the reason why she was not examined, or arrayed as a witness.

19. The learned Trial Court was justified in holding that non-examination of the victim did not prove fatal for the prosecution case in view of the scientific evidence available on record. The evidence on record clearly shows that semen was detected on the blanket Ex.P-1, which, as per the FSL Report, belonged to the accused i.e. the appellant herein. Thus, the learned Trial Court rightly held that this sufficiently proves penetrative sexual assault even in the absence of any direct evidence/ testimony of the victim or her parents. This scientific evidence coupled with the other circumstantial evidence unerringly point to the committal of the offence by the accused.

20. It is relevant to point out here that even otherwise, Section 29 of POCSO Act provides that where a person is prosecuted for committing any offence under Sections 3, 5, 7 and Section 9 of the Act, the Special Court shall presume, that such person has committed the offence, unless the contrary is proved. Furthermore, Section 30 of POCSO Act provides for presumption of culpable mental state. It provides that in any prosecution for any offence under the POCSO Act which requires a culpable mental state on the part of the accused, the Special Court

shall presume the existence of such mental state, but it shall be a defense by the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

21. At this stage, it may be useful to refer to the statement of the accused recorded under Section 313 Cr.P.C. In the said statement, the accused did not deny the deposition of PW-2, Doctor Mohan Singh Meena, Junior Resident, Department of Forensic Medicine and Toxicology, AIIMS Hospital. The appellant was posed the question regarding deposition of PW-2, wherein he had deposed that on 15th March, 2014, the appellant was brought to the Department of Forensic Medicine by Const. Yash Raj and he medically examined the appellant and prepared detailed MLC, Ex.PW2/A. During the course of medical examination of the appellant, he collected blood in gauze, penile swab, control swab, underwear which was preserved, sealed, signed and handed over to the police along with the sample seal. The appellant answered that the same was matter of record. The appellant further admitted that on the date in question, he had slept in the house of the complainant. About the detection of his sperm on the blanket, the appellant stated that he was suffering from medical ailment and he had no control over his discharge. However, DW-1, Doctor Shiv Kumar Soni, Medical Officer, CJ Dispensary, Tihar Jail deposed during his cross-examination that accused had not taken any treatment whatsoever for any sex related problem or any premature ejaculation. Similarly, DW-3, Doctor Habibullah, SMO Unani Department, Central Jail No.8-9, Tihar Jail, New Delhi deposed during his cross that the

accused had not approached him with any history of premature ejaculation or night-fall. Further, medical record of the accused Ex.DW3/A(colly) nowhere mentioned that the accused had given any history of UTI or Spermatorrhea since the time of lodging in jail.

22. In view of the above discussion, the appellant herein has rightly been convicted for the offence under Section 6 of the POCSO Act. Perusal of the evidence adduced on behalf of the prosecution shows that the charges against the appellant herein were proved beyond any doubt.

23. As regards the prayer for leniency by reducing the sentence awarded to the appellant, the act of the accused, considering the fact that he was already married having six children and being related to the parents of the minor victim, does not inspire any case for leniency in his favour. The accused has committed heinous crime of rape on a four year girl of tender age within his close family. This Court finds no justification in reducing the sentence awarded to the appellant.

24. Consequently the impugned judgment of conviction and order on sentence are upheld.

25. Appeal is accordingly dismissed.

CRL. M(BAIL) 596/2022 (Interim bail)

1. The appeal having been dismissed, this application is rendered infructuous and is thus dismissed.

2. Order be uploaded on the website of this Court.

**(MUKTA GUPTA)
JUDGE**

**(MINI PUSHKARNA)
JUDGE**

MAY 19, 2022
PB

