$~

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

% ***Reserved on: September 05, 2023***
Decided on: October 31, 2023

\+ **CRL.A. 612/2023 & CRL.M.(BAIL) 1089/2023**

AJEET SINGH ..... Appellant

Through: Mr. Deepanshu, Advocate

V

THE STATE GOVT. OF NCT OF DELHI AND ANOTHER ..... Respondents

Through: Mr. Utkarsh, APP for State with SI Abhishek Guleria, P.S. Kalyanpuri

CORAM
HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

J U D G M E N T

1. The present appeal is filed under article 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as **"the Code"**) on behalf of the appellant Ajeet Singh (hereinafter referred to as **"the appellant"**) against the judgment on conviction dated 27.03.2023 and order on sentence dated 10.05.2023 passed by the court of Sh. Ravinder Singh, Additional Sessions Judge (Special Court,

POCSO Act), East, Karkardooma Courts, Delhi in Sessions Case no.463/2016 arising out of FIR bearing no.0558/2015 registered under sections 377/506 of the Indian Penal Code, 1860 (hereinafter referred to as **"IPC"**) and under sections 6/8/12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as **"POCSO Act"**) at P.S Kalyanpuri.

2. The factual background is that SI Sudhir Rathee after receipt of DD no. 27A dated 24.06.2015 reached at LBS Hospital along with the respondent no. 2 and her two sons **J** aged about 7 years and **A** aged about 4 years where they were medically examined vide MLC bearing no 9259/15 and 9260/15 with alleged history of sodomy. The doctor referred them to SR surgery for further opinion and examination. SI Sudhir Rathee again on 26.05.2015 took the respondent no.2 and the victims **J** and **A** to LBS Hospital for obtaining forensic opinion and the doctor after examination opined that the possibility of sodomy/anal intercourse by erect penis of adult/any structure resembling it cannot be ruled out.

2.1 The respondent no.2 handed over a written complaint dated 26.06.2015 to SI Sudhir Rathee (hereinafter referred to as **"the**

Investigating Officer") wherein she primarily stated that she was residing at house bearing no. 20/144, Kalyanpuri along with family. The appellant who is her husband has been sexually exploiting her elder son **J** for the last three years and also started to sexually exploit her younger son **A.** The appellant and her mother also threatened the respondent no.2 and both the victims **J** and **A** were living under threats and fear. The appellant on 22.06.2015 in the night again committed the offence of aggravated penetrative sexual assault upon victims **J** and **A** and said fact was disclosed by the victims **J** and **A** to her.

2.2 The Investigating Officer on the basis of the MLCs of the victims **J** and **A** and surgery and forensic opinions got registered FIR bearing no 0588/2015 under sections 377/506 IPC and 6/8/12 of POCSO Act at P.S. Kalyanpuri. The statements of victims **J** and **A** were recorded under sections 161 and 164 of the Code. The appellant was arrested on 07.07.2015. The exhibits were sent to FSL. The charge sheet was filed after completion of investigation and the appellant was put to trial for offences punishable under sections 377/506 IPC and 6/8/12 of POCSO Act. The case after complying

with the provision of section 207 of the Code was committed to the Court of Sessions. The court of Sh. Raghubir Singh, ASJ-01, East, Karkardooma Courts, Delhi vide order dated 24.01.2017 framed the charge against the appellant for offence punishable under section 6 of the POCSO Act on allegations that the appellant was sodomizing the elder son **J** (aged about seven years) for the last about three years prior to lodging of the complaint and also sodomized him on 22.06.2015 in the night and the appellant also sodomized the younger son **A** (aged about 4 years) for some times and particularly on 22.06.2015 in the night. The appellant pleaded not guilty and claimed trial.

2.3 The prosecution during trial examined 9 witnesses including victim **J** as PW1, victim **A** as PW2, the respondent no. 2/Complainant as PW3 and Investigating Officer as PW7. The appellant as per section 294 of the Code admitted recording of statements of the victims **J** and **A** as Ex.PW1/A and Ex.P1 respectively under section 164 of the Code by the court of Ms. Swati Katiyar, MM, East, Karkardooma Courts, Delhi, FIR as Ex.P2, DD no. 27A dated 24.06.2015 as Ex.P3, Potency Report as Ex.P4, age

proof of the victims as Ex.P5 and Ex. P6 and FSL Report no. 2015/B-6381 BIO No. 1808/15 dated 29.09.2017 as Ex.A1. The prosecution evidence appears to be closed vide order dated 13.02.2019. The statement of the appellant was recorded under section 313 of the Code vide proceedings dated 06.04.2019 wherein the appellant alleged false implication and pleaded innocence. The appellant stated that he and his wife i.e. the respondent no. 2/complainant used to quarrel and the respondent no. 2 had lodged complaint against him at P.S. Kalyanpuri but police did not take any action on her complaint. Thereafter, the respondent no. 2 has falsely implicated him in this case by lodging false complaint against him through both the victims. The appellant preferred to lead defence evidence. The appellant examined his mother Sat Kaur as DW1. The defence evidence was ordered to be closed vide order dated 30.05.2019.

2.4 The court of Sh. Ravinder Singh-1, Additional Sessions Judge-01 (POCSO), East, Karkardooma Courts, Delhi (hereinafter referred to as **"the trial court"**) vide judgment dated 27.03.2023 (hereinafter referred to as **"the impugned judgment"**) convicted the appellant for the offence under section 6 of POCSO Act and under section 377

IPC by observing that the prosecution had proved beyond reasonable doubt that the appellant had committed the offence of penetrative sexual assault as defined in section (3)(a) of POCSO Act upon PW2 but the prosecution failed to prove that the appellant had committed the offence of penetrative sexual assault upon PW1. The trial court vide order on sentence dated 10.05.2023 sentenced the appellant to undergo rigorous imprisonment for 10 years with a fine of Rs.10,000/- for the offence punishable under section 6 of POCSO Act and in default of payment of fine, to undergo further rigorous imprisonment for six months. The benefit of section 428 of the Code was extended to the appellant.

3. The appellant being aggrieved, filed the present appeal and challenged the impugned judgment and order on sentence on the grounds that the impugned judgment is bad in law and facts, the impugned judgment is based on conjectures and surmises, the prosecution has failed to prove its case beyond reasonable doubts and as such the trial court should have given the benefit of doubt to the appellant and should have acquitted him, the trial court has failed to consider the testimonies of PW1, PW2 and PW3 in right perspective,

the trial court has failed to consider that the police officials and the NGO have got registered the present FIR with false and fabricated allegations against the appellant, the trial court has failed to consider the real dispute which was matrimonial dispute between the appellant and his wife i.e. the respondent no. 2 and no such incidents took place as alleged by the prosecution, the trial court has failed to consider that the appellant is the only care-taker & bread provider of the family and the trial court has failed to consider that the prosecution has failed to prove its case beyond all reasonable doubts. The appellant prayed that the impugned judgment and order on sentence be set aside.

3.1 The counsel for the appellant argued that the trial court has not appreciated evidence led by the prosecution in right perspective as PW1/victim **J** and the respondent no. 2/complainant as PW3 and PW2/victim **A** in cross examination did not support the case of the prosecution. The appellant was falsely implicated at instance of the respondent no. 2 in present case due quarrel between them. The counsel for the appellant also referred testimony of DW1 in

arguments. The counsel for the appellant argued that the impugned judgment is liable to set aside and the appellant be acquitted.

3.2 The Additional Public Prosecutor argued that the prosecution has proved the guilt of the appellant beyond reasonable doubt and referred testimony of PW2/victim **A**. The Additional Public Prosecutor argued PW1/victim **A** in examination in chief supported the case of prosecution and his cross examination does not affect credibility of testimony of PW2/victim **A** particularly in light of medical evidence. The respective testimonies of PW1/victim **J** and PW3 i.e. the respondent no. 2/complainant does not dilute criminality of the appellant. He argued that the appeal is liable to be dismissed.

4. It is reflecting that the prosecution in support of its case examined both the victims as PW1 and PW2 besides the respondent no. 2/complainant as PW3. The trial court at the time of recording of respective testimonies of the victim **J** as PW1 and the victim **A** as PW2 after preliminary questions, observed that they were having sufficient maturity to understand the questions put to them and to give rational answers. The testimony of the victim **J** as PW1 was recorded in question-answer form. PW1/victim **J** did not support the

case of the prosecution. PW1/victim **J** primarily deposed that the appellant who is father of PW1/victim **J** is a good person and did not do any wrong act either with him or with the victim **A/**PW2. PW1/victim **J** could not tell about his statement under section 164 of the Code. PW1/victim **J** admitted that he was living with the appellant in same house and quarrel took place between the appellant and the respondent no. 2/complainant. The appellant never removed his knicker and did not do *galat kaam* (sodomy) with him any time which caused pain in his anus. PW1/victim **J** deposed that he was taken to the hospital due to bleeding from his anus but no injury had ever been caused there. PW1/victim **J** admitted his signatures at point A on statement Ex. PW1/A recorded under section 164 of the Code. PW1/victim **J** denied that he deposed at the instance of his grandmother. PW1/victim **J** was not cross examined by the defence counsel on behalf of the appellant.

4.1 PW2/victim **A** deposed that he has been told by his mother i.e. the respondent no. 2/ complainant to depose. PW2/victim **A** used to be beaten by the appellant. The appellant removed his knicker 10 times and after removing knicker placed *lulli* (penis) at his private

part at back i.e. anus which caused pain to him. The respondent no. 2 i.e. mother of the victim **A** had beaten the appellant when the appellant was placing *lulli* (penis) on his private part. The respondent no. 2 had taken PW2/victim **A** to the hospital. PW2/victim **A** gave statement to a lady judge and told her that the appellant is not a good person. The appellant should be beaten and he deposed correctly. The appellant used to place his *lulli* (penis) in night at sleeping time and also used to do same act with his brother i.e. PW1/victim **J**. PW2/victim **A** in cross examination by defence counsel on behalf of the appellant deposed that the appellant had never beaten him and did wrong act with him. The appellant never put/inserted his *lulli* (penis) at his anus or anus of his brother i.e. PW1/victim **J**. PW2/victim **A** never told police or judge that the appellant put/insert his *lulli* (penis) on his anus. PW2/victim **A** deposed that he correctly deposed in cross examination. PW2/victim **A** was also cross examined by the Additional Public Prosecutor on behalf of the State wherein deposed that he has not deposed at instance of either the appellant or the respondent no. 2 and nothing had happened with him about 2-3 or 5 years back.

4.2 PW3 i.e. the respondent no. 2/complainant also turned hostile and did not support case of prosecution. PW3 deposed that she had a quarrel with the appellant who also gave beatings to her and both the victims. The police did not register complaint of the respondent no. 2/complainant and thereafter with help of an NGO, present FIR was registered by the police and the appellant was arrested. The police obtained her signatures on some papers. She admitted her signature at point A on the complaint Ex.PW3/A. PW3 was cross examined by the Additional Public Prosecutor wherein she denied suggestions that in complaint Ex.PW3/A she stated that for last three years prior to registration of FIR on 26.06.2015, the appellant was committing unnatural sex (sodomy) with her elder son i.e. the victim **J** and for few days prior to registration of FIR started committing unnatural sex with her younger son i.e. the victim **A** or that the victim **J** asked her to sleep with him so that the appellant could not do wrong with him or that when she asked for medical examination of the victims, the appellant and her mother in law threatened her to turn her out of the matrimonial home or that the appellant on 22.06.2015 committed sodomy with both the victims and thereafter the victim **A** apprised

her about the wrong done by the appellant and thereafter she went to P.S. Kalyanpuri and gave complaint Ex.PW3/A. PW3/complainant admitted that on 24.06.2015 police took her and both the victims to LBS Hospital for medical examination of victims but did not remember that she and victims informed the doctor about anal intercourse being done with them. PW3/complainant admitted that 30.06.2015 she along with both the victims came to Karkardooma Courts and the statements of both the victims were recorded by a Judge but expressed her ignorance about contents of the statements.

4.3 The prosecution during trial examined PW5 Dr. Abbas Ali, Casualty Medical Officer, LBS Hospital, PW6 Dr. Narender, S.R Surgery, LBS Hospital and PW9 Dr. Ashok Sagar, Assistant Professor, G.S Medical College, Pilakhwa. PW5 Dr. Abbas Ali on 24.06.2015 being posted as Casualty Medical Officer, LBS Hospital, Delhi medically examined PW1/victim **J** and PW2/victim **A** vide MLC Ex.PW5/A and Ex. PW5/B with the alleged history of sodomy and on examination found no external visible injury on the body of victims and referred them to Surgery department for local examination. PW5 in cross examination admitted that he had not

given opinion regarding sodomy upon the victims. PW6 Dr. Narender deposed that vide MLC Ex. PW5/A and Ex. PW5/B Dr. Shailender had examined both the victims on 24.06.2015 who had taken rectal swab which were sent for forensic examination and expert opinion. PW9 Dr. Ashok Sagar being Senior Resident on 26.06.2015 examined both the victims with the alleged history of sodomy and after examination opined that possibility of sodomy/anal intercourse by erect penis of adult or any structure resembling it, cannot be ruled out.

4.4 The appellant in defence examined his mother Sat Kaur as DW1 who primarily deposed that the appellant and the respondent no. 2 used to be quarrel over trivial matters and the respondent no. 2 had made complaints to the police against the appellant who was detained by the police. The respondent no. 2 used to threaten to implicate the appellant in a serious case. The appellant is innocent.

5. The trial court in impugned judgment opined that both the victims **J** and **A** were 'child' as defined in section 2(l)(d) of POCSO Act. The appellant also did not dispute age of both the victims. The appellant has also admitted the date of birth certificates pertaining to

both the victims as Ex.P6 and Ex.P5 and as per certificates Ex.P6 and Ex.P5, the date of birth of victim **J** is 20.07.2008 and the date of birth of victim **A** is 01.12.2011. The trial court has rightly observed that the prosecution has proved that the ages of the victims were less than 18 years at the time of commission of offence and as such POCSO Act is applicable.

6. The trial court also judicially determined whether the appellant had actually committed acts of sodomy with both the victims who happened to be his minor sons. The appellant as per prosecution had sexually exploited his elder son victim **J** for the last three years and also started to sexually exploit his younger son Victim **A**. The victims were also sexually exploited by the appellant in the night of 22.06.2015 and victims disclosed this to their mother i.e. the respondent no. 2 who reported this incident to the police on 24.06.2015.

6.1 The prosecution to prove guilt of the appellant, examined victim **J** as PW1, victim **A** as PW2 and the complainant i.e. the mother of both the victims as PW3. PW1/victim **J** and the respondent no. 2/PW3 turned hostile and did not support case of the prosecution.

As discussed by the trial court in the impugned judgment, PW1/victim **J** deposed that the appellant is a good person and did not remove his knicker and also did not do any wrong act with him although he admitted that he was taken to the hospital as blood was oozing from his anus but further deposed that the appellant has not done any wrong act with him. PW1/victim **J** admitted that his statement Ex.PWl/A was recorded under section 164 of the Code but claimed that statement Ex.PW1/A was made at the instance of one aunty. PW1/victim **J** has not supported version of the prosecution that the appellant has sexually exploited him for the last three years and also on 22.06.2015. PW1/victim **J** was cross examined by the Additional Public Prosecutor but there is nothing material in his cross examination to substantiate the allegations of penetrative sexual assault by the appellant on 22.06.2015 or prior to it. The respondent no. 2/the complainant also deposed that the appellant has not done anything wrong either with PW1victim **J** or PW2/victim **A** although during her cross examination, she admitted that police took her and her sons i.e. PW1/victim **J** and PW2/victim **A** to LBS Hospital for medical examination on 24.06.2015 and she also brought both

victims to Karkardooma Courts on 30.06.2015 for recording of their statements. There is as such nothing in respective testimonies of PW1/victim **J** and the respondent no. 2/PW3 which can connect the appellant with alleged offence. It is relevant to mention that as per testimony of PW9 Dr. Ashok Sagar, he examined PW1/victim **J** on 26.06.2015 with the alleged history of sodomy and thereafter opined on MLC Ex.PW5/A that possibility of sodomy/anal intercourse by erect penis of adult or any structure resembling it, cannot be ruled out. However quality and quantity of evidence led by the prosecution is not sufficient to connect the appellant with alleged offence qua PW1/victim **J**.

6.2 PW2/victim **A** supported the case of the prosecution in part of his testimony i.e. examination in chief wherein he primarily deposed that the appellant removed his knicker 10 times and after removing knicker placed *lulli* (penis) at his private part at back i.e. anus which caused pain to him. PW2/victim **A** was taken to the hospital by the respondent no. 2/PW3 i.e. his mother. PW2/victim **A** also admitted about his statement Ex.P1 under section 164 of the Code. PW2/victim **A** also deposed that the appellant used to place his *lulli*

(penis) in night at sleeping time and also used to do same act with his brother i.e. PW1/victim **J**. PW2/victim **A** in his statement Ex.P1 recorded under section 164 of the Code also supported case of the prosecution. This part of testimony of PW1/victim **A** is corroborated by the testimony of PW9 Dr. Ashok Sagar who examined PW2/victim **A** on 26.06.2015 with the alleged history of sodomy and thereafter opined on MLC Ex.PW5/B that possibility of sodomy/anal intercourse by erect penis of adult or any structure resembling it, cannot be ruled out.

6.3 Every person accused of an offence is presumed to be innocent and burden lies upon the prosecution to establish the guilt of the accused beyond reasonable doubt. The Supreme Court in **Shivaji Sahabrao Bobade and Another V State of Maharashtra**, (1973) 2 SCC 793 emphasized that our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. The Supreme Court in **State of U.P. V Shanker**, AIR 1981 SC 897 observed that it is function of the court to separate the grain from the chaff and accept what appears to be true and reject the rest. The Supreme Court in

Gurbachan Singh V Sat Pal Singh and others, AIR 1990 SC 209 observed that exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. The Supreme Court in **Krishna Mochi and Others V State of Bihar**, (2002) 6 SCC 81 observed that there is sharp decline in ethical values in public life and in present days when crime is looming large and humanity is suffering and society is so much affected thereby duties and responsibilities of the courts have become much more. It was further observed the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is in practice changing world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". However, the Supreme Court in **Sujit Biswas V State of Assam,** (2013) 12 SCC 406 also held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. The trial court in the impugned judgment referred section 29 of the POCSO Act by

observing that there is a presumption under section 29 of POCSO Act that if any offence is committed under section 6 of POCSO Act, then it shall be presumed to have been committed by the accused unless it is proved to the contrary. However, section 29 of POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and 9 of POCSO Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved. Therefore, it is for the prosecution to prove guilt of the appellant beyond reasonable doubt who has been charged for offence punishable under section 6 of POCSO Act which does not entail any dilution of doctrine of presumption of innocence. The Supreme Court in **Sunil Kumar V State of NCT**, 2021 SCC OnLine Del 2391 observed that as per section 29 of the POCSO Act, there is a presumption regarding guilt of the accused. The burden of proof on the prosecution is not of beyond reasonable doubt. The prosecution has to lay down and prove the fundamental facts regarding the guilt of the accused. Once such

facts are proved, the onus is upon the accused to lead evidence to rebut the presumption.

7. It is reflecting that entire prosecution is primarily based on testimony of PW2/victim **A**. The witness is considered to be an important factor or integral part of the administration of justice and role of a witness is paramount in the criminal justice system. The witness by giving evidence assists the court in discovery of the truth. The Supreme Court in **Mahender Chawla and Others V Union of India and Others**, (2019) 14 SCC 615 observed that witnesses are important players in the judicial system, who help the judges in arriving at correct factual findings. The instrument of evidence is the medium through which facts, either disputed or required to be proved, are effectively conveyed to the courts.

7.1 The trial court in establishing guilt of the appellant for offence punishable under section 6 of POCSO Act relied on testimony of PW2/victim **A.** The trial court observed that the conviction on the sole evidence of child witness is permissible, if such witness is found competent to testify and the court, after careful scrutiny of its evidence believes it and referred **Dattu Ramrao Sakhare and**

Others V State of Maharashtra, (1997) 5 SCC 341. The trial court while placing reliance on testimony of PW2/victim **A** further observed that the evidence of PW2/victim **A** inspires confidence as there is a thread of truth in the statements recorded by the Investigating Officer, by the MM, East, Karkardooma Courts as Ex.P1 and the testimony recorded in the court to the effect that the appellant touched his private part into his anus. The trial court has referred cross examination of PW2/victim **A** and observed that PW2/victim **A** in his cross examination conducted on 07.04.2022 testified that his father i.e. the appellant never put/insert his penis into his *potty wali jagah* (anus) and he never said anything to police or Judge in this regard and he is speaking truth. The trial court did not believe cross examination of PW2/victim **A** by observing that the appellant is the father of victims. The testimony of PW2/victim **A** was recorded on 22.08.2017 when he was four years of age and his cross examination was recorded on 07.04.2022 i.e. after gap of almost 56 months from his examination in chief and by that time PW2/victim **A** might have gained sufficient maturity to understand the consequence of his testimony recorded on 22.08.2017. Issues

which need judicial assessment and consideration are that what is the evidentiary value of part testimony of PW2/victim **A** and whether the appellant can be convicted on basis of part testimony of PW2/victim **A**. PW2/victim **A** in cross examination conducted by the defence counsel on behalf of the appellant deposed that the appellant had never beaten him or did any wrong act with him. The appellant never put/inserted his *lulli* (penis) at his anus or anus of his brother i.e. PW1/victim **J**. PW2/victim **A** never told police or Judge that the appellant put/insert his *lulli* (penis) on his anus. PW2/victim **A** deposed that he correctly deposed in cross examination. PW2/victim **A** was also cross examined by the Additional Public Prosecutor on behalf of the State wherein deposed that he has not deposed at the instance of either the appellant or the respondent no. 2 and nothing had happened with him about 2-3 or 5 years back.

8. Section 118 of the Indian Evidence Act, 1872 deals with the witnesses who can testify. It provides that all persons shall be competent to testify, unless in the consideration of court 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. The issue of evidentiary value of the testimony of child witness has been considered by the Supreme Court on many occasions. It is observed and held that the credibility of a child witness depends upon the circumstances of each case and the precaution which should have been taken while assessing the testimony of a child witness is that the witness must be reliable and demeanour of child witness must be like any other competent witness without likelihood of being tutored. The Supreme Court in **Dattu Ramrao Sakhare and Others V State of Maharashtra,** (1997) 5 SCC 341 also referred by the trial court in relation to child witnesses, held as under:-

> **5. …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 Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.**

8.1 The Supreme Court in **Ratansinh Dalsukhbhai Nayak V State of Gujarat,** (2004) 1 SCC 64 also held as under:-

> **7. …The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.**

8.2 The Supreme Court in **P. Ramesh V State Rep by Inspector of Police**, (2019) 20 SCC 593 also held as under:-

> **15. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii)**

> **give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.**

8.3 The courts as a rule of prudence before accepting the testimony of a child witness cautioned that the testimony has to be evaluated carefully being susceptible to tutoring. The Supreme Court in **State of Madhya Pradesh V Ramesh and Another**, (2011) 4 SCC 786 held as under:-

> **14. In view of the above, the law on the issue can be summarized to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with grater circumspection because he is susceptible to tutoring. Only in case there is evidence or record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.**

The Supreme Court in **Ranjeet Kumar Ram @ Ranjeet Kumar Das V State of Bihar,** 2015 SCC OnLine SC 500 also observed that

evidence of the child witness and its credibility would depend upon the circumstances of each case and only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one.

8.4 The acceptance of testimony of a child witness under POCSO Act came into consideration before the Courts on many occasions. The Supreme Court in **Ganesan V State Rep. by Its Inspector of Police**, (2020) 10 SCC 573 while dealing with conviction under POCSO Act held that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration and the court may convict the accused on the sole testimony of the prosecutrix. A Coordinate Bench of this Court in **Rakesh @ Diwan V The State (GNCT of Delhi),** 2021 SCC OnLine Del 3957 accepted testimony of the child victim as trustworthy, reliable and admissible.

The Calcutta High Court in **Animesh Biswas V State of W.B.,** 2023 SCC OnLine Cal 2633 observed that the sole testimony of the victim, a child witness, could be relied upon in cases of sexual assault

provided her evidence was trustworthy, unblemished, and of sterling quality.

9. PW2/victim **A** supported case of prosecution in examination in chief but did not support case of prosecution in cross examination. The evidence of the hostile witness cannot be rejected but has to be considered with caution. The Supreme Court in various decisions has discussed admissibility of testimony of a hostile witness. The Supreme Court in **State of U.P. V Ramesh Prasad Misra and Another,** (1996) 10 SCC 360 held the evidence of a hostile witness should not be totally rejected but it can be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. The Supreme Court in **C. Muniappan and Others V State of Tamil Nadu,** (2010) 9 SCC 567 held 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. The Supreme Court in **Mrinal Das and Others V State of Tripura,** (2011) 9 SCC 479 held as under:

> **67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is**

> **admissible. 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. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.**

The Supreme Court in **Arjun V State of C.G.**, 2017 (2) MPLJ (Cri.) 305 held that merely because the witnesses have turned hostile in part, their evidence cannot be rejected in *toto*. The evidence of such witnesses cannot be treated as effaced altogether but the same can be accepted to the extent that their version is found to be dependable and the court shall examine more cautiously to find out as to what extent he has supported the case of the prosecution.

10. It is accepted position of law that testimony of a child witness can be basis of conviction and testimony of a hostile witness cannot be rejected completely if the testimony inspires confidence. The testimony of PW2/victim **A** is required to be analysed with care and caution. PW2/victim **A** in examination in chief deposed that the appellant removed his knicker 10 times and after removing knicker placed *lulli* (penis) at his private part at back i.e. anus which caused pain to him. PW2/victim **A** was taken to hospital by the respondent no. 2 and also indirectly admitted making of statement under section 164 of the Code wherein stated that the appellant is not a good person. PW2/victim **A** also deposed that the appellant used to place his *lulli* (penis) in night at sleeping time and also used to do same act with his brother i.e. PW1/victim **J**. However PW2/victim **A** in cross examination did not support prosecution and deposed that the appellant never did wrong act with him and never put/inserted his *lulli* (penis) at his anus or anus of his brother i.e. PW1/victim **J**. PW3 i.e. the respondent no. 2/complainant although turned hostile but admitted her signature at point A on the complaint Ex.PW3/A which is genesis of registration of present FIR. PW3/complainant

admitted that both the victims **J** and **A** were taken to LBS Hospital on 24.06.2015 by the police for medical examination and on 30.06.2015 she along with both the victims came to Karkardooma Courts and the statements of both the victims were recorded by a Judge. The testimony of PW2/victim **A** also finds support from testimony of PW9 Dr. Ashok Sagar who on 26.06.2015 examined both the victims with the alleged history of sodomy and after examination opined that possibility of sodomy/anal intercourse by erect penis of adult or any structure resembling it, cannot be ruled out. PW2/victim **A** also in statement under section 164 of the Code also supported prosecution. The Potency Report Ex.P4 pertaining to the appellant also reflects that the appellant was capable of sexual intercourse. The part testimony of PW2/victim **A** if analysed with quality and quantity of evidence led by the prosecution inspires confidence and can be safely relied on being trustworthy and credible. Mere fact that PW2/victim **A** did not support prosecution and PW1/victim **J** and PW3/complainant also turned hostile does not affect credibility of part testimony of PW2/victim **A**. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity,

multiplicity or plurality of witnesses. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The Supreme Court in **Kuna @ Sanjaya Behera V State of Odisha,** (2018) 1 SCC 296 observed that the conviction can be based on the testimony of single eye witness if he or she passes the test of reliability and that is not the number of witnesses but the quality of evidence that is important. There is no legal force in arguments advanced by the counsel for the appellant that the testimony of PW2/victim **A** cannot be read into evidence as PW2/victim **A** did not support case of the prosecution and further PW1/victim **J** and PW3/the complainant also turned hostile. The courts should analyse and appreciate evidence either prosecution or defence with care, caution and lot of sensitivity in cases related to sexual exploitation of the children. The evidence of the victim cannot be discarded merely due to reason that he or she has not supported prosecution and other witnesses turned hostile. It is solemn duty of the court to find out truth which is founding stone of justice, after proper valuation and appreciation of evidence and other material proved on record during trial or otherwise. The evidence led by the prosecution proved

beyond reasonable doubt that the appellant subjected PW2/victim **A** sodomy on 22.06.2015 and prior to this. The trial court has rightly relied on the testimony of PW2/victim **A** in establishing guilt of the appellant.

11. The statement under section 313 of the Code is not a substantive piece of evidence. Section 313 of the Code ensures principle of natural justice to the accused. It empowers the court to examine the accused with the purpose to enable the accused to explain incriminating circumstances in the prosecution evidence. The Supreme Court in **Samsul Haque V State of Assam, (**2019) 18 SCC 161 held that the incriminating material is to be put to the accused so that the accused gets a fair chance to defend him. This is in recognition of the principles of *audi alteram partem*. The Supreme Court in **Reena Hazarika V State of Assam,** (2019) 13 SCC 289 observed that a solemn duty is cast on the court in the dispensation of justice to adequately consider the defence of the accused taken under section 313 of the Code and to either accept or reject the same for reasons specified in writing. It was also held that section 313 of the Code cannot be seen simply as a part of *audi*

alteram partem rather it confers a valuable right upon an accused to establish his innocence. The appellant in statement recorded under section 313 of the Code in his defence stated that he and his wife i.e. the respondent no. 2/complainant used to quarrel and the respondent no. 2 due to this reason had lodged complaint in P.S. Kalyanpuri. The respondent no. 2 has falsely implicated him by lodging false complaint against him through the victims. The appellant also led the defence evidence and examined his mother Sat Kaur as DW1 who primarily deposed that the appellant was implicated due to quarrel with the respondent no. 2 and the appellant is innocent. PW3 i.e. the respondent no. 2/complainant also deposed that the appellant used to give beatings to her and both the victims and thereafter present FIR was got registered with help of an NGO by the police. The defence taken by the appellant is considered in right perspective. The defence so taken by the appellant is appearing to be false, sham and without any basis and does not inspire any confidence.

12. The Trial Court has rightly held that the prosecution has proved beyond reasonable doubt that the appellant has committed the offence of penetrative sexual assault as defined in section (3)(a) of

POCSO Act upon PW2/victim **A** and said penetrative sexual assault becomes aggravated penetrative sexual assault within section 5(m) (n) of POCSO Act as PW2/victim **A** who is son of the appellant was less than 12 years of age at the relevant time. However, the prosecution has failed to prove that the appellant has committed the offence of penetrative sexual assault upon PW1/victim **J**. The arguments advanced by the counsel for the appellant and grounds of appeal are considered and analysed in right perspective but these are without any legal or factual force and cannot be accepted. The trial court rightly held the appellant guilty and convicted him for the offence punishable under section 6 of POCSO Act and under section 377 IPC. The impugned judgment passed by the trial court is well reasoned and was passed after considering relevant facts proved on record. There is no reason to interfere in impugned judgment. Hence, the present appeal is dismissed.

13. The Trial Court vide order on sentence dated 10.05.2023 sentenced the appellant to undergo rigorous imprisonment for 10 years along with fine of Rs. 10,000/- and in default of payment of fine, to undergo rigorous imprisonment for the period of six months

for the offence punishable under section 6 of the POCSO Act. The trial court also observed that the appellant has been sentenced under section 6 of the POCSO Act so, in terms of section 71 IPC, separate sentence under section 377 IPC is not required to be passed. The appellant has not paid the fine.

13.1 The counsel for the appellant submitted that the appellant is married and belongs to lower strata of the society. The financial condition of family of the appellant is very poor and the appellant used to earn livelihood for the family as the appellant was working as labourer. The counsel for the appellant prayed for lenient approach of the court in the sentence of the appellant.

13.1.1 The Additional Public Prosecutor for the respondent no.1/State argued that the appellant has committed heinous act of sodomy with his own minor son who was just aged about 4 years on the date of commission of offence. The appellant must be awarded adequate punishment so that it may act as a deterrent for other impending offenders.

14. The Child Sexual Abuse is a serious issue/problem being pervasive and disturbing and large numbers of children are being

subjected to physical, emotional, and sexual abuse. The Child Sexual Abuse deserves adequate attention of every stake holder directly or indirectly connected with administration of justice and judicial process. It requires to be addressed with lot of sensitivity and sensibility. It is the solemn duty of the court to award adequate punishment to the person accused of Child Sexual Abuse irrespective of his social, economic background or other domestic responsibilities. The Protection of Children from Sexual Offences Act, 2012 was enacted to protect children from offences of sexual assault, sexual harassment and pornography and to provide for establishment of Special Courts for trial of such offences. The preamble of the POCSO Act also reflects that the Government of India has acceded on 11.12.1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child. The POCSO Act considered sexual exploitation and sexual abuse of children as heinous crimes which need to be effectively addressed.

15. In the present case, the appellant being the biological father of PW2/victim **A** was under social, family, moral duty to protect PW2/victim **A** but the appellant had sexually exploited PW2/victim **A** on various occasions. The crime committed by the appellant cannot be taken lightly. It is a crime not only against the individual but against the fabric of the society and family.

16. Sentencing has significant role to play in the future prevention of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is executed. The Supreme Court in **Deo Narain Mandal V State of UP,** (2004) 7 SCC 257 opined that sentence should not be either excessively harsh or ridiculously low and while determining the quantum of sentence, the court should bear in mind the principle of proportionality. It was further observed that gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. The Supreme Court in **State of MP V Najab Khan and Others,** (2013) 9 SCC 509 observed as under :-

> **16. …in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of court to award proper sentence having regard to the nature of offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of victim of the crime but also the society at large while considering the imposition of appropriate punishment.**

16.1 The Supreme Court in **Shyam Narain V State (NCT of Delhi),** (2013) 7 SCC 77 observed that the fundamental purpose of imposition of sentence is based on the principle that the accused must realize that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of a just punishment is that the society may not suffer again by such crime.

17. The trial court while awarding punishment to the appellant observed that the aim of the punishment is the protection of the society and is cherished while imposing sentences upon the guilty. The trial court referred **Shailesh Jasvantbhai and Another V State**

of Gujarat and Others, (2006) 2 SCC 359 wherein the Supreme Court opined that protection of the society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentences. The trial court also observed and considered that the child victim was aged 4 years at the time of incident when the appellant sexually assaulted him. The trial court has already taken lenient view against the appellant and there is no reason to interfere in the punishment awarded to the appellant.

18. The present appeal is accordingly dismissed and pending applications, if any, also stand disposed of.

19. A copy of this judgment be sent to trial court for information and be also sent to the appellant through concerned Jail Superintendent.

DR. SUDHIR KUMAR JAIN
(JUDGE)

OCTOBER 31, 2023
n/sm