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

\+ **CRL.A. 920/2018**

Reserved on: 29.04.2019
Date of decision: 24.05.2019

IN THE MATTER OF:
SHAMBHU YADAV ..... Appellant
Through: Mr. S.S. Ahluwalia, Advocate (DHCLSC) with Mr.Mohit Bangwal, Advocate

versus

STATE ...Respondent
Through: Ms. Kusum Dhalla, APP

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE VINOD GOEL

HIMA KOHLI, J.

1. The appellant has assailed the judgment and order on sentence dated 16.05.2018 and 19.05.2018 respectively passed by the Court of the learned ASJ-01/Special Judge, POCSO Act, North, Rohini, Delhi in Sessions Case No.58941/16 arising from FIR No.80/2016, registered at Police Station: Alipur under Section 377 IPC and under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act'). In the impugned judgment, the appellant has been convicted for the offence of aggravated penetrative sexual assault on the victim, who is a minor boy aged 4 years, which is punishable under Section 6 of the POCSO Act and for the offence punishable under Section 377 IPC. By the order on sentence dated

19.05.2018, observing that the punishment under Section 6 of the POCSO Act is more stringent than the punishment prescribed under Section 377 IPC, the learned ASJ has awarded a sentence of rigorous imprisonment for life alongwith a fine of Rs.30,000/- under Section 6 of the POCSO Act. In default of payment of fine, the appellant has been directed to undergo simple imprisonment for 90 days.

2. The facts of the case as gathered from the record are that on 27.01.2016, SI Gajender Singh, who was posted at Police Station: Alipur, received a PCR call that one male person had committed a wrong act with a small boy at Teekri Khurd. The said information was recorded vide DD no.12A and the case was marked to SI Gajender Singh for investigation. SI Gajender Singh accompanied by another police personnel went to the spot and found that the beat constable was already present there. The beat constable produced the appellant and on inquiry, SI Gajender Singh came to know that the appellant had sodomized a four year old boy. The name of the victim has been anonymized in the impugned judgment as A, that of his mother as Smt. U and of his father as Sh. K. On coming to know that the victim had already been taken to SRHC Hospital, SI Gajender Singh proceeded there and met his parents. The appellant was also present at the hospital. Smt. U pointed towards the appellant as the aggressor. Both, the victim and the appellant were got medically examined by the concerned doctor.

3. In the meantime, the I.O., W/SI Tejwati arrived at the hospital alongwith an official belonging to an NGO and took over the investigation. The statement of the victim's mother, Smt. U was recorded. She stated that she has two sons and the victim, A is her elder

son. On 27.1.2016, at 3 PM, when she was sitting on the terrace and knitting, her son, A went to the room of the appellant situated in the same building for eating chicken rice. After some time, A rushed upstairs and told her that he was bleeding from the anus. On asking him how the bleeding had taken place, A informed her that the appellant had done something wrong with him. At this, the complainant raised a hue and cry and people from the locality gathered there. Arun Kumar, a distant relative of Smt. U, who was also residing in the same building, apprehended the appellant from a nearby shop and reported the matter to the police on phone. Based on her statement, the *rukka* was prepared and forwarded to the Police Station.

4. While at the hospital, the I.O. received a sealed *pullanda* of the exhibits of the appellant and the victim. The appellant was arrested and his disclosure statement was recorded. Thereafter, the police officers accompanied the appellant, the victim and his family members to the scene of the crime. At the instance of the appellant, one plastic mattress having blood stains and some yellowish liquid were found in his room and the relevant portion was cut out, placed in a plastic poly bag and seized. The I.O. prepared a site plan at the instance of the victim, duly witnessed by SI Gajender Singh. She also recorded the statement of the witnesses, including Arun Kumar, who had informed the police about the incident. On the basis of the *rukka*, an FIR was registered.

5. On completion of the investigation, the charge-sheet was filed and vide order dated 08.04.2016, the appellant was charged for committing penetrative sexual assault on the victim punishable under Section 6 of the POCSO Act. Alternatively, he was charged for committing an offence

punishable under Section 377 IPC to which he pleaded not guilty and claimed trial. During the course of trial, the original charge was amended on 21.03.2018 and the appellant was charged for committing penetrative sexual assault upon the victim by committing carnal intercourse and for an offence defined under Section 5(m) of the POCSO Act, punishable under Section 6 of the POCSO Act. He was also charged for committing carnal intercourse punishable under Section 377 IPC. The appellant pleaded not guilty to the said charge and claimed trial.

6. To bring home the guilt of the appellant, the prosecution examined 11 witnesses in all.

PUBLIC WITNESSES

7. Smt. U, mother of the victim, (PW-1) deposed as follows:-

"I have two children. Victim is aged about 4 years. Victim is my elder child. On 27.01.2016, my husband was working on private job and he left for his job at 8:30 am. I was doing household chores. At about 3 pm, I was knitting on my terrace. At that time, my son was going to the room of accused for eating chicken rice. After some time, victim came upstairs. Victim told me that he was bleeding. When I asked him that from where he is bleeding, he told me that he was bleeding from his anus. When I asked him as to how he bleed. Victim told me that Shambhu (Accused present in the Court, Correctly identified) caused it. Then I made hue and cry.

Then I came downstairs and saw that the door of the room of accused was latched. People from locality gathered there. Arun who is my distant relative apprehended accused from a nearby shop. Arun reported the matter to police on phone. Police arrived at the spot. Victim was taken to

hospital for his medical examination. Accused was also taken by the police. My husband accompanied victim. Police recorded my statement in the police station.

At this stage, statement of witness recorded by police is shown to her. Witness identifies her signatures at point A. The statement is now Ex.PW1/A.

Accused was arrested in my presence. I had shown the place of incident to police. When I saw the room of accused, I found some blood stains and yellow material on the bed sheet. Police seized the same in my presence.

My statement in the present case was recorded by Ld. MM.

At this stage, an envelope is opened sealed with the seal of SJ and a statement U/s 164 Cr.P.C. is taken out. The witness has been shown the statement and she identifies her signatures at point A and the same is Ex. PW1/B."

8. The victim (PW-2) deposed as follows:-

"Shambhu (present in the Court, correctly identified) ne apni nunu meri gand mein ghusa di.
Court Question: Did Shambhu removed your clothes?
Answer: Witness nodded in affirmation.
Court Question: Did you receive any injury?
Answer: Witness nodded in negative.
Court Question: Did you bleed?
Answer : Witness nodded in affirmative.
Court Question: Is Shambhu good person or bad person?
Answer: He is bad person."

Though an opportunity was afforded to the appellant to cross-examine the said witness, except for making him a suggestion that he had been tutored by his mother, the defence did not cross-examine him on any other aspect.

9. Sh. K, father of the victim (PW-5) deposed that he had two children. The victim was his older child, aged about 4 years. On 27.01.2016, he had gone to his factory situated at Bhorghar, Delhi. His wife called him up in the afternoon and stated that the appellant, who was residing on the second floor of the tenanted premises, where they too were living, had committed an act of sodomy with their son, who was bleeding from his anus. When PW-5 reached home, he saw that his son was bleeding from his anus. By then, the appellant had been apprehended by the public and the police had also reached at the spot. The victim was got medically examined by the police at SRHC Hospital and a case was registered against the appellant.

10. Arun Kumar (PW-4), who had first reported the matter to the police, and stated that on 27.01.2016, he was present in his house when PW-1 came to him crying and told him that somebody had committed a wrong act with her son. He saw blood smeared on the thigh of the victim, who uttered the name of the appellant. He then went to the appellant's room but found him missing. He noticed blood on the appellant's bed and on looking for him, found him near the house, where he apprehended him and called the police. He handed over the appellant to the police and the victim, A was got medically examined. The police had seized the blood stained piece of plastic mattress in the presence of the said witness.

POLICE WITNESSES

11. HC Vinod Kumar (PW-3) and HC Jaswant (PW-6) are the formal witnesses to the investigation. PW-3 recorded DD No.12A (Ex.PW3/A1) and got the FIR registered (Ex.PW3/A). He made an endorsement on the

rukka (Ex.PW3/B) and issued a certificate under Section 65(B) of the Indian Evidence Act (Ex.PW3/C). HC Jaswant (PW-6) posted as the Malkhana Moharrar at Police Station: Alipur, deposed that he had made entries in the register in respect of nine sealed samples, (Ex.PW6/A) and released the sealed samples for being sent to the FSL, Rohini for an opinion, (Ex.PW6/B), against acknowledgement receipt (Ex.PW6/C). He deposed that as long as the exhibits had remained in his custody, they were intact and untampered.

12. Ms. Sadhika Jalan (PW-9) posted as the Metropolitan Magistrate at the relevant time, deposed that on receiving an application from the police, she had recorded the statement of the victim's mother (PW-1) under Section 164 Cr.PC (Ex.PW1/B).

13. SI Gajender Singh (PW-7) was the initial Investigating Officer, who proved the exhibits seized from the scene of the crime and collected the sealed exhibits relating to the appellant and the victim from SRHC Hospital. Thereafter, he had handed over the investigation to W/SI Tejwati (PW-10), who recorded the statement of the complainant, took over the sealed exhibits from PW-7 vide seizure memo (Ex.PW7/A and PW7/B) and arrested the accused. The disclosure statement of the appellant was recorded (Ex.PW7/E) and at his instance, the pointing out memo was prepared in respect of the scene of the crime (Ex.PW7/F). The exhibits collected from the scene of the crime were seized vide seizure memo (Ex.PW7/G). The site plan prepared at the instance of the victim is marked as Ex.PW7/H. On an application moved under Section 164 Cr.P.C. the statement of the PW-1 and PW-2 were recorded. PW-10 deposed that since the victim was of a tender age and his parents had not

registered his birth, his age proof could not be obtained and his ossification test was also not recommended for the same reason. She stated that except for PW-4, no other public witness was present when they returned from the hospital and reached back to the spot. She had tried to make inquiries from the nearby residents of the room but none had co-operated.

MEDICAL EVIDENCE

14. Besides the material public witnesses, the medical and forensic evidence in the instant case is of great significance. Dr. Vinod Dahiya, Medical Officer, SRHC Hospital (PW-8) proved the MLC of the victim (Ex.PW8/A), wherein it was recorded that on local examination, bleeding was found around the anal area. PW-8 also examined the appellant on the same day and proved his MLC as Ex.PW8/B. Both the victim and the appellant were referred by him to SR Surgery for further examination.

15. Since the prosecution did not cite the doctor in the Surgery Department of SRHC Hospital, as a witness, the trial court summoned Dr. Jitender Nath Jha, Senior Resident, SRHC Hospital as Court Witness No.1. He testified that on local examination of the victim, he had observed, *"blood clot in the perianal area, fresh anal tear noted, anal spasm was present"* and opined that *"the findings are suggestive of anal penetration"*. He proved his detailed noting endorsed on the back of the victim's MLC, (Ex.CW1/A) and the detailed noting on the back of the appellant's MLC (Ex.CW1/B) and stated that thereafter, he had referred the appellant to the Forensic Department for a final opinion on his potency.

16. Dr. R.K. Anand, Chairman and Additional Medical Superitendent, Safdarjung Hospital, New Delhi (PW-11) stated that on 04.08.2017, a Medical Board was constituted under the orders of the court to conduct the potency test on the appellant. On examining the appellant, the Board opined in the potency test report (Ex.PW11/11) that there was nothing to suggest that he could not perform sexual intercourse.

FSL REPORT

17. Last, but not the least is the expert opinion of the FSL (Ex.F-1). The report records that on a biological examination, blood of the appellant (Ex.6) and rectal swab of the victim (Ex.8) were detected on the plastic mattress seized from the appellant's room (Ex.9). Further, human semen was detected on the appellant's underwear (Ex.1a) and rectal swab of the victim (Ex.8). The results of the DNA examination were that the alleles from the blood gauze of the appellant (Ex.6) were accounted for in the alleles from his underwear (Ex.1a) and the victim's cotton wool swab (Ex.8). Further, the alleles from the plastic mat piece (Ex.9) were accounted for in the alleles from the victim's cotton wool swab (Ex.8). Thus the DNA report established that there was sufficient material in the exhibits to conclude that semen stains present in the appellant's underwear and the victim's cotton wool swab were similar to the blood gauze of the appellant and blood stains present on the victim's cotton wool swab were similar to those found on the plastic mat piece.

18. On conclusion of the prosecution evidence, the statement of the appellant was recorded under Section 313 Cr.PC, wherein he denied the prosecution case. In reply to question No.1, he admitted that on

27.01.2016, at about 3 PM, the victim, A, aged 4 years, had gone to his room to eat chicken rice. In reply to question No.14, he stated that PW-4 had falsely testified because he had to return him a sum of Rs.15,000/- that he had borrowed from the appellant prior to the incident. He claimed that he was falsely implicated in the case by PW-4 and PW-5 to extort money. He sought to attribute the bleeding in the anus region of the victim to his scratching his anus by using a *sua*.

19. In view of the testimony of PW-1 and PW-2 duly corroborated by the medical evidence, the trial court convicted the appellant for the offence punishable under Section 6 of the POCSO Act and under Section 377 IPC.

ARGUMENTS

20. To assail the impugned judgment, three pronged arguments were advanced by Mr. S.S. Ahluwalia, learned counsel for the appellant. Firstly, that there are material contradictions between the statement of PW-1 under Sections 161 Cr.PC and 164 Cr.PC vis-a-vis her testimony in court. Secondly, that PW-4 was an unreliable witness, since he is related to the victim's mother and though there were several public witnesses present at the scene of the crime, the prosecution failed to produce any independent witness. Lastly, it was urged that the prosecution failed to show the spot from where the appellant had been apprehended and contradictory statements in this regard were made by PW-1 and PW-4.

21. On the point of sentence, learned counsel for the appellant cited the decision of a co-ordinate Bench of this Court in Jabbar vs. State reported as **251 (2018) DLT 71 (DB)** and argued that simply because

Section 6 of the POCSO Act contemplates punishment for aggravated penetrative sexual assault as punishable with rigorous imprisonment for a term that shall not be less than ten years, but may extend to imprisonment for life besides fine, could not be a ground for the trial court to have imposed the maximum punishment of rigorous imprisonment for life on the appellant.

ANALYSIS AND DISCUSSION

22. We have heard the arguments advanced by Mr. S.S. Ahluwalia, learned counsel for the appellant and Ms. Kusum Dhalla, learned APP and carefully scanned the evidence brought on record.

23. Broadly speaking, the trial court has convicted the appellant by relying on the testimonies of PW-1 and PW-2 and noted that the same stand duly corroborated by medical and forensic evidence brought on record. The victim was four years old at the time of the crime. Being a child witness, his testimony was recorded in-camera and the learned ASJ asked him general questions so as to satisfy herself that he was competent to answer questions. The reply of the victim to the questions posed was brief and to the point. He identified the appellant, who was present in court, confirmed the fact that he had removed his clothes and stated that "*Shambhu (present in the Court, correctly identified) ne apni nunu meri gand mein ghusa di".* On asking the victim if he had received any injury, he had nodded in the negative. The court then re-framed the question and asked him as to whether he had suffered any bleeding, to which he nodded in the affirmative. On asking him as to whether the appellant was a good person or a bad person, the victim answered that he was a bad person. Though an opportunity to cross-examine PW-2 was

available to the defence, except for suggesting that he had been tutored by his mother, no other question was asked.

24. Similarly, PW-1 to whom the victim had come running after the ghastly act was committed by the appellant, corroborated her son's version and stated that on the fateful day, her son had gone to the appellant's room for eating chicken-rice and when he came to the terrace, where she was present, the child had told her that he was bleeding from his anus. On asking him as to how he had suffered the injury, PW-2 named the appellant as the perpetrator of the crime. It is noteworthy that at the time her statement was recorded under Section 164 Cr.PC, she had narrated the very same facts. During her testimony, there was no attempt on the part of PW-1 to embellish her statement, or improve upon the same in any manner. Though she was cross-examined by the defence, nothing material had emerged therefrom.

25. The touchstone for evaluating the testimony of a child victim in cases of sexual assault is well settled. The judicial dicta is that as long as the victim's testimony is found to be credible, sincere and rings true, it is sufficient to convict the accused. It is equally true that there is no impediment in accepting the uncorroborated testimony of a child victim. The only pre-condition is that such a testimony should be carefully scrutinized before accepting or rejecting it.

26. In Panchhi & Ors. vs. State of U.P. reported as **AIR 1998 SC 2726**, the Supreme Court observed that the evidence of a child witness cannot be rejected outright. However, the said evidence ought to be carefully evaluated and scrutinized with greater circumspection because

a child is susceptible to be swayed by what others tell him and can be an easy prey to tutoring. The Court must assess as to whether the statement of the victim is his voluntary expression of what had transpired or was it made under the influence of others. A similar view was expressed in Mohd. Kalam vs. State of Bihar reported as **(2008) 7 SCC 257**.

27. In State of H.P. vs. Gian Chand reported as **(2001) 6 SCC 71**, the Supreme Court observed that the court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon, though there may be other witnesses available who could have been examined but were not examined.

28. In State of Rajasthan vs. Om Prakash reported as **(2002) 5 SCC 745**, the Supreme Court elaborated the approach that courts must adopt in the cases of child rape, as follows:-

> "***13.*** *The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In* ***State of Punjab v. Gurmit Singh [(1996) 2 SCC 384]****, referring to* ***State of Maharashtra v. Chandraprakash Kewalchand Jain [(1990) 1 SCC 550***], *this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook.* ***The testimony***

of the 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. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury." (emphasis added)

29. In Mohd. Kamal vs. State of Bihar reported as (**2008) 7 SCC 257**, where it was argued that the evidence of the child witness in a rape case should not have been accepted in the absence of any corroboration, the Supreme Court dismissed the appeal filed by the accused by observing that the trial court and the High Court had found the evidence of the child witness as cogent, credible, free from any influence and reliable.

30. In State of Himachal Pradesh vs. Sanjay reported as **(2017) 2 SCC 51**, where the prosecutrix at the relevant time was 9 years old and charge was framed against the accused under Sections 376 (2) (f) and 506 IPC, the Supreme Court made the following pertinent observations, which in our view, would apply with equal force to a victim of a sexual offence covered under the POCSO Act :-

"*30. By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which the testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due*

precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside…….. "

*"31……..****By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused.*** *No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole.* ***Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does****. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion?....."* (emphasis added)

[Also Refer: Rameshwar vs. State of Rajasthan; **AIR 1952 SC 54**, Mangoo vs. State of M.P.; **AIR 1995 SC 959**, Gagan Kanojia and Anr. vs. State of Punjab; **(2006) 13 SCC 516**, Nivrutti Pandurang Kakote and Ors. vs. State of Maharashtra; **AIR 2008 SC 1460**, State of Madhya Pradesh vs. Ramesh; **(2011) 4 SCC 786** and Raj Kumar vs. State of Madhya Pradesh **(2014) 5 SCC 353**]

31. Besides the testimony of PW-1 and PW-2, the learned trial court also relied on the testimony of PW-4, a resident of the very same building, who had noticed blood on the thigh of the victim and had gone to the room of the appellant, who was found missing. PW-4 had noticed blood on the bed of the appellant and apprehended him from a nearby place.

32. The plea of the learned counsel for the appellant that PW-4 is an interested witness being a distant relative of the victim's mother, is found to be devoid of merits. It is no doubt a well settled rule of prudence that the evidence of a related or interested witness should be examined meticulously, but once the court is satisfied that his/her testimony is credible, then the said evidence can be relied upon even without corroboration. Further, unless it is proved that such a witness harbours some enmity against the accused or he wished to implicate him falsely, for all effects and purposes, he can be treated as an independent witness.

33. In Seeman alias Veeranam vs. State reported as **(2005) 11 SCC 142**, the Supreme Court had explained the above legal position in the following manner:-

> *"4.* ***It is now well settled that the evidence of witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible.*** *The witness could be a relative but that does not mean to reject his statement in totality.* ***In such a case, it is the paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinizing the evidence of the interested sole witness.*** *The prosecution's non-production of one independent witness who has been named in the FIR by itself cannot be taken to be a circumstance to discredit the evidence of the interested witness and disbelieve the prosecution case. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement."* (emphasis added)

34. In Waman v. State of Maharashtra reported as **(2011) 7 SCC 295**, while dealing with the case of a related witness, the law was summarized by the Supreme Court in the following words:-

> *"20. It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence.* ***In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinize their evidence meticulously with a little care.****"* (emphasis added)

35. The law relating to related/interested witness was distilled by a Division Bench of this Court of which one of us (Hima Kohli, J) was a member, in a recent decision in the case of Govind Raj vs. The State (NCT of Delhi) reported as **2019 (257) DLT 633**, wherein the conclusion drawn was as follows:-

> *"32. A glance at the above decisions makes it clear that the evidence of an interested and/or related witnesses should not be examined with a coloured vision simply because of their relationship with the deceased. Though it is not a rule of law, it is a rule of prudence that their evidence ought to be examined with greater care and caution to ensure that it does not suffer from any infirmity.* ***The court must satisfy itself that the evidence of the interested witness has a ring of truth. Only if there are no contradictions and the testimony of the related/interested witness is found to be credible, consistent and reasonable, can it be relied upon even without any corroboration.*** *At the end of the day, each case must be examined on its own facts. There cannot be any sweeping generalisation."* (emphasis added)

[Also refer: Dalip Singh vs. State of Punjab **1954 SCR 145**, Sarwan Singh vs. State of Punjab **(1976) 4 SCC 369**, Kartik Malhar vs. State of Bihar **(1996) 1 SCC 614** and Jayabalan vs. UT of Pondicherry **(2010) 1 SCC 199** and Raju vs. State of Tamil Nadu **(2012) 12 SCC 701**]

36. In the instant case, PW-4 is a natural witness, who was at home on the relevant date and time and residing in the very same building, where the appellant, the victim and his family were residing as tenants. By no stretch of imagination can he be treated as an interested witness for the simple reason that the word, 'interested' connotes that a witness ought to

have had some animus against the accused or he harboured a hostility against him. The appellant's version that PW-4 had reason to depose falsely since he had borrowed some money from him prior to the date of the incident, rings hollow particularly in the light of yet another version of the incident sought to be offered by him to the effect that both, PW-3 and PW-4 had planned to extort money from him. Though the appellant was afforded an opportunity to lead evidence, he failed to prove the said allegations.

37. Another defence taken by the appellant was that the victim had started bleeding from his anus having scratched the same with a sua, used to stitch jute cloth. The said argument was tested and negated by the trial court for the following reasons:-

> *"35. The victim bleeding from his anus is a factum, which is not disputed by the accused, the same having been otherwise, emphatically established by the testimony of the victim, his mother and the MLC of the victim Ex. PW 8/A, as well as the testimony of Mr. Arun Kumar examined as PW 4, who testified that he also noticed blood on the thighs of the victim, soon after the incident. The suggestion given to PW 1 / the mother of the victim on behalf of the accused, was that the victim was bleeding from his anus because he had scratched himself with a 'Sua'. However, had this been the case, and the visit of the victim at the house of the accused, not having been disputed, where did the alleged Sua come from, was not thrown any light upon. Presumably, had this been the case, the Sua would have also been present in the house of the accused, and if a four year old child starts scratching himself and that too on his anal region, with a Sua, surely the adult person i.e. the accused would have stopped him from doing so. Going a little further, if the child had been wanting to scratch himself with a Sua, the child would have to extend his arm towards his back*

and only then, with great difficulty, could he have succeeded in being able to scratch just the exact place i.e. the anus without causing injury on his hips or the surrounding anal region. Going one step ahead, if the child had so succeeded and had started bleeding, the first person who noticed the blood, would have been the accused, and if he had no guilty conscience, he would have brought the child to his home and informed his mother that the child had injured himself with a Sua. The accused, however, did no such thing but rather put a latch on his room and went away. The MLC of the victim Ex. PW8/A does not note the presence of any injuries on the area surrounding the anus of the child, but merely blood being present there. The suggestions put to the witnesses and part of the defence taken by the accused therefore, is found to be too far fetched to be believable."

38. The logic given by the trial court in the para extracted above is sound and we find no reason to disagree with the same. In any event, besides the ocular evidence, there is sufficient medical evidence brought on record by the prosecution to squarely indict the appellant. The Doctor (PW-8) who was the first one to examine the victim at the hospital had recorded in the MLC that bleeding was noticed around his anal region. Further, SR Surgery, (Court Witness No.1) had corroborated the said observations on examining PW-2 and had recorded in the MLC that the findings are suggestive of anal penetration. The said opinion stands further corroborated on the basis of the scientific evidence. The analysis of the exhibits forwarded to the FSL clearly nails down the appellant as the perpetrator of the crime. The biological examination and the DNA examination results of the FSL leave no manner of doubt that the victim

was subjected to aggravated penetrative sexual assault by none other than the appellant.

39. Coming lastly to the plea of the learned counsel for the appellant that there were contradictions in the statements of PW-1, as recorded under Section 161 Cr.PC and 164 Cr.PC, vis-à-vis her testimony in court, it is trite that contradictions in matters of detail cannot be a ground to disbelieve a witness if his/her testimony is corroborated in material particulars. In our opinion, the contradictions sought to be pointed out by learned counsel for the appellant are not so material as to dilute the entire prosecution case. In the case of State (Delhi Administration) and Ors. vs. Laxman Kumar and Ors. reported as **AIR 1986 SC 250,** referring to the contradictions in the deposition of witnesses, the Supreme Court had observed as below:-

> *"43. .....**It is common human experience that different persons admittedly seeing an event, give varying accounts of the same. That is because the perceptiveness varies and a recount of the same incident is usually at variance to a considerable extent. Ordinarily, if several persons give the same account of an event, even with reference co minor details, the evidence is branded as parrot like and is considered to be the outcome of tutoring**. Having read the evidence of these witnesses with great care, we are of the view that the same has the touch of intrinsic truth and the variations are within reasonable limits and the variations instead of providing the ground for rejection, add to the quality of being near to truth. ....."* (emphasis added)

40. It has also been held by courts that identical testimonies without any contradictions, can in fact be suspect. In Shivaji Sahabrao Bobade vs. State of Maharashtra reported as **AIR 1973 SC 2622**, speaking for the

Bench, Justice V.R. Krishna Iyer made the following observations when it comes to evaluation of evidence of a witness, which may not be found to be completely credible:-

> *"19.* ***We must observe that even if a witness is not reliable, he need not be false and even if the Police have trumped up one witness or two or has embroidered the story to give a credible look to their case that cannot defeat justice if there is clear and unimpeachable evidence making out the guilt of the accused.*** *Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between `may be" and `must be" is long and divides vague conjectures from sure conclusions."* (emphasis added)

41. In the instant case, the defence has not been able to shake the testimony of any of the witnesses in their cross-examination. Their testimonies stand duly corroborated in all material particulars. To top it all, there is sufficient medical and forensic evidence placed on record by the prosecution to bring home the guilt of the appellant.

42. As for the plea that no independent witness was produced by the prosecution though the I.O. (PW-10) and SI Gajender Singh (PW-7) had stated that many public persons had gathered at the spot when PW-1 had raised an alarm, we are of the opinion that nothing would turn on the absence of public witnesses in the present case when the testimony of the child victim itself has been found to be truthful, reliable and sincere and went unrebutted in cross-examination. Moreover, the testimony of PW-1 fully corroborates the victim's version and is found to be equally reliable and trustworthy. [Refer: Pala Singh and Anr. vs. State of Punjab **AIR 1972 SC 2679**; Paras Ram vs. State of Haryana **AIR 1993 SC 1212**;

Pradeep Narayan Madgaonkar and Ors. vs. State of Maharashtra **AIR 1995 SC 1930**; Balbir Singh vs. State **(1996) 11 SCC 139**; Kalpnath Rai vs. State (Through CBI) **AIR 1998 SC 201** and M. Prabhulal vs. Assistant Director, Directorate of Revenue Intelligence **AIR 2003 SC 4311**].

43. Here is a case where for once, the police did not lose any time in conducting the investigation and the sequence of the events that stand amply corroborated in all material aspects, are borne out from the independent evidence brought on record, all which when taken together, endorse the testimony of the victim that it was the appellant who had committed carnal intercourse with him. For the aforesaid reasons, we have no hesitation in upholding the impugned judgment and the order of conviction.

44. This takes us to the last plea taken on behalf of the appellant, which is on the quantum of sentence. It has been canvassed that the trial court has been unduly harsh in awarding rigorous imprisonment for life to the appellant and remained unmindful of the fact that it was his first offence and he is the main bread earner of his family comprising of a wife and a child.

45. As noted above, the victim was a four year old boy, who was lured by the appellant in his room as he offered to feed him chicken rice. The victim had innocently accepted the said offer at its face value and had willingly gone to the appellant's room situated in the same premises, where he and his family were residing. Since the appellant was known to the victim being a neighbour, there was no reason for the victim to have distrusted him. By committing such a perverse act, the appellant has not

only caused physical injuries to the victim but more than that, the said act would have left deep emotional scars on him likely to stay on in his mind for a long long time to come. This reprehensible animality demonstrated by the appellant would have caused the victim such trauma that he will be wary of reposing trust in an adult or live a joyous and carefree life in his formative years. There will always remain a shadow of fear and anxiety looming over him. This trust deficit caused to the victim by none other than a neighbour whom he knew well, is an irreparable damage to his psyche. What could be more damaging than this? It is said that *"Better broken bones than broken spirit"*. When the spirit is broken, and that too at such a tender age, it is bound to stultify the healthy all rounded growth of the child victim. It is noteworthy that the appellant was 25 years old on the date of committing the offence. He was married and had a child. But that did not deter him from lusting for the 4 year old victim. The fact that the appellant was himself father of a small child and yet he had no compunction in committing such a heinous crime, gives strength to our resolve to uphold the judgment. In this context, we can do no better than extract the following passage of the judgment in Om Prakash (supra):-

> *"19. Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of 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 the social stigma attached thereto. According to some surveys, there has been a steep rise in 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. They are the 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 modes of sexual abuse. These factors point towards a different approach required to be adopted. The overturning of a well-considered and well-analysed judgment of the trial court on grounds like non-examination of other witnesses, when the case against the respondent otherwise stood established beyond any reasonable doubt was not called for. The minor contradiction of recovery of one or two underwears was wholly insignificant."

46. In the light of the aforesaid discussion, we do not find any mitigating circumstance for interfering with the order on sentence, which is accordingly maintained. As a result of the above discussion, the present appeal is dismissed as being devoid of merits, while upholding the judgment of conviction and the order on sentence awarded to the appellant.

47. We may note that the learned ASJ has invoked the provision of Section 357 Cr.P.C. and directed that out of the fine realized from the appellant, a sum of Rs.20,000/- be given to the victim through his mother by way of compensation. Additionally, further compensation of Rs.4 lakhs has been granted in favour of the victim under Section 33(8) of the POCSO Act, 2012 read with Rule 7 (2) of the POCSO Rules, 2012. Having regard to the nature of the crime and the tender age of the victim, we are of the opinion that the compensation amount awarded by the trial court ought to be enhanced under the Delhi Victims Compensation

Scheme, 2015. A copy of this order shall be forwarded forthwith to the Secretary, DSLSA for passing appropriate orders.

48. Trial court record be released forthwith alongwith a certified copy of the judgment. Copy of this judgment shall be sent to the concerned Jail Superintendent for updating the jail record.

(HIMA KOHLI)
JUDGE

(VINOD GOEL)
JUDGE

MAY 24, 2019
rkb/ap/na