

(2025) 08 DEL CK 0687

In the Delhi High Court

Case No : Criminal Appeal No. 195 Of 2024

Jaswinder Singh Alias Kake Alias Sardar

APPELLANT

Vs

State Of Nct Of Delhi & Anr

RESPONDENT

Date of Decision : 12-08-2025

Acts Referred:

Code of Criminal Procedure, 1973 — Section 164, 313, 374(2), 428, 482
Indian Penal Code, 1860 — Section 377, 380
Protection of Children from Sexual Offences Act, 2012 — Section 3, 5, 5(m), 5(n),
5(p), 6, 29
Evidence Act, 1872 — Section 118

Citation : (2025) 08 DEL CK 0687

Hon'ble Judges : Manoj Kumar Ohri, J

Bench : Single Bench

**Advocate : Himanshu Anand Gupta, Bekhar Anand Gupta, Anvesh Verma,
Navneet Kaur, Sidhartha Barua, Ishwar Chandra, Pradeep Gahalot**

Final Decision : Dismissed

Judgement

Manoj Kumar Ohri, J

1. The present appeal filed under Section 374(2) read with Section 482 Cr.P.C., has been instituted assailing the judgement of conviction dated 21.10.2023 vide which the has been convicted for offences punishable under Sections 5 (m), (n) & (p) punishable under Section 6 POCSO Act and order of sentence dated 15.01.2024 in Sessions Case No. 972/2019 arising out of FIR No. 703/2019 registered under Sections 377/380 IPC & 6 of POCSO Act at P.S. Raj Park.

Vide order on sentence, appellant was sentenced to undergo RI for 20 years for the offence under Sections 5 (m), (n) & (p) punishable under Section 6 POCSO Act, along with a fine of Rs.5,000/- in default of payment of fine, appellant was sentenced to undergo simple imprisonment for 02 months. The appellants were also given the benefit of Section 428 CrPC.

2. The facts as noted by the Trial Court in the impugned judgement are extracted

herein below:-

"In brief, as per the charge-sheet, on 22.09.2019, DD No. 22A was marked to HC Munde Tuka Ram and thereafter SI Kulbir was called to the spot. The victim 'S' had been sent in a PCR to SGM Hospital for his medical examination and in his MLC, the alleged history of sexual assault (sodomy) was recorded. The statement of the mother of the victim i.e. Smt. 'RD' was recorded to the effect that they were permanent resident of Bihar and her husband worked in Delhi in a helmet-making factory where the accused Jaswinder @ Sardar @ Kake also worked and he resided with them in the same room. She further stated that on 22.09.2019, in the afternoon, her husband had gone to work and she was present in the room with both her sons as well as the accused. She, further, stated that her son 'S' was lying on the cot with his uncle Sardar while she and her son SO were sleeping on the floor. She further stated that at about 1 PM, she heard the scream of her son 'S' and upon waking up, she saw that the zip of the pants of the accused was open, the underwear of her son 'S' was removed, and the accused had put his hand on the mouth of 'S' so that he would not make any noise upon which she scolded the accused, called her son 'S' towards, her and 'S' informed her that the accused had done wrong act (galat kaam) with him. She further stated that she took both her children out of the room and locked the accused in the room (kundi laga di) telling him that she was going to bring her husband, but she met her husband on the way, and upon returning, she found that the accused had got the neighbours to open the door and had run away along with Rs.3000/- cash and ATM card of SBI."

3. The charge-sheet came to be filed on 21.11.2019 and charges were framed vide order dated 23.03.2022, under Section 5(m), (n)& (p) punishable under Section 6 of the POCSO Act and in the alternative Section 377 IPC as well as for offence under Section 380 IPC to which, the appellant pleaded not guilty and claimed trial. In support of its case, the prosecution examined as many as 14 witnesses, including the victim, who was examined as PW1. The mother and father of the child victim were examined as PW3 and PW4, respectively. Dr. Bina, CMO, SGM Hospital and Dr. Sandip Balar, SR, SGM Hospital, who proved the MLC of the child victim, were examined as PW2 and PW13, respectively. The rest of the witnesses were formal in nature and deposed about the various aspects of the investigation. In defence, statement of the appellant was recorded under section 313 CrPC, wherein he denied the prosecution's case, and he also examined his mother as DW2.

4. The first contention raised by the appellant relates to the reliability on the case of the prosecution, as the first information about the incident, as recorded in DD No. 22A (Ex. PX-5) on 22.09.2019, is that a person fled after committing theft. It is next contended that the prosecution's case is also improbable, as, concededly, at the time of the incident, both mother and sister of the child victim were present at the spot. The testimony of the child victim is also called into question, being tutored and made to falsely implicate the appellant at the

instance of his parents due to a money dispute. Learned counsel for the appellant also contends that the testimony of the child victim has material improvements over his previous statements made during the investigation. In this regard, it is contended that while in the statement recorded under Section 164 Cr.P.C., the child victim stated that he was sleeping on the cot with the appellant, however, in the testimony before the court, it was stated that he was lying with his sister. Another improvement is that, in the statement recorded under Section 164 Cr.P.C., the child victim stated that on his raising alarm, the appellant ran away, while in the deposition, he stated that the appellant pretended to sleep. Learned counsel also found fault in the testimony of the mother of the child victim by contending that while in 164 Cr.P.C. statement she had stated that she saw the appellant's pant was removed and he had inserted his penis into the anus of the child victim whereas in her deposition, she stated that she had only seen that her son's underwear was removed while appellant's zip was open, and on being asked, the child informed about the incident of insertion of penis by the appellant in the anus of the child. She further deposed that she saw blood. In this regard, reference is also made to the FSL report (Ex PX-6), to submit that the same does not lend any support to the case of the prosecution. It is further contended that the defence had consistently given suggestions of false implication on account of money dispute between the parties. It has come in the testimony of the mother of the child victim that her neighbour, also reached at the spot, however, no such person was examined. Lastly, it is contended that the house in question, where the incident took place, was measuring 25 sq. yards and as such, commission of the offence in such a small area was improbable.

5. Per contra, Ld. APP for the State has defended the impugned judgement and submitted that though the appellant has alleged improvements in the court deposition of the above statement of the child victim and his mother however, the witnesses were not confronted with such improvements at the time of their deposition. Further, while referring to the MLC it was stated that the same would prove that the appellant had committed the offence.

6. I have heard the learned counsels for the parties and perused the Trial Court Record.

7. The child victim was examined as PW1. The factum of the child victim being aged about 6 years at the time of the incident is not disputed either before the Trial Court or in the present appeal. Before recording his statement, the Trial Court duly noted the competency of the child victim to understand questions and answer them. On being asked the statement was recorded in question answer form. It is also not disputed that the appellant was already known, being employed by the father of the child victim and was residing in the same house. The child victim correctly identified the appellant. The relevant portion of the statement of the child victim is extracted hereinbelow :-

"Without oath

Q. Appke saath kya hua tha ?

Ans. Mummy niche so rahi thi. Mein khat par leta cartoon dekh raha tha.

Q. Apke saath charpai par aur kon tha ?

Ans. Meri bahan

Q. Phir kya huwa tha apke saath cartoon dekhte dekhte ?

Ans. Bahan khat se uth kar mummy ke pass chali gayi.

Q. Phir kya hua ?

Ans. Sardar kurkura khilane ke liye boi rahe the.

Q. Phir kya hua ?

Ans. Susu waii jagah par toilet wali jagah diya tha.

Q. Beta thoda explain karo ki kya kiya tha ?

Ans. Toilet wali jagah par susu kar diya tha.

Q. Jab usne aisa kiya to appko dard huwa tha ?

Ans. Han. Chillaya tha to mummy jag gayi, phir wo jhoothmooth ka sone ka natak karne lag gaye.

(Court Observation: the witness is extremely shy and seems uncomfortable to talk about the incident.)

Q. Aap chillaye kyun the appko dard kyun huwa tha ?

Ans. Bahut dard huwa tha. Toilet wali jagah par susu kar diya tha.

Q. Kya jisne ye kiya tha aap use pehchan sakte ho ?

Ans. Han."

In cross-examination by the Ld. PP, the child victim answered in affirmative that at the time of recording of statement under Section 164 Cr.P.C. he had told the Judge that the appellant had inserted his penis in the victim's anus. The exact questions and answers are extracted hereinbelow:-

"Q. Kya ye baat jo apne Judge Sahab ko batayi thi ki "uncle ne apna susu meri poti wali jagah mein dala tha", aisa huwa tha ?

Ans. Han."

8. In cross-examination, the child victim denied the suggestion that no such incident had taken place as well as he deposed on the asking of his mother. The mother of the child victim, while appearing as PW3, stated that prior to the incident, the appellant had been residing in their house for the last 7 months. She stated that about 3 years ago, while her husband had gone to the factory,

she along with her children were in their house and the appellant was also present there. In the afternoon, the appellant was lying in a cot with her son while she was lying on the floor when she heard her son's cries. She saw that the underwear of her son was lowered down and zip of pant worn by the appellant was open. The appellant was lying behind her son. On being asked her son told her that the appellant had inserted his penis in the anus of her son. She also saw that blood had come out from the anus of her son. She stated that after locking the appellant in the house she went outside and on the way she met her husband. However, when they reached home, they were informed that the appellant met the neighbour and got the door opened and managed to escape. She noticed that about Rs.3000/- and SBI ATM Card were also stolen. She identified the appellant as well as clothes worn by the child victim which were later seized. In her cross-examination, she admitted that the house was constructed in 25 sq. yards however, denied the suggestion that there was any monetary dispute between the appellant and her husband. She also stated that prior to the incident, the appellant usually would lie on cot beside her son. She further stated that though the appellant was residing with them, however was not paying any rent or food. The appellant was kept on contract by her husband on a monthly payment of Rs.8,000/-.

9. Father of the child victim (PW-4), during his deposition stated that he was told about the incident by his wife and on reaching home found that sum of Rs.1000-1500 in cash and SBI ATM Card missing. During cross-examination, he stated that at the time of the incident the appellant was not only residing with his family in his house but also used to eat there. He denied the suggestion that as they wanted to evict the appellant, he was implicated in the false case.

10. The MLC of the child victim (Ex.PW-2/A) was proved through PW13. The MLC noted the following observation :-

"Fissure present at 12 o'clock

Bleeding positive

Anal tone increased"

In cross-examination, the PW13 was asked the significance of words 'anal tone' to which he answered that it is a normal physiological finding which may be indicative of sexual assault. When a suggestion was put to PW13 regarding the history of bleeding, the same was answered as being mentioned in the MLC at point C.

11. At this stage, the Court takes note of the conclusion in the FSL Report (Ex.PX-6) as per which, there was no blood/semen/DNA of the appellant was detected on the clothes and anal swab of the child victim.

12. At the time of recording of statement of the appellant under Section 313 Cr.P.C., he admitted working with the father of the child victim. He stated that one month prior to the incident, the child victim along with his sister and mother

had started residing with the father of child victim. The mother of the child victim did not like him and wanted the appellant to be evicted as the accommodation was only 25 sq. yards. On the day of the incident, he was sleeping alone, and suddenly the child victim shouted. The appellant further stated that on that day, on being informed by his mother that the his father was unwell, the appellant, left for his home in Aligarh. He further claimed that he has been falsely implicated in the matter over a money dispute, as he was employed by the father of the victim, who refused to pay him the entire salary.

13. Concededly, the age of the child victim is not disputed. The appellant has not denied his presence at the spot on the day of the incident. He, however, denies that any such incident took place and strongly relies on the first information about the incident recorded through DD No.22A. Though, it has been contended that there were material improvements in the deposition of the child victim as well as his mother, however, the said witnesses were not even confronted with the alleged improvements/contradictions. Furthermore, when seen in the light of the consistency in the narration of the incident by the child victim, the said contradictions are found to be insignificant. The child victim had clearly, consistently and in unequivocal terms stated that the appellant had inserted his "su su wali jagah" in the victim's "potty wali jagah". The mother of the child victim also stated that she was present at the spot, and immediately the child victim had narrated the incident to her. She herself saw the underwear of the child victim lowered, and the zipper of the appellant's pants was open. She saw the appellant lying beside the child victim on a cot.

14. Even though the FSL has not found the samples to be matched with the exhibits, however, the same by itself would not dent the prosecution's case, as the MLC corroborates the deposition of the child victim. It is trite law that once the testimony of the child victim inspires confidence and is found to be credible and reliable, the inconclusive medical or forensic report would not shatter the prosecution's case. There is no requirement of law to insist upon corroboration of the statement of a victim of sexual assault to base conviction of an accused. Reliance in this regard can be placed on the decision of the Supreme Court in *Ranjit Hazarika vs. State of Assam*, (1998) 8 SCC 635 wherein it was held that :-

6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated...

15. In *State of Himachal Pradesh v. Sanjay Kumar alias Sunny* (2017) 2 SCC 51, while relying on the testimony of a child witness to restore the conviction, the following observations were made by the Supreme Court:

"31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. 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? The plea about lack of corroboration has no substance (See *Bhupinder Sharma v. State of H.P.*5). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

Child victims of sexual assault are also injured witnesses and their testimony does not require corroboration as a rule, provided that the witness is credible and reliable. The competence of a child witness and its evaluation by the Court has been the subject matter of many decisions. The Supreme Court in *Dattu Ramrao Sakhare v. State of Maharashtra* (1997) 5 SCC 341, observed 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."

16. In the present case, though suggestions of false implication and tutoring the child victim were given, however, finding the testimony of the child victim to be consistent and reliable, the contention raised by the appellant is found to be meritless. Though it was also contended that one aunt living in the

neighbourhood was also present at the spot, however, her non-examination would not be fatal to the prosecution's case.

17. Section 29 of POCSO Act provides that Court shall presume that the accused has committed the offence for which he was charged with, until the contrary is proved. However, before this presumption can operate, the prosecution has to prove the foundational facts. A three Judge Bench of the Supreme Court in *Sambhubhai Raisangbhai Padhiyar v. State of Gujarat* (2025) 2 SCC 399 has held that section 29 of the POCSO Act comes into play once the foundational facts are established. It holds as follows:-

35. It will be seen that presumption under Section 29 is available where the foundational facts exist for commission of offence under Section 5 of the POCSO Act. Section 5 of the POCSO Act deals with aggravated penetrative sexual assault and Section 6 speaks of punishment for aggravated penetrative sexual assault. Section 3 of the POCSO Act defines what penetrative sexual assault is.

18. Gainful reference in this regard may also be made to the decision of a Co-ordinate Bench of this Court in *Veerpal v. State* 2024 SCC OnLine Del 2686, wherein it was held as under:-

20. Section 29 of POCSO Act provides that Court shall presume that the accused has committed the offence for which he is charged with, until contrary is proved. However, the presumption would operate only when the prosecution proves the foundational facts in the context of allegation against the accused beyond reasonable doubt. After the prosecution establishes the foundational facts, the presumption raised against the accused can be rebutted by discrediting the prosecution witnesses through cross-examination and demonstrating the gaps in prosecution version or improbability of the incident or lead defence evidence in order to rebut the presumption by way of preponderance of probability.

In the present case, it is evident that in light of the statements of the child victim, his mother and the MLC, the foundational facts stood established and the presumption against the appellant applied in full force. It was for the appellant to rebut the same by discrediting the prosecution witnesses through thorough cross examination or breaking the link in prosecution case, however he has miserably failed to do so, as he was unable to even confront the witnesses with alleged contradictions in earlier statements.

19. In view of the afore-noted reasons, appeal is dismissed and the impugned judgment as well as the conviction of the appellant are upheld. The appellant's bail bonds are cancelled, and he is directed to surrender immediately before the concerned Jail Superintendent.

20. Copy of the judgment be communicated to the Trial Court, as well as concerned Jail Superintendent for information and necessary compliance.