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

%   Reserved on: 6th July, 2022

Pronounced on: 13th July, 2022

CRL.A. 352/2021

PURAN   ..... Appellant

Represented by: Mr. B P Sharma, Mr. T S Varun & Ms. Sudesh Kumari, Advocates

versus

THE STATE   ..... Respondent

Represented by: Ms. Aasha Tiwari, APP for the State with WSI Nisha, PS Kapasehra.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MR. JUSTICE ANISH DAYAL

J U D G M E N T

1. By way of the instant appeal under Section 374(2) Cr.P.C., the appellant has challenged his conviction under Section 6 of Protection of Children From Sexual Offences Act, 2012 (POCSO Act) and the order dated 8th June, 2021 whereby he has been sentenced to undergo life imprisonment for a period not less than 14 years. In addition, compensation of Rs.4,50,000/- was granted to the victim in accordance with Delhi Victim Compensation Scheme.

2. The judgment under challenge was passed by learned Additional Sessions Judge (ASJ-05) POCSO South West District, Dwarka Courts, New Delhi on 12th March, 2020, in S.C. Case No. 440384/16, pertaining to FIR No. 237/14, P.S. Kapashera registered

under Section 6 of the POCSO Act and the order of sentence was passed on 8th June, 2021.

3. The facts in brief are that in the night of 25th May, 2014, the appellant forcibly entered the house of the child victim, allegedly aged about 10 years, and committed the offence of penetrative sexual assault punishable under section 6 of the POCSO Act. Accordingly, above noted FIR was registered at PS Kapasehra on 31st May, 2014. Pursuant to the investigation, charge-sheet was filed against the appellant for commission of offence under section 376 IPC and section 4 (6) of POCSO Act. Charge was however, framed against the appellant for offence punishable under section 6 of POCSO Act. Appellant pleaded not guilty and claimed trial. During trial, the prosecution examined 14 witnesses. The accused was examined under Section 313 Cr.P.C. when he pleaded innocence and stated he wished to lead defence evidence. Accordingly, the accused examined himself as DW-1 and 2 more witnesses from his employer company as DW-2 and DW-3.

Submissions by the appellant:

4. To substantiate his case, the appellant through the counsel and the memo of appeal *inter alia* submitted as follows:

(i) PW-1, the child victim, did not remember the month and year of the incident and only mentioned that it happened 2 to 3 days after the 20th in the said month when her parents along with the younger sister had left for the native place to Gorukhpur, U.P.

(ii) The child victim PW-1 knew appellant Puran prior to the incident as he had stayed as a tenant in their house earlier.

(iii) The child victim was living on the second floor of the building along with her family and there were six more tenants in the same building and her bhabhi and brother used to come daily to inquire about their well being.

(iv) The DD entry No.16A dated 31st May, 2014 recorded at 2:40 PM pursuant to PCR call pertains to the incident of eve-teasing ("*ched-chad*"). This information was supplied by the father of the victim to the PCR from his phone.

(v) Around 9:00 PM on the same day MLC of the victim child was conducted as per which there were no sign of injury pursuant to which detailed examination of the victim child was conducted.

(vi) At the date of incident, the appellant was at his working place as viz. IGI Airport (APM Air Cargo) where he was working as a porter and attendance record has proved his physical presence at the work place.

(vii) The child victim had been taken to a local doctor on 25th May 2014 by the neighbor and there the victim's version was in respect of pain in the stomach and not sexual assault.

(viii) As per the statement of PW-1, the clothes worn by her on the day of the incident were washed by her and hence, matching done by the FSL would not be probative.

(ix) As per the report of Safdarjung Hospital, the radiological bone age as per the ossification report of the child victim was declared as between 12-14 years. Therefore, considering the error margin of 2 years with benefit of doubt to the accused, the age of victim child be taken as 12 years on the lower side and 16 on the higher side and therefore, the offence as under Section

5 (m) of POCSO Act (which mandates penetrative sexual assault on a child below 12 years as aggravated penetrative sexual assault) is made out. Consequently, the appellant can at best be convicted for an offence defined under Section 3 and punishment if at all under Section 4 of the Act as it stood before the amendment of 2019 by Act No.25. By the said amendment, the punishment had been for "not less than 7 years" than "not less than 10 years" post the amendment. Since the offence was allegedly committed in the year 2014, pre-amended version of the POCSO Act would be applicable.

(x) The appellant has already been incarcerated for more than 3.5 years since 2014 and was on bail during the period of trial.

(xi) There was a mention of quarrel between the appellant and the father of the victim child and therefore it was suggested that the appellant was framed for the offence of rape.

Submissions by the State:

5. In order to prove the guilt of the appellant, the Additional Public Prosecutor on behalf of the State, submitted as follows:

(i) The MLC post examination of the victim child reported that the hymen was torn.

(ii) The FSL report found the match between the DNA isolated from the *pyjami* of the victim worn on the date of incident and the blood on gauze of the appellant and there was no cross-examination of the FSL Officer PW-14 by the appellant.

(iii) As per the statements of PW-3, the father of the victim and PW-1, the victim herself, it was evident that when the father

alongwith his wife and youngest daughter, left for his native place - Sant Kabir Nagar, U.P. on 7th May, 2014, he left his 2 other daughters in the custody of his nephew who was residing at the ground floor of the building. On 12th May, 2014 when the father of the victim child was unable to contact his nephew, he requested the appellant to take care of his daughters. When he returned to Delhi on 31st May, 2014, the victim child started weeping and told him that 2-3 days after 20th of the said month (May, 2014) the appellant had committed rape on her.

Relevant Evidence:

6. The following relevant aspects are gleaned from a perusal of the evidence on record:

(i) PW-1 has given a detailed account of her ordeal and had correctly identified the appellant in the Court. She testified that she did not remember the month or year of the incident but it happened 2-3 days after the 20th of the said month when her parents along with her younger sister had gone to the native place to Gorakhpur, U.P. She further stated that the appellant Puran was known to her prior to the incident as he had stayed as a tenant in their house earlier and he used to visit their house occasionally. About 2 to 3 days after her parents leaving, the appellant came to their house at about 9 pm and despite her asking him to leave in the absence of the parents, he forcibly entered the house. The appellant then went to fetch eggs from a nearby shop and prepared egg curry and had dinner with her and her younger sister. At around 11 P.M., her younger sister slept on a *takth* while she herself slept on the floor. In the night, the

appellant touched her and on her resistance the appellant was violent with her. On her attempt to sleep again, the appellant came on the floor and after gagging her with a cloth, committed the act of rape and later threatened that he would kill her if she disclosed the fact. On the next day at 7 A.M., the appellant left their house but came back the day after at 6 A.M. and threatened her against disclosure. When her parents returned on the 7th day of the next month she told her parents and thereafter her father called the police. The police came and made enquiries from her and recorded her statement. Thereafter, she was taken to the hospital for medical examination.

(ii) In her cross examination, she stated that she was wearing a frock and payjami on the date of incident, which clothes were taken by the police. She stated that she used to wash clothes on her own. During her cross examination she stated that "*had washed my clothes which were worn by me on the date of incident*". She stated that she had narrated the incident to one aunty residing in the building.

(iii) Smt. 'S' was examined as PW-2 who deposed that she was residing as a tenant on the ground floor in the building while the victim and her family were staying on the third floor of the same building. She stated that at about 5-5.30 A.M., the child victim had come to see her and started weeping and disclosed about the unfortunate incident. She stated that she had not physically examined the child victim and that she had never seen the appellant in the house of the victim prior to the date of incident. She stated that the parents of the child victim had gone to their native place and the child victim alongwith her younger

sister was staying at their house. The parents returned after 2-3 days who also made enquiries and called the appellant to their house. During that process, some altercation took place and thereafter PCR was called by the shopkeeper.

(iv) PW-3, the father of the victim child testified that after he had left for his native place, he had first asked his nephew to take care of his daughters in his absence and when his nephew was not available, he requested the appellant, whom he knew as he had stayed in house of Puran as a tenant for a period of about 5 to 6 months. On his return on 31st May, 2014, he was told about the incident by his daughter whereupon he called the appellant to confront him with the accusation. Thereafter, police was called who took him, his daughter and the appellant to PS Kapasehra. He stated that the clothes of his daughter that were worn by her on the date of incident were seized by the police.

(v) During his cross-examination PW-3 denied that an altercation had taken place between him and the appellant on the issue of return of money or that he owed any money towards the appellant.

(vi) The MLC was signed and written by Dr. Anshu Aggarwal, who had left the services of Safdarjung Hospital, therefore, PW-7 Dr. Nikita Kumari had identified her signatures. Similarly, PW-8 Dr. Hari Shankar Niranjan identified signatures and handwriting of Dr. Garvit Shukla.

(vii) PW-9 ASI Ranbir Singh had reached the spot after receiving the DD entry with Ct. Om Prakash. Thereafter, got the case registered and sent the child victim for medical examination. He testified that the *bichona* on which the assault

was committed and also the clothes worn by the child victim on the date of incident were seized by Insp. Neeraj Tokas vide seizure memo Ex. PW-3/B and Ex. PW-3/A. The case property was sent to the FSL

(viii) Investigation Officer, PW-11 Insp. Neeraj Tokas, also testified that he had recorded statement of the witnesses and duly identified the contents of the sealed parcels.

(ix) Dr. Poonam Sharma from FSL entered in the witness box as PW-14 and testified that 3 sealed parcels were received in the office of FSL for examination. She confirmed that in her opinion as per DNA profiling (STR analysis) performed on the exhibits provided was sufficient to conclude that DNA profile generated from the source of exhibit i.e. *pyjami* of victim was similar with the DNA profile generated from the source of exhibit i.e., blood on gauze of the appellant. There was nothing material in her cross examination by the appellant to displace this opinion.

(x) On the directions of the learned trial court, the bone age of the victim on the date of the examination i.e. 12th August, 2014 was determined. As per the report given by the Safdarjung Hospital, the radiological bone age of the victim was determined as between 12 to 14 years. These medical reports were not controverted by the accused during the trial. Therefore, at the time of the incident i.e. 25th May, 2014, the victim was “child” as defined under Section 2(d) of the POSCO Act. The accused was reported as aged about 55 years as on the date of the incident as mentioned in his MLC and on the report regarding the potency test.

(xi) The defence presented the appellant Puran as DW-1 who admitted that "*father of child victim made a call to me from his native place stating that I had come to my native place by leaving the children behind, you can go and see them*". He also stated that he had received a call from the father of the victim on 31st May, 2014 and had gone to her house with his wife. Upon reaching the gali near the house, the father of the victim child started quarrelling and due to the ruckus, someone called the police. He said that he was on night duty throughout that month and there was a biometric system at his place of work recording the joining and leaving the duty and that he was falsely implicated in the present matter. In his cross examination he admitted that on 25th May, 2014, the date of incident, it was an 'off day'.

(xii) Sh. Ram Suman Pandey, Supervisor in the Cargo services, the company where the accused worked was presented as DW2. He had brought the records of attendance including the manual attendance register sheet (master roll) and copy of biometric record which were duly exhibited. In his cross examination he confirmed that on 31st May, 2014, i.e., the date of incident, the appellant was "Off duty". However, he further volunteered that as per biometric record the timings of entry and exit of the appellant were mentioned. He further stated that it is possible that after making the entry in the biometric machine, any person can move in and out of the building. He further stated that the biometric machine was being handled by CLB personnel (other company's personnel). No certificate under

Section 65(B) of Indian Evidence Act had been filed in support of the biometric documents.

(xiii) Sh. Shakti Singh, the Manager (HR) in APM AIR Cargo Terminal Services was presented as DW3 and also testified on the same lines as DW2.

7. For the purpose of convenient reference, the relevant provisions of the POCSO Act are extracted hereunder:

Section 3: Definition

A person is said to commit "penetrative sexual assault" if--
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

Section 4: Punishment for penetrative sexual assault.

(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years[1] but which may extend to imprisonment for life, and shall also be liable to fine.

(2)[2] Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean

[1] Substituted for "seven years" by the Amending Act of 2019
[2] Inserted by the Amending Act of 2019

imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3)[3] The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

Section 5: Aggravated penetrative sexual assault.

(l) ……

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) ……

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

Section 6: Punishment for aggravated penetrative sexual assault.

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.
(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.[4]

Analysis:

8. On a combined assessment of contentions raised by the parties, arguments heard and the perusal of evidence, the following conclusions are arrived at by this Court:

[3] Inserted by the Amending Act of 2019

[4] Prior to the Amending Act of 2019 section 6 read as: "*Whoever commits penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine*"

a) The fact that the father of the victim and the rest of the family were away on the date of incident leaving behind their two young daughters stood duly proved by the testimonies of PW-1, PW-2 and PW-3 and even of the accused.
b) The fact that the father of the victim had requested the appellant to go and check on his daughters while he was away is corroborated by testimony of the father and even of the accused.
c) The accused has stated that his presence at the night of the incident in the house of the victim was not corroborated. However, having regard to the statement of the victim which is in great detail [the presence of the appellant at the night of the incident, his forcible entry, resistance of the child victim to his advances, appellant's procuring eggs and cooking and dining with them, the sleeping arrangements between the appellant and the victim and the younger sister, thereafter his assault on her when she resisted followed by his sexual assault] is highly probative in favour of the victim and against the appellant. The testimony of PW-1, the child victim stood strong and consistent in her cross examination. Minor contradictions in her testimony, particularly being a child victim that too of sexual assault can be ignored, as per settled principles of law. Further, taking into account the testimony of PW-2 with whom the victim had shared the very next morning of the incident about sexual assault by the accused is also noteworthy. There was no reason as to why PW-2 'S' who was independent witness and a neighbour would depose against the accused whom she had reportedly never seen. Her testimony stood uncontroverted and

there was no suggestion that she was deposing falsely for any vested reasons at the behest of the parents of the child victim.

d) The fact that the victim stated that she was wearing a *pyjami* and a frock on the date of incident and that it was the same *pyjami* that was seized by the police and was sent to FSL for examination, is also established. The FSL opined that there was a DNA match between what was found on the *pyjami* and the blood gauze of the accused, which has high evidential value against the accused.

e) The contention raised by the appellant that the victim per her testimony had washed her *pyjami* and therefore, FSL evidence cannot be taken to be truth, has no basis whatsoever. It is not very clear from her deposition during the cross examination, since at one point she generically stated that "*I wash my clothes on my own in the absence of my parents*" and on another occasion she stated that "*had washed my clothes which were worn by me on the date of incident*". Whether the washing was prior or later is not clear. Notwithstanding the issue of washing clothes, the *pyjami* was seized by the police on 31st May, 2014 which was 5-6 days after the incident and whatever biological specimen it had as a residue was picked up by the FSL and fully matched with the biological sample taken from the blood gauze of the appellant. The FSL report has remained unrebutted and there is no reason to doubt the veracity of the same.

f) As per the MLC of the child victim prepared on 31st May, 2014, though there were no signs of injury, it states basic facts of the incident. The medico-legal examination report of sexual violence records that the victim's hymen was torn.

g) As regards the fact of a quarrel on 31st May, 20214, it is evident that when the appellant was confronted by the father of the victim about the sexual assault, the quarrel ensued resulting in a PCR being called. The story presented by the appellant that he was framed due to monetary debt owed by the father of the victim towards him is not substantiated by any evidence. The said suggestion is denied by PW-3, the father of the victim nor is there any other corroborating evidence except for the bald statement by the accused.

h) As regards alibi sought to be presented by the appellant regarding his presence at his employer's company on the date of incident, stood vitiated since the officials of the company where he worked duly proved through records that he was off duty on that date i.e., 25th May, 2014.

i) The contention of the appellant that the initial DD entry was regarding "eve teasing" (*ched chad*) is again not worthy of any assessment since as per statements made by PW-2, the aunty and PW-3, father of the victim, PCR call was made post the quarrel between the father of the victim and the appellant in presence of many people of the colony. Therefore, it would be safe to presume that the DD entry was based on a call to PCR and the caller stated broadly about *ched chad* rather than stating the specific allegation of sexual assault.

j) A cumulative reading of the above evidence both of the victim, the circumstantial evidence of narrating the incident to PW-2 soon after the incident and to the father by the victim, the scientific evidence of MLC and FSL reports regarding the seized clothes and sample of the blood gauze of the accused,

proves beyond reasonable doubt that the accused had committed the offence of penetrative sexual assault on the child victim on 25th May 2014. This Court also wishes to observe that it was reprehensible since the appellant had been given the duty to act as a guardian of two young girls by their father and he was thus in a position of trust which he grossly betrayed by using the opportunity to satisfy his lust.

The law seriously frowns upon sexual offences against the children for which purpose POCSO Act was enacted in the year 2012 by the Government of India.

9. The only issue that needs to be deliberated upon is which provision of POCSO Act would be applicable. Learned Trial Court has convicted the appellant for the offence of aggravated penetrative sexual assault'. Aggravated penetrative sexual assault as defined in Section 5 Sub Sections (m) and (p) of the Act with respect to sexual assault on a child below twelve years and by a person in trust or authority, punishable under Section 6 of the Act.

10. The offence of penetrative sexual assault on a child, if below twelve years, would convert into aggravated penetrative sexual assault thereby inviting a higher punishment under section 6 which was not less than 10 years upto life imprisonment prior to the amendment in the year 2019 and not less than 20 years, extendable upto life imprisonment post the 2019 amendment.

11. Ossification report of the age of the child victim has returned a finding of 12-14 years. Considering that a margin of ±2 years is allowed, the benefit of doubt going to the accused, at best the lower range of 12 years would be considered for this case. If so, it would not

come under the definition of 'aggravated penetrative sexual assault' under Section 5 (m) of the Act.

12. Contention of learned counsel for the appellant that since the offence was committed in the year 2014, the provision prior to 2019 amendment would apply which provides for a term not less than 7 years but which may extend to imprisonment for life, in view of the offence not falling under Section 5 (m) but under Section 3 of POCSO Act, ignores the fact that there is yet another provision of the POSCO Act which was relied upon by the learned trial court viz. Section 5(p) for conviction.

13. Section 5(p) brings penetrated sexual assault on a child in the home of the child from a person who is in a position of trust or authority of the child into the definition of "aggravated penetrated sexual assault" and thus punishable under Section 6. In the facts of this case, it has been uncontroverted that the accused had been requested by the father of the victim to take care of his two young daughters while the family was away. It would, therefore, be apposite to assess whether that accused was in a "*position of trust or authority of the child*" by accepting such request by the father of the victim. This Court is of the view that the accused indeed was in a position of trust with the child victim and it is on the basis of the trust that the child victim had allowed the accused in their home and also were pushed to dine with him first and then shared the same room for the sleeping arrangements at night, which included the accused, the child victim and her younger sister. Therefore, notwithstanding, the inapplicability of Section 5(m), on the facts of this case, the accused

has been rightly convicted for an offence as defined under Section 5(p).

14. Reference may be made to the decision of the Hon'ble Supreme Court in **Nawabuddin vs. State of Uttarakhand** (2022) 5 SCC 419 where the Apex Court has noted that in a case where the victim was a minor girl and the accused was a man of 65 years aged and was a neighbour of the victim girl, he had the duty to protect the victim girl when alone rather than exploiting her innocence and vulnerability. The Hon'ble Supreme Court observed that "*it is a case where trust has been betrayed and social values are impaired.....therefore, the accused as such does not deserve any sympathy and/or leniency*". A Division Bench of this Court as well in **Gaya Prasad Pal @ Mukesh vs. State** (2016) 235 DLT 264 relying on Section 5 (p) of the POSCO Act in a case where the step-father was the accused, noted that "*thus, the penetrative sexual assault having occurred within the confines of the home where the prosecutrix was living with the appellant, virtually her guardian, clause (p) of Section 5 also renders it a case of aggravated penetrative sexual assault*".

15. Accordingly, the accused would be liable for a punishment for aggravated penetrated sexual assault under Section 6 of POSCO Act, as it stood prior to the amendment of 2019 i.e. punishable with rigorous imprisonment for a term not less than 10 years but extendable to imprisonment for life.

16. In the circumstances of the present case, the accused was given the task of being a guardian of the victim and he abused and violated that trust thereby marring the life and future of the child, causing serious mental agony to the child victim, the younger sister (who was

also in the vicinity of the victim at the time of the crime) and the parents who would be completely shaken by such an egregious, reprehensible and heinous act.

17. The appellant has submitted that he is now about 60 plus years of age and is the sole earning member of the family and has an unmarried daughter who has to get married, are not the best mitigating circumstances, considering the nature, seriousness and depravity of his offence.

18. As regards the power to prescribe punishment for the entirety of convict's life for a specific period of more than 14 years, say 20 or 30 years, rests with the Division Bench of this Court or the Hon'ble Supreme Court. As per the decision of the Hon'ble Supreme Court articulated in paragraph No. 104 of ***UOI vs. V. Sriharan & Ors.,*** (2016) 7 SCC(5JJ) "*.... the power to impose a modified punishment providing for any specific term of incarceration or till end of convict's life as an alternate to death penalty can be exercised only by the High Court and the Supreme Court and not by any inferior court*."

19. Accordingly, it is implicitly clear that the power to award sentence of any specific period or till the end of convict's life, lies with this Court and did not lie with learned Trial Court.

20. However in the present case, the learned Trial Court has awarded the sentence of imprisonment for life not less than 14 years, as per the mandate of Section 433A IPC. Thus, this Court deems it fit to not interfere with the sentence awarded by the learned Trial Court.

21. Appeal is accordingly dismissed. Copy of this order be uploaded on the website of this Court and be also sent to

Superintendent, Jail for intimation to the appellant and updation of records.

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22. Application is disposed of as infructuous.

(ANISH DAYAL)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 13, 2022/sm