IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRR-121-2022
Reserved on: 24.02.2022
Pronounced on: 02.03.2022

ANKIT AND OTHERS **...Petitioners**

Versus

STATE OF HARYANA **…Respondent**

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

*****

Argued by : Mr. U.K. Agnihotri, Advocate for the petitioners.

Mr. Kanwar Sanjiv Kumar, Astt. A.G. Haryana

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VINOD S. BHARDWAJ. J.

1. The challenge in the instant revision petition is to the judgment dated 02.12.2021 passed by the learned Additional District & Sessions Judge, Fast Track Court, Sonepat in CRA.35/2021 as well as to the judgment of conviction dated 09.03.2021 and the order of sentence dated 12.03.2021 passed by the Principal Magistrate, Juvenile Justice Board, Sonepat whereby the petitioners have been convicted for commission of offence punishable under Section 377 of the Indian Penal Code, 1860 (for short 'the IPC') and Section 10 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act'). Vide order of sentence dated 12.03.2021, the following sentence was imposed upon the petitioners that were to run concurrently :-

Name	***Under Section***	***Imprisonment***
1. Ankit, son of Sh. Manoj, resident of village khandrai, Gohana City, Sonepat,	*Section 10 of Protection of Children from Sexual Offences Act, 2012*	*Imprisonment for a period of 2 years and fine of Rs. 1000/-. In default of payment of*

		fine, he shall be further imprisoned for 30 days of simple imprisonment
1. Ankit, son of Sh. Manoj, resident of village khandrai, Gohana City, Sonepat,	*Section 377 of IPC*	*Imprisonment for a period of 2 years and fine of Rs.500/-. In default of payment of fine, he shall be further imprisoned for 15 days of simple imprisonment.*
2. Mohan son of Sh. Moti Ram, resident of village Khandrai, Gohana City, Sonipat,	*Section 10 of Protection of Children from Sexual Offences Act, 2012*	*Imprisonment for a period of 2 years and fine of Rs. 1000/-. In default of payment of fine, he shall be further imprisoned for 30 days of simple imprisonment*
2. Mohan son of Sh. Moti Ram, resident of village Khandrai, Gohana City, Sonipat,	*Section 377 of IPC*	*Imprisonment for a period of 2 years and fine of Rs.500/-. In default of payment of fine, he shall be further imprisoned for 15 days of simple imprisonment.*
3. Deepak, son of Sh. Balraj, resident of village Khandrai, Gohana City, Sonipat.	*Section 10 of Protection of Children from Sexual Offences Act, 2012*	*Imprisonment for a period of 2 years and fine of Rs. 1000/-. In default of payment of fine, he shall be further imprisoned for 30 days of simple imprisonment*
3. Deepak, son of Sh. Balraj, resident of village Khandrai, Gohana City, Sonipat.	*Section 377 of IPC*	*Imprisonment for a period of 2 years and fine of Rs.500/-. In default of payment of fine, he shall be further imprisoned for 15 days of simple imprisonment.*

2. The brief facts of the case as they emerge are that the petitioners (Children in conflict with law and here-in-after referred to as 'CCL') were apprehend on the basis of a complaint submitted by one Vinod Kumar stating that on 15.09.2018 his son Lakshay, aged 08 years had gone to the Primary School, Village Khandrai, at around 6:00 p.m. where Ankit son of Manoj, Mohan son of Moti Ram and Deepak son of Balraj committed Sodomy and unnatural act of carnal intercourse with his son.

3. Pursuant to the said statement, FIR was registered, investigation was conducted and the accused-CCL's Ankit, Mohan and Deepak were apprehended. Upon completion of investigation, a final report under Section 173 Cr.P.C. was presented before the Juvenile Justice Board, Sonepat. No dispute has been raised in so far as juvenility of CCL's are concerned.

4. Upon compliance of the provisions under Section 307 Cr.P.C. and finding a prima facie case, notice of accusation under Section 377 of the IPC and Section 10 of the POCSO Act was served upon the CCL's to which they pleaded not guilty and claimed trial.

5. After consideration of the evidence led by the respective parties and upon its careful examination alongwith the arguments advanced by learned parties, the Principal Magistrate, Juvenile Justice Board, Sonepat came to a conclusion that the prosecution had been able to successfully establish the guilt of CCL's on the strength of the evidence produced and held the CCL's Ankit, Mohan and Deepak, guilty for commission of offences under Section 377 of the IPC and Section 10 of the POCSO Act.

6. The said judgment of conviction dated 09.03.2021 and the order of sentence of dated 12.03.2021 passed by the Principal Magistrate, Juvenile Justice Board, Sonepat was challenged by means of filing CRA/35/2021 before the Court of learned Sessions Judge, Fast Track Court, Sonepat.

7. Upon hearing the respective parties and after consideration of the submissions advanced by the counsel appearing on their behalf, the learned Sessions Judge, Fast Track Court, Sonepat dismissed the appeal preferred by the CCL's vide its order dated 02.12.2021. Hence, the present revision petition.

8. Learned counsel for the petitioners has raised an argument that the finding of conviction recorded against the petitioners is perverse and is not substantiated by the evidence available on record. It is contended that the prosecution has not been able to establish occurrence of the event in the nature of carnal intercourse against the order of nature with the victim and has in this regard referred to statement of PW-3 Dr. Sachin, Medical Officer, CHC, Gohana wherein it has been deposed by the said doctor who had conducted medical examination of the victim Lakshay that he did not find any external injuries and marks on the victim while admitting that the MLR Ex.PW3/B bears his signatures.

9. A further reference is made to the statement of victim Lakshay who has appeared as PW-11. The extract of the statement relied upon by the learned counsel for the petitioner and referred to by the Principal Magistrate, Juvenile Justice Board, Sonepat is extracted as under :-

> ***"PW-11 Lakshay, Victim*** *was asked several general questions. After interacting with Lakshay, it was opined that he is in fit state of mind to depose rationally for his age. Thereafter, his statement was recorded. He has deposed that on 15.9.2018, he was going to some shop to purchase an item. On the way, he met Mohan who asked him to come to Gym with him. He locked him inside a school room.* ***Two boys namely Deepak and Ankit were already present there and all three of them committed forcible intercourse with him and sodomised him. He identified all the three CCL's. He has deposed that he raised alarm, upon which, his father came there. His father took him to the hospital.*** *He has deposed that CCL's also threatened to kill him in case he told about the occurrence to any person. In his cross-examination, he has stated that the occurrence took place around 6:00 p.m. He has also deposed*

that he went to the hospital around 6:30 p.m along with his father and grand-mother.

10. By making reference to aforesaid statement, learned counsel has submitted that the reference made in the statement is factually incorrect in as much as the said witness had never deposed about being sodomised and has only stated that the CCL's had done 'Wrong Act/Bad Act' with him. Learned counsel raised a supplementary argument that since the medical examination is stated to have taken place on the same day and without any delay, absence of any external marks of injury or detection of semen or Spermatozoa on the body or clothes of victim runs out any possibility of the victim being subjected to forcible intercourse or having been sodomised. It is, thus, contended that the finding of conviction recorded under Section 377 of the IPC is misconceived.

11. Learned counsel has further argued that the conviction of the petitioners under Section 10 of the POCSO Act is also not sustainable as the necessary ingredients of aggravated sexual assault are not made out. It is argued that in the absence of any medical evidence to corroborate penetration, the provision of Section 3 and Section 4 would not be attracted in as much as the allegations are not supported by corroborative medical evidence. Finally, learned counsel for the petitioner has also argued that the petitioners were themselves juvenile at the time of commission of the offence and as such a lenient view ought to be taken while sentencing the petitioners who have an entire career ahead of them and that their prospects shall be gravely marred due to conviction under the said offence. Learned counsel further placed reliance on the judgment of the Hon'ble Supreme Court in the matter of "***Prahlad versus State of Rajasthan*** reported as ***2019***

(1) RCR (Criminal) 78" to contend that in the absence of a corroborative and reliable evidence to establish the charge of penetrated sexual assault, conviction under Sections 3 and 4 is unsustainable and is thus liable to be set aside. The counsel placed reliance on the following paragraphs of the aforesaid judgment of the Hon'ble Supreme Court is extracted as under :-

> "*11. The postmortem report reveals the following injuries on the body of the victim:*
>
> *1. 3x1 cm on left thigh on anterior knee.*
> *2. 6x1 cm on right leg.*
> *3. 2x1 cm abrasion on right thigh.*
> *4. 1x1.5 cm on nose.*
> *5. 1x1 cm on right wrist.*
>
> *In the Examination in Chief itself, the doctor PW10 who conducted the post-mortem examination has deposed that the genital organs of the victim were normal. The doctor further opined that the death of the deceased was caused due to acute hemorrhage. Post-mortem report is at Ex. P15. In the cross-examination, the doctor has admitted that all the aforementioned five injuries are simple in nature and they are likely to be caused by falling. Fracture on the left rib nos. 10 and 11 mentioned in the post-mortem report can be caused by falling on a stone. PW10 further stated that the genital organs of the deceased were healthy and no marks of any injury were present on the private parts of the deceased. Signs of sperm ejaculation were also not found on the external skin near the genital organs of the deceased. No injury was present on the head of the deceased. The doctor further deposed that when forcible sexual intercourse is committed upon a tender girl, there is a possibility of her vagina getting ruptured and bleeding from her genitals. There is no such mention in the post-mortem report. The FSL report regarding vaginal swab which was sent for examination is not helpful for the prosecution to prove the offence under Sections 3 and 4 of the*

POCSO Act. Prosecution, practically relies upon the doctor's evidence only for proving the offence under Section 4 of the POCSO Act. No other material is placed on record by the prosecution to prove the offence under Section 4 of the POCSO Act. However, the evidence relating to penetration into the vagina, mouth, urethra or anus of a child etc. or any part of the body is not found. The Trial Court as well as the High Court have not gone into the depth of the evidence relating to offence of penetrative sexual assault, in detail. Certain casual observations are made which are not supported by the evidence led by the prosecution. In light of the aforementioned evidence of PW10 doctor, and in view of the fact that no other reliable evidence exists to prove the charge of penetrative sexual assault, i.e. any of the acts as detailed in Section 3 of the POCSO Act, it is our considered opinion that the Trial Court and the High Court are not justified in convicting the accused for the offence under Section 4 of the POCSO Act. We find from the judgment of the High Court that absolutely no reason, much less any valid reasons were assigned for convicting the accused for the offence punishable under the POCSO Act. Since no reliable material is available against the accused for the aforementioned offence of the POCSO Act, the benefit of doubt would go in the favour of the accused. After scanning through the entire materials on record in order to satisfy the conscience, and having regard to the seriousness of the charge, we conclude that the accused needs to be given the benefit of doubt in so far as the offence punishable under Section 4 of the POCSO Act is concerned.

12. Since the accused is to be acquitted for offence under Section 4 of the POCSO Act, in our considered opinion, this is not a fit case to impose the death penalty on him, inasmuch as the appellant does not have any criminal background, nor is he a habitual offender. Motive for the offence of murder is not clear and of course it is generally hidden, known to the accused

only. Under such circumstances, the court will have to see as to whether the case at hand falls under the 'rarest of the rare' case category. The accused was also young during the relevant point of time. The duty is on the State to show that there is no possibility of reform or rehabilitation of the accused. When the offence is not gruesome, not cold-blooded murder, nor is committed in a diabolical manner, the court will impose life imprisonment. In the case at hand, the mitigating factors outweigh the aggravating factors. The only aggravating factor in the matter is that the accused took advantage of his position in the victim's family for committing the murder of the minor girl inasmuch as the minor girl was treating the accused as her Mama (uncle).

13. We do not find that the murder has been committed with extreme brutality or that the same involves exceptional depravity. On the other hand, as mentioned supra, the accused was young and the probability that he would commit criminal acts of violence in the future is not available on record. There is every probability that the accused can be reformed and rehabilitated. In this context, the observations made by this Court in the case of ***Bachan Singh v. State of Punjab, (1080) 2 SCC 684****, is reproduced as follows:*

> *"209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot 1 (1980) 2 SCC 684. be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3). Judges should never be bloodthirsty. Hanging of murderers has never been*

> *too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of the human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."*
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> *14. Be that as it may, since the offence of rape is not proved and as the offence of murder is proved beyond reasonable doubt, the accused is liable to be convicted for the offence under Section 302 IPC. In view of the aforementioned reasons, the judgment of the Trial Court as well as the High Court convicting the accused for the offences under Sections 3 and 4 of the POCSO Act and imposing capital punishment on him stands set aside. However, for the offence under Section 302 IPC, the accused is sentenced to undergo imprisonment for life. Appeals are partly allowed in the aforesaid terms.*

12. Learned counsel for the petitioners also placed reliance upon the judgment of a Division Bench in the matter of "***Dalbir Singh versus State of Haryana*** reported as ***2003 (1) R.C.R (Criminal) 727*** to contend that self-serving testimony of a child witness which is un-corroborated in material particulars cannot be accepted and must be evaluated more

carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him. Reference was made to the paragraph of the said judgment extracted as under :-

> *"18. The law regarding the testimony of a child witness is well settled. A conviction can be based on the basis of testimony of a child witness. His testimony can be relied on even in the absence of oath, if he understood nature of the questions and gave rational answers thereof. The only precaution, which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable and his or her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in very case the evidence of such a witness be corroborated before the conviction can be allowed to stand, but as a rule of prudence the court always finds it desirable to have the corroboration to such evidence from other dependable evidence on record. Before recording the statement of a child witness, the learned trial Court has to satisfy itself that the witness was capable to depose. The testimony of a child witness cannot be rejected simply on the ground that because of his tender age, he was likely to be tutored. It is not the law that if a witness is a child, his evidence shall be rejected even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be awayed by what others tell him. In the facts and circumstances of the present case, the learned trial Court has rightly believed the testimony of Harjit Singh (PW6) and the necessary precaution has been taken while relying upon his statement. We has also examined the statement of this witness along with other evidence available on the record. The version of the incident, narrated by him, is reliable as the same has been corroborated by other evidence available on the record,*

> *particularly the medical evidence, as discussed in the earlier part of this judgment. Learned counsel for the appellants, while referring to the statement of this witness the Court as PW6 and statement made by him before the police, which is Ex.DA on the record, has pointed out certain contradictions, like that before the police he stated that the quarrel between his mother and accused Dalbir Singh and Karnail Singh took place in the day time, while in the Court, he stated that the quarrel had taken place in the night time; or that before the police, he told the diesel oil was sprinkled on his mother, whereas in the Court, he stated that Kerosene oil was sprinkled; or that in the Court, he stated that accused Gian Singh and Dalbir Singh caught hold of his mother be arms and took her in the room, whereas before the police, he did not mention about the arms. We are of the opinion that these contradictions in the evidence of a child witness are of trivial nature and do not effect the substratum of the prosecution case.*

13. Controverting the arguments advanced by the learned counsel for the petitioners, Mr. Kanwar Sanjiv Kumar, Asstt. A.G. Haryana has stated that the testimony of the child witness cannot be discarded and that the judgment relied upon by the counsel for the petitioners in the matter of "***Dalbir Singh versus State of Haryana (Supra)*** rather supports the case of the prosecution. The aforesaid judgment holds that a conviction can be based for the testimony of child witness and that such a testimony can be relied on even in the absence of an oath, provided, the witness understands the nature of questions and gives rational answers to the same. It is contended that the Court had duly recorded its satisfaction when the victim/child witness appeared as PW-11. After satisfying itself that state of mind of the child is mature enough and that he is able to depose rationally, that the statement of the said witness was recorded. As such, the testimony of the victim/child

witness cannot be disbelieved. It is further argued that the aforesaid Division Bench judgment of the High Court also holds that there is no rule or practice that in every case, the evidence of such a witness ought to be corroborated before a conviction can be allowed to stand. Rather, the same is only a rule of prudence and it is only desirable to seek corroboration of such evidence from other reliable evidence on record. The Courts below having duly evaluated the maturity of the child witness and his ability to give rational answers to the questions recorded their satisfaction about his ability and have taken his statement into consideration. It is also argued that mere absence of any external mark of injury cannot be the basis to discard the testimony of child witness. It is further submitted that the testimony of the witness PW-11 Lakshay wherein it is stated that the petitioners had committed "Wrong Act/Bad Act" should be understood from the ordinary and general understanding of the said phrase from the point of view of a child and it would not be appropriate to apply the yardsticks of a fully grown adult to assess the gravity of the offence and to seek specific and detailed narration of the occurrence to ascertain the ingredients of the offence.

14. Learned State counsel has further placed reliance on the judgment of the Hon'ble Supreme Court and the matter of "***Ganesan versus State represented by its Inspector of Police"*** reported as ***2020 (10) SCC 573*** to submit that when the child witness/victim was mature, trustworthy and reliable, and has been thoroughly and fully cross-examined, conviction can be based on sole evidence of such victim in the case of sexual assault. Reference was also made to the judgment of Hon'ble Supreme Court in the matter of ***"State of Himachal Pradesh versus Manga Singh reported as 2019 (16) SCC 759*** wherein it was observed that when the evidence of a

victim does not suffer from any basic infirmity and the probabilities factor does not render it unworthy of credence, there is no reason to insist on corroboration except from medical evidence. In such cases, even the solitary testimony of a prosecutrix would be sufficient to base a conviction, if it inspires confidence of the Court. The observation of the Hon'ble Supreme Court relied upon by the learned State counsel is relied as under :-

> *"12. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the 'probabilities factor' does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court."*

15. I have heard learned counsel for the parties and have gone through the record of the case with their assistance.

16. The question which arises for consideration is with respect to the validity and legality of the judgment passed by the Courts below. Before adverting to the merits of the arguments raised by the petitioner, it would be essential-first to refer to the statutory provision contained in The Protection of Children from Sexual Offences Act, 2012. The relevant statutory provisions are extracted as under :-

> *"**Section 2 - Definitions** (1) In this Act, unless the context otherwise requires,*

(a) "aggravated penetrative sexual assault" has the same meaning as assigned to it in section 5;

(b) "aggravated sexual assault" has the same meaning as assigned to it in section 9;

Xx xx xx xx xx

(f) "penetrative sexual assault" has the same meaning as assigned to it in section 3;

Xx xx xx xx xx xx

Xx xx xx xx xx xx

***Section 3 - Penetrative sexual assault**.- 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 9 - Aggravated sexual assault

(a) Whoever, being a police officer, commits sexual assault on a child—

Xxxx xxxx xxxx xxxx xxxx xxxx

Xxxx xxxx xxxx xxxx xxxx xxxx

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

***Section 10 - Punishment for aggravated sexual assault**.- Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.*

17. A perusal of the aforesaid provisions shows that the aggravated sexual assault is a distinct offence as compared to penetrative sexual assault. Learned counsel for the petitioners has placed reliance on Section 3 of the POCSO Act which is punishable under Section 4 of the POCSO Act. In the instant case, the petitioners have been convicted for offence under Section 10 of the POCSO Act. The said provision deals with punishment for **aggravated sexual assault** as prescribed under Section 9 of the POCSO Act. Section 9 (m) prescribes that whoever commits sexual assault on a child below 12 years would be liable for having committed aggravated sexual assault. Section 7 of the POCSO Act deals with sexual assault and reads as under :-

***Section 7 - Sexual Assault.-** Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.*

18. A conjoint reading of the aforesaid provisions fairly shows that penetration is not *sine qua non* for attracting the penalty of sexual assault. Any act that would involve touching the private parts/genitalia or primary/secondary sexual characteristics of a child with a sexual intent involving physical contact without penetration would amount to a sexual assault. As the victim was about 08 years of age, hence, by operation of Section 9 (m), the offence fell in the category of aggravated sexual assault which is punishable with a term as prescribed under Section 10 of the POCSO Act.

19. A perusal of the testimony of PW-11 establishes that the victim was over-powered by the accused persons and was subjected to Wrong Act/Bad Act. The said witness has been subjected to cross-examination by the defence but the said witness has reiterated having been subjected to Wrong Act/Bad Act by the petitioners and denied all suggestions of false implication. He has also given a detailed description of the circumstances that preceded the occurrence and also the subsequent developments. Reliability and admissibility of the statement of the said witness cannot be discredited merely for want of corroboration through medical evidence especially when the charge is of a non-penetrative sexual assault. There is thus no infirmity in so far as conviction under Section 10 of the POCSO Act is concerned.

20. The same now leads to the conviction for an offence under Section 377 of the IPC, the same reads as under :-

> ***377. Unnatural offences***.—*Whoever voluntarily has* ***carnal intercourse against the order of nature*** *with any* ***man****, woman or animal, shall be punished with [imprisonment for*

life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

*Explanation.—**Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.***

21. The argument of the learned counsel that in the absence of the medical record showing any penetration, the offence under Section 377 of the IPC would not be attracted in view of the explanatory notes is fallacious and is liable to be rejected as the same is not the true import of the Section.

22. The aforesaid explanation is illustrative and prescribes that an incidence of penetration would be sufficient to constitute carnal intercourse. The said explanation cannot be read to assign a meaning that penetration is necessary to constitute carnal intercourse. Section 377 cannot be restricted by use of the word "Penetrative intercourse" when the same has not been specified in the statutory provision. The use of phrase "carnal intercourse" as against "penetrative intercourse" or "sexual intercourse" is a conscious act of the legislature reflecting the clear intent of the legislature to engraft an offence under Section 377 to be separate and different that the offence contemplated against "sexual intercourse". The omission of the legislature is neither negligent nor an outcome of over-sight. It is a conscious and deliberate act considering that Section 375 IPC, prior to its amendment, specifically used the word "Sexual intercourse with a women". Hence, legislature cannot be perceived to be ignorant of the said phrase and has to be presumed to have consciously chosen a different phrase i.e. "Carnal intercourse" with an object and purpose.

23. The word "intercourse" has been defined in legal literature/legal lexicons as under:-

> *The legal lexicons and legal literature define the words 'intercourse', 'sexual' and 'carnal' and those words when used in juxtaposition, in the following way :*
>
> *i) P. Ramanatha Aiyar's 'Major Law Lexicon' 4th Edition (2010) defines "intercourse", in its widest connotation, as 'social communication between individuals'. Black's Law Dictionary 11th Edition defines "intercourse" as "physical sexual contact, especially involving the penetration of the vagina by the penis";*
>
> *ii) In the heterosexual context, the judicial connotation given to "sexual intercourse" is penile-vaginal penetration. This connotation is found in Sakshi (supra);*
>
> *iii) The word "carnal" is understood in P. Ramanatha Aiyar's 'Major Law Lexicon' 4th Edition (2010) to mean anything pertaining to the flesh or to the sensual.*

24. While defining 'carnal intercourse', a Division Bench of the High Court of Delhi has observed in the matter of ***Kamal versus State*** reported as ***2021 SCC online Delhi 5396***, as under :-

> ***51.*** *Therefore, in our opinion, 'carnal intercourse against the order of nature' appearing in section 377 must have the following ingredients:*
>
> *i. it must have to do with flesh and sensuality, namely it must be carnal;*
>
> *ii. there must be intercourse between individuals, without restricting it only to human-to-human intercourse;*
>
> *iii. it must involve penetration other than penile-vaginal penetration, since by the very nature, intent and purpose of*

section 377, it must refer to an unnatural act, such as 'penile-anal penetration', 'digital penetration' or 'object penetration'.

52. *Subject to the requirement of the above ingredients, we however completely agree that attempting to define the phrase 'carnal intercourse against the order of nature' with exactitude is neither possible, and perhaps not even desirable. Accordingly, though we hesitate to give the phrase 'carnal intercourse against the order of nature' any exhaustive meaning, we hold, that as a matter of law,* ***any physical act answering to all the above ingredients,*** *committed* ***upon a minor*** *is per-se 'carnal intercourse against the order of nature'.*

25. It would also be necessary to make a reference to the following extract of the judgment of the matter of Madras High Court in the matter of ***Raja versus State represented by Inspector of Police, All Women Police Station Perambular District*** passed in ***Criminal Appeal No.741 of 2019*** decided on 26.07.2021, the relevant paras is extracted as under:

18. Though the evidence of P.W.15 doctor who conducted the medical examination on the victim stated that there is no external injury and the doctor who conducted medical examination on the accused in respect of potency test stated that there was no external injury on the private part of the appellant, before the said doctor-P.W.11, a suggestion was also put that while male having sexual forcible sexual contact with 7 years old child, naturally his private part would sustain injury. But it is not hard and fast rule. It depends upon the force he used and also it depends upon the act committed by him. Both the doctor P.W.11 and P.W.15 have stated that there is no external injury either on the private part of the victim or the appellant. But that may not be the sole ground to disbelieve the case of the prosecution and the evidence of the victim. The

victim has not stated that he forcibly penetrated and she had pain or she sustained injury on any part of her body.

19. A careful perusal of the statement made before Judicial Magistrate and statement before doctor shows that the appellant took her to bushes which was behind the Ganesha Idol and removed her inner wear and he also removed his inner wear and made her to lie on floor and he laid on her. After some time, he asked her to leave and also threatened not to reveal to anybody and she left the place and got her clothe wet. Therefore, mere injury not sustained by either the appellant or the victim may not be the ground to disbelieve the case of the prosecution and the evidence of the victim. Therefore, the opinion of the doctors also not conclusive proof and will not be helpful to take a different view.

27. As far as non appearance of the injury on the private part of the appellant and the victim is concerned, P.W.11 and 15 have clearly stated that there is no injury. But a careful reading of the evidence of the victim, previous statement of the victim, would prove the case of the prosecution beyond all reasonable doubts and hence non-presence of the injuries is not fatal to the case of the prosecution.

26. In another case of the Madras High Court i.e. ***Criminal Appeal No. 267 of 2021*** titled as ***"Premkumar versus State represented by the Inspector of Police, All Women Police Station, Mayiladuthural"*** decided on 25.10.2021, the High Court of Madras observed as under:

13. In the present case on hand, there is no eye witness except the victim child, who was 10 years at the time of occurrence and while recording the statement under Section 164 of Cr.P.C. and when the prosecution cross examine the victim child, she has clearly spoken about the incidents and the manner in which the offence committed by the appellant, which is cogent, consistent and natural and hence this Court does not

> *finds any reason to disbelieve or discord the evidence of the victim child. Even though, the victim and the other witnesses turned hostile, the victim, during cross examination by the prosecution has clearly stated that the accused has committed the sexual assault. It is settled proposition of law that the evidence of the hostile witness would not be totally rejected. If spoken in favour of the prosecution or the accused are required to be subjected to close scrutiny and the portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. In the absence of any valid reason to disbelieve the evidence of the victim, this Court finds that the evidence of the victim child inspires the confidence of the Court. On a careful reading of the evidence of the victim child, this Court finds no reason to disbelieve the same. On reading of the entire materials, this Court is of the view that the prosecution has proved its case beyond all reasonable doubt. The learned trial Judge has rightly appreciated the evidence of the prosecution witnesses in a right perspective and convicted the appellant accordingly, in which this Court does not find any perversity.*

27. As per the Concise Oxford Dictionary the word "Intercourse" means 'sexual connection'. In order to determine as to whether there is intercourse or not, what is to be considered is whether the visiting organ is enveloped at least partially by a visiting organism. Similarly, the word "Penetrate" has been defined in the concise Oxford dictionary "Find access into or through, pass through" as noticed in the matter of "***State of Kerala versus Kundumkara Govindum"*** the relevant paras is extracted as under:

> *18. Even if I am to hold that there was no penetration into the vagina and the sexual acts were committed only between the thighs, I do not think that the respondents can escape conviction under Section 377 of the Penal Code. The counsel of the respondents contends (in this argument the*

Public Prosecutor also supports him) that sexual act between the thighs is not intercourse. The argument is that for intercourse there must be encirclement of the male organ by the organ visited; and that in the case of sexual act between the thighs, there is no possibility of penetration.

19. The word 'intercourse' means 'sexual connection' (Concise Oxford Dictionary). In Khanu v. Emperor AIR 1925 Sind 286, the meaning of the word 'intercourse' has been considered: And to decide whether there is intercourse or not. what is to be considered is whether the visiting organ is enveloped at least partially by the visited organism. In intercourse between the thighs, the visiting male organ is enveloped at least partially by the organism visited, the thighs: the thighs are kept together and tight.

20. Then about penetration. The word 'penetrate' means in the concise Oxford Dictionary 'find access into or through, pass through.' When the male organ is inserted between the thighs kept together and tight, is there no penetration? The word 'insert' means place, fit, thrust.' Therefore, if the male organ is 'inserted' or 'thrust' between the thighs, there is 'penetration' to constitute unnatural offence.

21. Unnatural offence is defined in Section 377 of the Penal Code; whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits unnatural offence. The act of committing intercourse between the thighs is carnal intercourse against the order of nature. Therefore committing intercourse by inserting the male organ between the thighs of another is an unnatural offence. In this connection, it may be noted that the act in Section 376 is "sexual inter, course" and the act in Section 377 is carnal intercourse against the order of nature."

22. The position in English law on this question has been brought to my notice. The old decision of Rex v. Samuel Jacobs

> *(1817) Russ & Ry 381 CCE lays down that penetration through the mouth does not amount to the offence of sodomy under English law. The counsel therefore argues that sexual intercourse between the thighs cannot also be an offence under Section 377 of the Penal Code. In Sirkar v. Gula Mythien Pillai Chaithu Maho. mathu, 1908 TLR Vol XIV Appendix 43, a Full Bench of the Travancore High Court held that having connection with a person in the mouth was an offence under Section 377 of the Penal Code. In a short judgment, the learned Judges held that it was unnecessary to refer to English Statute Law and English text books which proceeded upon an interpretation of the words sodomy, buggery and bestiality; and that the words used in the Penal Code were very aim pie and died enough to include all acts against the order of nature. My view on the question is also that the words of Section 377 are simple and wide enough to include any carnal intercourse again tithe order of nature within its ambit. Committing intercourse between the thighs of another is carnal inter, course against the order of nature.*

28. From a perusal of the aforesaid pronouncements as well as the understanding of the word "Carnal intercourse", it is evident that in order to attract Section 377, the Act in question must have to do with flesh and sensuality and that the same must involve penetration other than penile-vaginal penetration. The contention of the petitioners is restricted only to one of the aspects of the scope of Section 377 i.e. sodomy, which is a term used for anal intercourse and is derived from the Old Testament story of Sodom and Gomorrah. The suggestive interpretation of the petitioner that Section 377 IPC cannot be attracted but for occurrence of an eventuality where there is an anal penetration does not find support in the statute.

29. A comparative examination of the definition of rape as contemplated under Section 375 of the IPC as well as the provision contained under Section 377 of the IPC also shows another significant difference. Whilst Section 375 prescribes the act to involve both the genders i.e. male and female, no such requirement is prescribed under Section 377. The very fact that Section 377 was intended to be gender neutral, the legislature mandated it to be attracted only in the event of a penetration, other than what is contemplated under Section 375 IPC. The offence under Section 377 IPC may also be attracted against two women where the element of penetration, as projected by the learned counsel for the petitioners, may not be a possible eventuality. Thus, the argument of the petitioners does not fall in tandem with the statutory mandate.

30. Hence, Section 377 can be attracted even in a situation where the penetration happens to be on any other part of the body of a victim, the predominant intent in the commission of the Act, however, has to be sexual. Hence, the argument of the petitioners that conviction is bad for want of any external mark of injury around the body of the victim is liable to be rejected as not being well founded. The judgments of Courts below thus cannot be held to be perverse on the said count.

31. Having held so, it would now be essential to refer to the aspect of absence of injury on the person of the victim. The Hon'ble Supreme Court had held in the matter of ***"Vijay @ Chinni versus State of Madhya Pradesh",*** bearing ***Criminal Appeal No. 660 of 2008*** decided on 27.07.2010 that absence of injury or mark of violence on the person of victim is inconsequential. The same would occur in the event of a violent resistance. However, where the victim is a minor or has surrendered to the inevitable

due to sheer timidity, there may be a possibility of the victim not suffering any injury. The observations as recorded by the Hon'ble Supreme Court are reproduced as under:

> *26. In the case of **Gurcharan Singh Vs. State of Haryana AIR 1972 SC 2661,** this Court has held that "the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless, surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape."*

32. The victim in the instant case happens to be a child of 08 years of age who was allegedly over-powered by 03 boys of a bigger age and under the said circumstances it may not be likely to assume that the victim was in any position to offer a challenge or resistance to the perpetrators of the offence. Besides, there is no stand taken by the prosecution that the victim had violently resisted the petitioners and in the absence of any such stand of the prosecution, and any such suggestion having been put-forth to the witness while being subjected to cross-examination in defence, the testimony of the victim cannot be disbelieved solely on the ground of absence of any marks of external injury. The submissions thus advanced on behalf of the counsel for the petitioners that offence under Section 377 of the IPC and/or Section 10 of the POCSO Act are not made out, is dispelled and is liable to be rejected.

33. It is thus held that the order of conviction passed by the Courts below for offences under Section 377 IPC and Section 10 of the POCSO Act

is valid, legal and in accordance with law and does not suffer any illegality, infirmity or perversity.

34. Now, referring to the parting plea of the petitioners for taking a lenient view against the petitioners, it would be essential to refer to the objects and reasons of the POCSO Act. A reference to the same was made also in the judgment of "***Eera versus State (NCT Delhi)"*** reported as (***2017) 15 SCC 133*** and the same reads as under:-

> *20. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the Pocso Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the Preamble, it is manifest that it recognises the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well-being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The Statement of Objects and Reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child friendly procedure. Dignity of the child has been laid immense emphasis in the*

scheme of legislation. Protection and interest occupy the seminal place in the text of the Pocso Act."

35. Further, the Hon'ble Supreme Court, in the matter of ***Nawabuddin versus State of Uttrakhand*** bearing ***Criminal Appeal No. 144 of 2022*** decided on 08.02.2022 recorded as under:-

9.3 As it can be seen from the Statement of objects and reasons of the POCSO Act since the sexual offences against children were not adequately addressed by the existing laws and a large number of such offences were neither specifically provided for nor were they adequately penalised, the POCSO Act has been enacted to protect the children from the offences of sexual assault, sexual harassment and pornography and to provide for establishment of special courts for trial of such offences and for matters connected therewith and incidental thereto.

9.4 At this stage, it is required to be noted that the POCSO Act has been enacted keeping in mind Article 15 and 39 of the Constitution of India. Article 15 of the Constitution, inter alia, confers upon the State powers to make special provision for children. Article 39, inter alia, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. To achieve the goal as per Article 15 and 39 of the Constitution, the legislature has enacted the Protection of Children from Sexual Offences Act, 2012.

9.5 As noted in the Statement of objects and reasons, as per the United Nations Convention on the Rights of Children, to which India is a signatory to the treaty, the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent (a) the inducement or coercion of a child

to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or other unlawful sexual practices; and (c) the exploitative use of children in pornographic performances and materials.

Article 19 of the Convention states the following:

1. *States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all form/s of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

2. *Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

   The general comment No.13 on the Convention specifically dealt with the right of the child to freedom from all forms of violence and it has observed that "no violence against children is justifiable; all violence against children is preventable"

10. Keeping in mind the aforesaid objects and to achieve what has been provided under Article 15 and 39 of the Constitution to protect children from the offences of sexual assault, sexual harassment, the POCSO Act, 2012 has been enacted. Any act of sexual assault or sexual harassment to the children should be viewed very seriously and all such offences of sexual assault, sexual harassment on the children have to be dealt with in a stringent manner and no leniency should be shown to a person who has committed the offence under the POCSO Act. By awarding a suitable punishment commensurate with the act of sexual assault, sexual harassment, a message must be conveyed to the society at large that, if anybody commits any offence under the POCSO Act of sexual assault, sexual harassment or use of children for pornographic

> *purposes they shall be punished suitably and no leniency shall be shown to them. Cases of sexual assault or sexual harassment on the children are instances of perverse lust for sex where even innocent children are not spared in pursuit of such debased sexual pleasure.*

36. A perusal of the object of the statute re-inforces the need for the Courts to adopt a stance in the matters relating to offences against children. A misplaced sympathy is likely to defeat the statutory object and purpose. Considering that the victim happens to be a child of only 08 years as on the date of occurrence, his dignity having been violated by sheer brute force, I am not inclined to accept the said submission as well and reject the same.

37. Hence, I do not find any illegality, infirmity, perversity or any error apparent on the face of the record in the judgment passed by the Courts below convicting the petitioners for the offences punishable under Section 377 of the IPC and Section 10 of the POCSO Act. Finding no merits in the submissions advanced by the learned counsel for the petitioners, the instant revision petition is accordingly dismissed.

(VINOD S. BHARDWAJ)
JUDGE

March 02, 2022
Vishal sharma

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No