IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment pronounced on: 18.10.2022

CRL.A. 44/2020

BAGENDER MANJHI ..... Appellant

versus

STATE (GOVT. OF NCT) DELHI ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Chetan Lokur, Advocate along with the Appellant (produced in custody).
For the respondent : Mr. Ashish Dutta, APP for the State with S.I. P.S.: Lodhi Colony.

CORAM:
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present appeal under the provision of Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C"), read with section 383 of Cr.P.C, arises out of the judgment dated 11.10.2019 and the order on sentence dated 31.10.2019, rendered by the learned Additional Session Judge-01, Special Court,

(POCSO), South District, Saket Court Complex, New Delhi, in Session Case No. 7763/2016, titled as '*State vs. Bagender Manjhi'*, emanating from F.I.R. No.152/2012 (hereinafter referred to as the "subject FIR:) under Sections 376 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act"), registered at Police Station-Lodhi Colony, New Delhi.

2. By way of the impugned judgment dated 11.10.2019, Bagender Manjhi ("the Appellant"), has been convicted for the commission of offences punishable under the provision of Section 376(2)(f) IPC and section 6 read with section 5/3 of POCSO. Further, by way of the impugned order on sentence dated 31.10.2019, the appellant has been sentenced to undergo imprisonment for life, along with a fine of Rs.20,000/. In default of the payment of fine, the appellant has been sentenced to undergo simple imprisonment for two additional months.

3. Since this matter concerns sexual offences against a 'minor', the names of the prosecutrix and some key witnesses have been anonymized in keeping with the verdict of the Hon'ble Supreme Court in ***Nipun Saxena and Anr. vs. Union of India & Ors.***, reported as **(2019) 2 SCC 703**.

4. The gravamen of the charge, for which the Appellant has been convicted; is for having committed penetrative sexual assault on his niece Baby "J"; being the brother-in-law of the mother ("PW 1") of the victim, hereinafter referred to as the "prosecutrix"; an infant girl aged about one year old, at the time of commission of the offence.

5. The relevant facts necessary for the adjudication of the subject criminal appeal are encapsulated herein below:

i) The case arises from receipt of a DD Entry No. 16A dated 01.12.2012, recorded pursuant to a reported altercation; during patrolling, by Head Constable Kulbir Singh ("PW 4") at Aliganj, Mother Dairy, New Delhi. Upon reaching the spot of the quarrel, PW 4 was apprised that, the appellant had committed rape on the prosecutrix. The appellant, at this stage, was being held by members of the public. PW 4 got the appellant released and immediately informed the Duty Officer, Officer HC Shiv Kumar ("PW 12") of the incident that had occurred. Following this, W. Sub-Inspector Kailash ("PW 10") along with W. Constable Rameshwari ("PW 11") and Constable Surender ("PW 8") reached the spot and commenced the investigation. Thereafter, PW 10 took the prosecutrix, her

mother (PW 1) and the appellant to All India Institute of Medical Sciences, where the prosecutrix and the appellant were medically examined.

ii) Thereafter, PW 10 recorded the statement of Ms. "D" i.e., PW 1 (name mentioned at Serial No. 01 in the list of witnesses attached with the chargesheet, but withheld in order to protect the identity of the prosecutrix), the mother of the prosecutrix; wherein, she asseverated that she and her husband are residents of the jhuggis situated at Aliganj, near Khanna Market, New Delhi and that the appellant, who hails from their native village, resides in the same jhuggis. PW 1 further stated that, on 01.12.2012, Mr. "TM" ("PW 2") i.e., her husband and the appellant, had consumed liquor together and when her husband returned to the jhuggi, she served food i.e., chicken to him. PW 1 furthermore stated that PW 2 had asked her to send food to the appellant as well; and thereupon she had sent the same to the appellant through her infant daughter (the prosecutrix). PW 1 also stated that after some time the appellant came to their *jhuggi* and took away the prosecutrix—who was playing outside their

jhuggi—on the pretext that he is taking the latter for a stroll.

iii) Thereafter, PW 1 upon hearing the screams and cries of the prosecutrix, immediately ran outside and saw that the appellant was standing outside his jhuggi and had placed the prosecutrix on his lap; and that the prosecutrix was crying. PW 1 further asserted that she took the prosecutrix from the appellant and made attempts to pacify her; but however, prosecutrix continued to cry ceaselessly. PW 1 at this stage in the belief that the prosecutrix must have suffered some injury, checked her body, whereupon she found blood on the *payjami* of the prosecutrix. Thereafter, PW 1 checked further, and found blood oozing out from the prosecutrix's private parts and consequently, realised that some wrongful act had been perpetrated upon the prosecutrix, by the appellant, since nobody other than him was present with the prosecutrix at the time of the incident.

iv) As a consequence, PW 1 raised alarm and public persons gathered at the spot and upon being informed that the appellant had committed a wrongful act with the

prosecutrix, beat him up. In the meantime, the police officials arrived at the spot and the present FIR, being FIR No.152/2012 was registered, predicated on the aforesaid statement of PW 1.

6. Thereafter, the appellant was arrested and the investigation ensued. The exhibits *qua* the appellant and the prosecutrix, collected by the doctors, subsequent upon their respective medical examination, were sent for analysis to the Forensic Science Laboratory ("FSL"). After completion of the investigation, the chargesheet was filed against the appellant for commission of offences punishable under the provisions of Section 376 of IPC and under Section 6 read with Section 4 of the POCSO Act; to which the appellant pleaded not guilty and claimed trial. At the stage of evidence, in proof and support of their case, the prosecution examined 16 witnesses. The appellant in his defence chose not to lead any evidence.

7. The appellant in his statement under Section 313 of the Cr.P.C, whilst denying the case of the prosecution *in toto*, stated that he had been falsely implicated in the case. Further the appellant asserted that he is innocent, alleging that the father (PW 2) and mother (PW 1) of the prosecutrix are his neighbours and that they had abruptly started fighting with the appellant and beating him. The appellant further

stated that he had been falsely implicated in the case and that police officials had forcibly taken semen of the appellant in police custody so as to fabricate evidence against him. The appellant furthermore stated that he had not committed any wrongful act with the prosecutrix.

8. Upon completion of the trial, the appellant was convicted essentially based on the following evidence:-

i) **The depositions of the prosecution witnesses; in particular the testimony of PW-1**; and

ii) The medical evidence brought on record.

After carefully examining the testimonies of the witnesses and hearing the arguments on behalf of the parties, the Ld. Trial Court convicted the appellant under sections 6 read with 5/3 of the POCSO Act and section 376 of the IPC, as aforestated.

Arguments of behalf of the Appellant

9. Mr. Chetan Lokur, learned counsel appearing on behalf of the appellant would submit as follows.

(i) The first contention is that, the evidence against the appellant was planted in order to frame him. It is the appellant's contention that Constable Kuldeep Singh ("PW 7") has evidently framed the appellant inasmuch as Inspector Shanti Goswami ("PW 15") had not recorded the statement of the person who collected the exhibits and

samples; thereby causing an unexplained break in the chain of custody of the prosecution evidence. The appellant has placed reliance on the assertedly contradictory depositions of PW 7 and PW 6.

(ii) In this regard it is observed that, PW 7 deposed that on 12.12.2012 he was posted as a Constable at Police Station, Lodhi Colony; and further deposed that on that day he took eight sealed pullandas along with two sample seals alongwith a forwarding letter from the malkhana and deposited the same with the FSL, Rohini vide RC No. 8384/21/12; and also that he obtained the acknowledgment therefor from FSL regarding the deposit of the exhibits and the photocopy of the acknowledgment, which is marked as Exhibit PW 7/C. PW 7 lastly deposed that so long as the sealed pullandas and the sample seals remained in his possession, the same were not tampered with in any manner and the same were deposited with the FSL in proper sealed and intact condition.

(iii) Relying on the Forensic evidence, PW 6, deposed that on 12.12.2012 eight sealed parcels in connection to the FIR No. 152/2012, PS Lodhi Colony were received by FSL,

Rohini, and the same were marked to him for examination. PW 6 further deposed, that seals on the parcels were intact as per the forwarding letter and that the exhibits were examined by him. PW 6, furthermore deposed that a detailed report in this regard was filed, a copy of which is marked as Exhibit PW 6/A.

(iv) Learned Counsel appearing on behalf of the appellant next submits, that the learned Trial Judge has erred in convicting the appellant, in so far as, there are glaring discrepancies and contradictions between the testimonies of PW 1 and PW 2 and that ergo, they are unreliable.

(v) Learned counsel for the appellant in this regard further submits that, apart from PW 1 and PW 2; no other public witness, specifically, no neighbor, was examined by the Police; this despite the deposition of the PW 1 and PW 2 to the effect, that after the commission of the offence the appellant tried to escape but was caught by the neighbours and beaten-up, and that it was only thereafter was the appellant handed over to the Police.

(vi) The third and concluding submission made on behalf of the appellant is that the MLC recorded by the Dr. Supriya

("PW 13") and in particular, the report post examination, only constitutes an opinion, hence the same is of no evidentiary value and therefore, ought to be rejected altogether. The learned counsel for the appellant further submits that since the two smears collected from the vagina of the Prosecutrix do not show the presence of human semen and only the underwear of the Prosecutrix shows the presence of the semen of the appellant, therefore, it cannot be regarded as conclusive proof of penetrative sexual intercourse between appellant and the Prosecutrix. It is urged that resultantly, that the FSL Report [Exhibit PW 6/A] cannot be considered as conclusive evidence. This argument again is devoid of merit as considered infra.

Arguments on behalf of the State

10. *Per Contra*, **Mr. Ashish Dutta** learned APP appearing on behalf the state has dispelled the first and second contentions ground raised on behalf of the Appellant by drawing this Courts attention to the decision rendered by the Hon'ble Supreme Court in, ***Vijay v. State of Madhya Pradesh*** reported as **2010 (8) SCC 191.** In that decision the Hon'ble Supreme Court has held as under:-

> "24**.** it is settled proposition of law that even if there **are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvement**s, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the appellant. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart ofthe matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses.
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> 25. Thus, in view of the above**, the law on the point can be summarised to be that the evidence of the witnesses must be read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole."**

11. Further, the APP has in rebuttal to the contentions of the appellant, placed reliance on and has meticulously emphasised and highlighted the testimony of PW 4, wherein, it has been deposed that on 01.12.2012 when he was patrolling near Mother Dairy, Aliganj he heard loud noises and immediately reached the spot of the commotion; whereupon PW 4 was apprised of the circumstance, that, the appellant, had committed rape upon a one-year-old infant (the prosecutrix). Furthermore, PW 4 categorically deposed that the appellant at the time

was caught by members of the public and had been given a beating. PW 4 clearly deposed that he got the appellant released from the clutches of the public and informed PW 12 at P.S. Lodhi Colony of the incident of rape upon the prosecutrix; pursuant to which, the DD No. 16- A was recorded, and the investigation initiated. Resultantly, the testimony of PW 1 is indisputably corroborated.

12. We have extensively heard counsel appearing on behalf of the parties; examined the material on record; and perused the entire evidence.

13. The appellant it is reiterated has been convicted for offences punishable under section 376(2)(f) of the IPC along with Sections 6 read with Section 5/3 of the POCSO Act. We consider it necessary, for the sake of completeness, to reproduce the relevant portions of the subject provisions of law.

> **Section 376, IPC. Punishment for rape**; reads as under—
>
> (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description 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].
>
> xxx
>
> **(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman;** or
>
> xxx
>
> **(j) commits rape, on a woman incapable of giving consent; or**
>
> **(k) being in a position of control or dominance over a woman, commits rape on such woman; or**

xxx

(3) Whoever, commits rape on a woman under sixteen years of age 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 that person's natural life, and shall also be liable to fine:
Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
Provided further that any fine imposed under this sub-section shall be paid to the victim.]

14. It is also considered germane to consider the relevant provisions of POCSO Act as attracted to the factual matrix of this case:

Section 3, POCSO- 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 5 POCSO- Aggravated penetrative sexual assault.—(

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

(i) within the limits of the police station or premises at which he is appointed; or

(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or

(iii) in the course of his duties or otherwise; or

(iv) where he is known as, or identified as, a police officer; or

b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child—

(i) within the limits of the area to which the person is deployed; or

(ii) in any areas under the command of the forces or armed forces; or

(iii) in the course of his duties or otherwise; or

(iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation.—When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning

of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which—

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of Section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; 9[* * *]

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; 10[* * *]

11[(iv) causes death of the child; or]

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

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

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(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

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or

(s) whoever commits penetrative sexual assault on a child in the course of 12[communal or sectarian violence or during any natural calamity or in similar situations]; or

(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

Section 6, POCSO - Punishment for aggravated penetrative sexual assault; reads as under:

(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.

15. The Hon'ble Supreme Court in ***Ms. Eera through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr***. reported as, (**2017) 15 SCC 133** has intricately dealt with the object of the

legislation. The relevant portion for the consideration of the present case, has been reproduced hereinbelow:

> "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."

16. There is no gainsaying that rape is a heinous crime, not only abhorrent as against the victim but also against society at large. The offences against minors, more particularly sexual assault are increasing alarmingly and it is, therefore, necessary for the courts to imbibe the legislative wisdom. The plight of a victim and the shock suffered can be felt instinctively; as the victim of rape is left

devastated by the traumatic experience, as well as an unforgettable shame; being haunted by the memory of the horrific experience forcing her into a state of terrifying melancholia. The torment on the victim has the potential to corrode the poise and equanimity of any civilized society. It has been correctly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female.

17. The Hon'ble Supreme Court in ***Lillu @ Rajesh &Ors. Vs. State of Haryana*** **: (2013) 14 SCC 643,** dealing with a similar question in the case of child rape, reiterated the aforesaid principles and observed that:-

> "12. In State of Punjab v. Ramdev Singh [(2004) 1 SCC 421 : 2004 SCC (Cri) 307 : AIR 2004 SC 1290] this court dealt with the issue and held that rape is violative of the victim's fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanising act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. **It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman i.e. her dignity, honour, reputation and chastity.** Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution."

It is the duty of the courts to consider such specialized legislation in the circumstances to which they owe their origin so as to ensure coherence and avoid any unintended and undesirable consequences.

Deposition of Material Prosecution Witnesses:

18. Upon careful consideration of the rival submissions made by learned counsel for the appellant and the learned APP for the state, the evidentiary aspects that come forth including the testimony on the record are of critical significance:

19. The primary legal contention raised on behalf of the appellant is to the effect that, apart from PW-1 and PW-2, the parents of the prosecutrix, no other public witnesses have been examined by the prosecution to prove the guilt of the appellant. It is further contended that the testimonies of the parents are unreliable owing to the circumstance that the witnesses in question are the parents of the prosecutrix and further that the said testimony is uncorroborated.

20. This proposition in our considered view, is no longer *res integra*. The Hon'ble Supreme Court has dealt with the same issue in a catena of judgments and Justice Lahoti speaking for the Bench in ***State of H.P. v. Gian Chand*** reported as **(2001) 6 SCC** has unequivocally observed that the court must first assess the trustworthy intention of

the evidence adduced and available on record. If the court finds the evidence adduced, worthy of being relied on, then the testimony must be accepted and acted on, even though there may be other witnesses available who could potentially be examined but were not examined.

21. There is unquestionably a well-defined distinction in law between a related witness and an interested witness. The Apex Court in ***Md. Rojali Ali v. The State* of Assam** reported as **AIR 2019 SC 1128** held as under:

> "10. As regards the contention that all the eye-witnesses are close relatives of the deceased, it is by now well-settled that **a related witness cannot be said to be an 'interested' witness merely by virtue of being a relative of the victim.** This Court has elucidated the difference between 'interested' and 'related' witnesses in a plethora of cases, **stating that a witness may be called interested only when he or she derives some benefit from the result of a litigation, which in the context of a criminal case would mean that the witness has a direct or indirect interest in seeing the accused punished due to prior enmity or other reasons, and thus has a motive to falsely implicate the accused**".

22. The unimpeached testimony of PW 1 (mother of the prosecutrix) recorded on 18.11.2013 is reproduced as under:-

> "That around an year ago i.e. on 01.12.12. Accused Bagender present in the court today was drinking liquor alongwith my husband. My husband returned after the drinking session. Accused Bagender was present in the nearby jhuggi who had drink liquor with my husband . On that day, I had prepared chicken and I sent some chicken to accused Bagender through my daughter J[redacted], who was aged about one year only. J[redacted] took the chicken to Bagender . **Accused Bagender is my devar as per the relation of my village. J[redacted] returned after delivering the chicken. After some time accused Bagender came**

> **and took away J[redacted]. After some time I started searching for J[redacted]. When I was searching I heard that J[redacted] was find in the nearby Jhuggi. I noticed that accused Bagender was having J[redacted] in his lap and was coming out of his jhuggi. My daughter J[redacted] was continuously crying, although I tried to pacify her . When she did not stop crying I checked up her body and found that she was bleeding from her private part.** I immediately make noise as I could gathered that **accused did a wrong act with my daughter J[redacted] due to which she started bleeding from her private part.** A crowd gathered and I told the act of the accused. Accused Bagender was caught then and there by the crowd . Later on, police arrived and took the accused into custody. My statement Ex.PW1/A was recorded, bearing my RTI at Point A. Accused Bagender was arrested in my presence and I put my RTI on his arrest memo Ex.PW1/B at Point A. **Accused Bagender is present in court today who did wrong act with my one year old daughter J[redacted]. My daughter was also medically examined."**

23. The statement of Mr. "TM", PW 2 (the father of the prosecutrix), recorded on 25.02.2014 which corroborates the testimony of PW 1, is reproduced as under:-

> "On 01.12.12 I had some drinks with accused Bagender Manjhi my neighbour in his Jhuggi No.41. When I was returning accused asked me to send some vegetable/chicken to him. After returning my wife to send some dish to the accused. Thereafter, my wife sent some chicken through my daughter J[redacted] aged about one year to accused Bagender. After having meal accused picked up my daughter J[redacted] from outside my Jhuggi by stating that he will just roam around with her, after some time I heard the screams of J[redacted] and send my wife to take her back. My wife took back J[redacted] and found her bleeding from her private part. J[redacted] was crying loudly. My wife told me that accused Bagender had done some wrong act with our daughter J[redacted] I also noticed that J[redacted] was bleeding from her private part. Accused Bagender ran away from there but he was chased and nabbed by us. He was giving beatings by the crowd Police was called. J[redacted] was medically examined. Accused Bagender is present in the court today (correctly identified)." [SIC]
>
> (examination in chief dated 25.02.2014)

24. Thus, PW-1 and PW-2 cannot be characterised as interested witnesses simply because they are the parents of the prosecutrix; and nothing from the record or in the submissions of the appellant even remotely suggests that PW-1 and PW-2 had any motive in framing the appellant for the commission of such a heinous crime.

25. In view of the foregoing, it is clear that the defence raised by the appellant that he has been falsely implicated in the case by PW-1 (*mother of the prosecutrix)* and PW-2 *(father of the prosecutrix)*, is a mere after-thought. The parents' testimony is credible and inspires confidence as they were witnesses to the commission of the offence being present at the relevant time.

26. However, it was also submitted by the counsel for the appellant that there are discrepancies in the testimony of PW1 and PW2. Bearing in mind that the parents are the only public witnesses besides the police officials and medical witnesses examined by the prosecution; it becomes imperative to decide whether minor contradictions in the witness statements can form grounds to disregard prosecution evidence as a whole.

27. The Courts have time and again dealt with this question, and we are of the view that while appreciating the evidence of a witness,

minor discrepancies on trivial matters, that do not affect the core of the prosecution's case; would not prompt the Court to reject the evidence in toto. Certain details which do not in any way corrode the credibility of a witness, cannot and should not be characterized as omissions or contradictions.

28. In ***State of U.P. Vs. M.K. Anthony*** reported as **AIR 1985 SC 48**, the Hon'ble Supreme Court laid down certain guidelines in this regard, which are required to be followed unquestionably by the courts. The Hon'ble Court observed as under: -

> "10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw- backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. **Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details**. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention

> and reproduction differ with individuals. Cross examination is an unequal duel between a rustic and refined lawyer."

29. Further, in ***State v. Saravanan & Anr.*** reported as **AIR 2009 SC 152**, while dealing with a similar issue, the Hon'ble Supreme Court observed:

> "18. .... **while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety.** Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. **Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies**."

30. Also, in ***Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Anr***. reported as **(2013) 12 SCC 796**, the Hon'ble Supreme Court observed:

> "28. As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. **It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness.** The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defense can take advantage of such inconsistencies. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission (See Leela Ram vs. State of

Haryana and another, Rammi alias Rameshwar v. State of M.P. and Shyamal Ghosh v. State of West Bengal).

(emphasis supplied)

31. Further, as per the law laid down by the Hon'ble Supreme Court in ***Smt. Shamin vs. State (GNCT of Delhi,)*** in **Criminal Appeal No.56/2018, decided on 19.09.2018**, small/ trivial omissions in testimony of witnesses do not justify a finding by the Court that the testimony of the witness cannot be relied upon and that minor discrepancies on trivial matters not touching the core of the case with a hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical errors without going to the root of the matter does not permit ordinarily the rejection of the evidence as a whole and rather what is to be considered is whether those inconsistencies go to the root of the matter or whether they pertain to insignificant aspects and that though, the defence may be justified in seeking advantage of incongruities obtaining in the evidence if they relate to the root of the matter, where they relate to insignificant aspects, no benefit of doubt is available in relation thereto.

32. In view of the foregoing discussion, in our considered view, normal discrepancies do occur in the depositions of the witnesses owing to their mental disposition such as shock and horror at the time

of the incident. There is no gainsaying the position of law and there can be no quarrel with the proposition that when the testimony of the prosecution witnesses is creditworthy, trustworthy, unimpeached and inspires confidence; the conviction of the appellant can be sustained.

Medical Evidence:

33. The other material aspect which, in our opinion, requires our due consideration is the medical evidence marshalled by the prosecution during trial. While dealing with the aspect of placing reliance on the MLC as corroborative evidence, and whether that would be correct or not; it is imperative to understand that by their very nature, sexual offences are committed in seclusion and are hence surrounded by a sense of secrecy. Therefore, except for the evidence of the prosecutrix, there can usually not always be other corroborating evidence of eyewitness. Hence medical evidence (MLC Report, FSL report and the statement of the medical expert) can be of much significance in such offences.

34. Coming now to the clear and clinching medical evidence adduced; Dr. Rajanikanta Swain ("PW 5") on 01.12.2012 who had medically examined the appellant brought by PW 10; testified as follows:-

> "That on 01.12.12 I have medically examined accused Bagender Manjhi brought, by Ct. Surender Singh. On physical examination of accused Bajender Manjhi, it is opined that there is nothing to suggest that he is incapable of performing sexual intercourse. My detailed report in this regard is on Ex.PW 5/A, bearing my signatures at point A."
>
> (examination in chief dated 30.07.2014)

Exhibit PW 5/A, clearly adduced that the penis is of normal size, uncircumcised and **smegma** is absent. The doctor opined *"that there is nothing to suggest that he is incapable of performing sexual intercourse."* Presence of alcohol in the appellant's bloodwork and the aftermath of the beatings given to the appellant are also corroborated by the MLC.

35. Further, testimony of Dr. Supriya (PW 13), who medically examined the prosecutrix is both graphic and telling; and is profitably reproduced hereinbelow:

> "On 01.12.2012, I was working as Senior Resident at AIIMS Hospital. On that day, patient Baby 'J' (the victim) was brought by W/Ct. Rameshwari and her mother on ground of the rape. The mother of the patient had alleged rape by one Bagender Manjhi. She found her baby to be bleeding per vagina.
>
> The child had also not passed urine after the episode. On examination, the child was. conscious. **The hymen was torn and there was blood at introitus. There was 0.5 cm abrasion in the posterior fourchatte.** 2 smears were taken (interoital and perinial) and 2 pants of the child were, taken for forensic examination. The exhibits were sealed with the seal of hospital and handed over to W/Ct. Rameshwari along with sample seal. I had prepared the MLC of the patient which is now Ex. PW 13/A which bears my signature at point A.

> I had prepared the MLC Ex. PW13/A in my handwriting. The history of the case was told by the mother of the patient. The patient of one year was examined only two points of view, one was sexual assault and another is accidental injury. There can be no vaginal bleeding in case there is infection in the stomach of small baby. If the mother takes liquor, eats non vegetarian food or spicy food and there is infection in the body of mother that will not pass on to the feeding baby, however some infection like HIV can pass on.
>
> It is wrong to suggest that if the mother is taking liquor and eating spicy food and then the baby is breast fed, the baby shall get infected and there would be vaginal bleeding. If the child of such an age falls and gets injured, there may be hymen torn. The hymen of age of one year baby can be torn by physical injury or by sexual assault. It is wrong to suggest that I have not carried out the proper medical-examination from all angle."
>
> (examination in chief dated 20.12.2017)

The **MLC (Exhibit PW 13/A)** that was prepared underscores the following findings:-

i) The prosecutrix was conscious;
ii) The hymen was torn;
iii) There was blood at introitus; and
iv) Abrasion at mucosal tear of 0.5 cm.

36. In addition, the relevant extract from the FSL Report NO.FSL 2012/DNA-8618, dated 01.09.2014 is reproduced hereinbelow:-

Description of Articles Contained in Parcel

" Exhibit '2': The shirt of the appellant having blood stains.
Exhibit '3': Blood sample of the appellant.
Exhibit '4': One baby pajami
Exhibit '5': One underwear having darker stains (of baby "J")

Exhibit '6': One microslide with faint smear (of baby "J")
Exhibit '7': One microslide with faint smear (of baby "J")
Exhibit '8': One Gudari
Exhibit '9': One Kambal (blanket)

Result of Biological Analysis

1. Blood was detected on exhibits '2', '3', '4' and '5'.
2. Blood could not be detected on exhibits '8' and '9'.
3. **Human semen was detected on exhibit '5'.**
4. **Semen could not be detected on exhibits '4', '8' and '9'.**

Result of DNA Analysis

DNA profile generated from the source of exhibit '3' (blood sample of accused) was found to be similar to the DNA profiles generated from the source of exhibits '2' (shirt of accused and '5' (underwear of baby J[redacted]"

37. The position of law on the question, whether absence of human semen in the smears collected from the vagina of the Prosecutrix, in a case of rape, would result in an acquittal, is well settled. The Hon'ble Supreme Court in the case of ***Wahid Khan v. State of M.P*** reported as **(2010) 2 SCC 9** while upholding the conviction under section 376 IPC, made the following observations:

> "It has been a consistent view of this Court that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.
>
> 20. It is appropriate in this context to reproduce the opinion expressed by **Modi in Medical Jurisprudence and Toxicology (22nd Edn.) at p. 495 which reads thus:** "Thus, to **constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen.** Partial penetration of the penis within the labia majora or the vulva or pudenda **with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law**. It is therefore quite possible to

> commit legally, **the offence of rape without producing any injury to the genitals or leaving any seminal stains.** In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. **Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity**. Whether **the rape has occurred or not is a legal conclusion, not a medical one."**
>
> (emphasis supplied)
>
> 21. Similarly in Parikh's **Textbook of Medical Jurisprudence and Toxicology, "sexual intercours**e" has been defined as under:
>
> "**Sexual intercourse**.—In law, this term is held to mean the **slightest degree of penetration of the vulva by the penis with or without emission of semen**. It is therefore quite possible to commit **legally the offence of rape without producing any injury to the genitals or leaving any seminal stains**."

38. In the present case it is observed that, the oral testimony is completely corroborated by the medical evidence on the record. The prosecutrix and the appellant were both medically examined at the All India Institute of Medical Sciences (AIIMS), New Delhi on 01.12.2012 by PW 13 and the MLC dated 01.12.2012 has been proved on record as Exhibit PW 13/A; the contents of the abovementioned MLC have been perused by this court in their entirety and they admit of no sense of doubt or manipulation in any manner and of any kind. **The MLC of the prosecutrix *(supra)*, confirms that the hymen of the prosecutrix was torn; further there was blood at the introitus,**

abrasion at mucosal tear; and furthermore as per the FSL report, the appellant's semen was found on the undergarments worn by the prosecutrix at the time of the commission of the offence.

39. Again, for the sake of completeness, we observe that the time of medical examination of the appellant at AIIMS vide MLC dated 01.12.2012 of appellant exhibited as Exhibit PW 5/A; it has been clearly opined that there was nothing to suggest that the appellant was incapable of performing sexual intercourse under normal circumstances, nor was any other abnormality noticed that would in any manner preclude the commission of the offence by the appellant. Significantly it is pertinent to note that **smegma** is absent, a fortiori; buttressing the finding that the appellant had sexual intercourse recently

40. In light of the above, we find no weight in the contention urged on behalf of the appellant that the medical evidence does not support the case of the prosecution.

41. Having regard to the totality of facts and circumstances, appearing on the record of the case, we find ourselves in complete agreement with the following conclusions arrived at by the Learned Trial Court:

i) It can without an iota of doubt be concluded that PW 1's testimony, read in conjunction with all the other corroborative prosecution witnesses' evidence, which we opine are cogent, credible, trustworthy; clearly establish that the appellant committed rape/ aggravative penetrative sexual assault upon the prosecutrix.

ii) A conjoint reading of the testimony of PW 6 and PW 7 does not admit to any contradictions or inconsistency, thereby rendering specious the first contention urged on behalf of the Appellant.

iii) Moreover, the oral testimony is completely corroborated by the medical evidence on the record. The MLC of the prosecutrix, confirms that the hymen of the prosecutrix was torn; further there was blood at the introitus, abrasion at mucosal tear; and furthermore, the appellant's semen was found on the undergarments worn at the time of the commission of the offence, by the prosecutrix. This makes the finding of guilt qua the appellant conclusive and absent any other explanation; and in fact, no

explanation or evidence much less cogent evidence has been brought forth or offered by the appellant in this behalf.

iv) *Ex abundanti cautela* we have also explored any possible reason for false implication of the appellant; and we find nothing tenable on the record to suggest that. The arguments on behalf of the appellant in this case lack merit, in view of the undeniable circumstance that there is clear and unambiguous testimony of the mother of the prosecutrix (PW 1), corroborated by the testimony of the father of the prosecutrix (PW 2) unequivocally implicating the appellant for the commission of the said sexual offences.

42. Accordingly, there is no warrant for this Court to differ with the conclusion arrived at by the learned trial court, that the appellant is guilty of the offences of rape and penetrative sexual assault upon the person of the prosecutrix.

43. Let it also not be forgotten that the present is a case of rape on a girl child, only 01 years old, at the time of commission of the offence. Nothing can be more heinous than a crime committed on a child. It is

trite to state that it is necessary for the Courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in Article 39 of the Constitution of India which, inter alia, stipulates that the State shall, in particular, direct its policy towards securing that the tender age of the children is not abused and that children are given environment opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment. [*Ref: State of Rajasthan v. Om Prakash (supra)*]

44. In view of the foregoing, in our considered view, the prosecution established the guilt of the appellant beyond reasonable doubt. Consequently, neither the conviction nor the sentence awarded to the appellant, by the learned Trial Court warrant any modification. Resultantly, the judgment and order on conviction dated 11.10.2019 and the order on sentence dated 31.10.2019 are both hereby upheld.

45. The present appeal is accordingly dismissed, with no order as to costs.

46. The Trial Court Record be sent back forthwith.

47. A copy of this judgment be provided to learned counsel appearing on behalf of the parties, electronically and be also uploaded on the website of this Court *forthwith*.

SIDDHARTH MRIDUL
(JUDGE)

ANUP JAIRAM BHAMBHANI
(JUDGE)

OCTOBER 18, 2022
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Click here to check corrigendum, if any